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THE  
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TEXAS REPORTS  
(Civil Cases)

BEING A COMPLETE

Encyclopedia and Digest of All the Texas Case Law (Civil) up  
to and including Volume 102 Texas Reports, Volume 49  
Civil Appeals, Posey's Unreported Cases, White &  
Willson's Texas Appeals Civil, and Cases  
in Southwestern Reporter not  
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UNDER THE EDITORIAL SUPERVISION OF

THOMAS JOHNSON MICHIE

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Volume III

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*Italics indicate cross references.*

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### ABBREVIATIONS.

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Dallam .....	Dallam's Reports.
Posey.....	Posey's Unreported Cases.
S. W.....	Southwestern Reporter.
Tex. Civ. App.....	Texas Civil Appeals Reports.
App. Civ. Cases.....	Texas Appeals, Civil Cases (White & Willson).
Tex.....	Texas Supreme Court.
25 Tex. Supp.....	25 Texas Supplement.
No op.....	No opinion.

# Encyclopedic Digest of Texas Reports (Civil Cases)

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## BONDS.

BY W. F. SOUDER.

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CONSTABLES AND MARSHALS; SEQUESTRATION; STOCK AND STOCKHOLDERS; TAXATION; TRUSTS AND TRUSTEES; VENDOR AND PURCHASER; WORKING CONTRACTS.

## I. Definitions, Distinctions and General Considerations.

**Bond.**—A bond is what binds. Therefore any instrument in writing that legally binds a party to do a certain thing may be called a bond. *Courand v. Vollmer*, 31 Tex. 397, 401.

**Recognizance.**—A recognizance is defined to be "an obligation of record which a man enters into before some court of record or magistrate duly authorized, with condition to do some particular act." *Lawton v. State*, 5 Tex. 270, 271.

**Distinction.**—The only material respect in which it differs from another bond is that an ordinary bond is the creation of an original debt or an obligation *de novo*; a recognizance is the acknowledgment of a former debt upon record. *Lawton v. State*, 5 Tex. 270, 271.

**General Consideration—Bond at Common Law.**—The term "bond" as used in the common law is of similar import with the term "obligation" as used in the civil law. *Cayce v. Curtis*, *Dallam* 403.

**Use of Word by Legislature.**—The legislature has used the words "bond," "obligation," and "instrument in writing," as convertible terms, and as meaning the same thing. *Courand v. Vollmer*, 31 Tex. 397, 401.

**Money Obligations.**—Bonds payable in gold coin of the United States of the present standard weight and fineness are money obligations. *Winston v. Ft. Worth (Civ. App.)*, 47 S. W. 740, 745, affirmed in 93 Tex. 677, no op.

## II. Form, Requisites and Validity.

### A. PARTIES.

See, generally, the title PARTIES.

#### 1. Obligor.

A bond given to secure a right

which the principal obligors were already entitled to enjoy is void. *Eichoff v. Tidball*, 61 Tex. 421, 425.

**Omission of Name of Obligor in Body.**—The omission of the name of an obligor in the body of a bond when it is duly signed by him, forms no substantial objection to it. *Braidfoot v. Taylor*, 1 App. Civ. Cases, §§ 174, 175; *Hirams v. Coit*, *Dallam* 449.

**Partnership.**—Any bond given by the members of a partnership in the prosecution of a suit is less objectionable if executed by them individually than if executed in the name of the firm under seal, because it was once held that a firm could not bind itself at common law by a seal to the name of the firm, or, in other words, that a copartnership firm could not as such make a deed at common law. *Drake v. Brander*, 8 Tex. 351. See, generally, the title PARTNERSHIP.

#### 2. Obligee.

**Must Be Designated.**—The omission of the name of any payee or obligee whatever from a bond is fatal to its validity. *Sacra v. Hudson*, 59 Tex. 207.

Thus a suit by heirs against a guardian, on a guardian's bond which did not contain the name of the payee, could not be maintained (*Pach. Dig.*, art. 3895). Such a bond is neither good under the statute nor at common law. *Sacra v. Hudson*, 59 Tex. 207. See post, "Rule as to Validity," II, H, 2, a.

#### 3. Sureties.

See the title PRINCIPAL AND SURETY.

**Partnership as Surety.**—The signature of a partnership or firm name as surety on a claimant's bond is valid, though the names of the individual members be not signed. *Jacobs, etc., Co. v. Shannon*, 1 Tex. Civ. App. 395, 21 S. W. 386.

And the omission to insert the names of the sureties for an appeal in the body of an appeal bond does not affect the validity of the instrument, or impair the obligation of the sureties, provided the bond be properly signed and sealed, and duly attested. *Cooke v. Crawford*, 1 Tex. 9; *San Roman v. Watson*, 54 Tex. 254.

**Signature upon Condition.**—Where a bond recites that "the person to whom this bond is entrusted has absolute authority to deliver it, and the same is made and shall be construed without reference to any other instrument whatsoever," a surety thereon can not defend by showing that he signed it upon oral conditions to which his liability was subject. *Page v. White Sewing Mach. Co.*, 12 Tex. Civ. App. 327, 34 S. W. 988. See the title ESTOPPEL.

## B. EXECUTION.

### 1. Signature.

**Sufficient as to Maker.**—Where an obligor's signature appeared at the foot of a bond, but his name was not mentioned in the body thereof, the court held that the bond was sufficiently executed as to him. *Braidfoot v. Taylor*, 1 App. Civ. Cases, §§ 174, 175.

**Place of Signature.**—A bond is not a nullity because the principal signs his name in the middle of it, instead of at the end. *Taylor v. State*, 16 Tex. App. 514.

### 2. Seal.

**Under Civil Law.**—Under the Spanish law a seal was not required to give validity to a statutory bond; and as a party chose to bind himself so he was bound. *Sloo v. Powell*, Dallam 467.

Where the word "bond" was employed in the statute passed while the civil law was in force in the republic, it is held to import the same as if the word "obligation" had been used; and whereas seals were unknown to

the civil law, the instrument called for by the word "bond" in such a statute need not be under seal. *Cayce v. Curtis*, Dallam 403.

A twelve months' bond taken before the introduction of the common law was good, although without seal. *Cayce v. Curtis*, Dallam 403.

**Under Common Law.**—The word bond has a technical meaning derived from the common law, and such contracts were required to be under seal. *Foster v. Champlin & Co.*, 29 Tex. 22, 30; *Courand v. Vollmer*, 31 Tex. 397, 401.

But that requirement has been wholly abolished by the act of February 2, 1858, which reads as follows: "No scroll or private seal shall be necessary to the validity of any contract, bond or conveyance, whether respecting real or personal property, except such as are made by corporations; nor shall the addition or omission of a scroll or seal in any way affect the force and effect of the same; and every contract in writing hereafter made shall be held to impart a consideration as fully, and in the same manner, as sealed instruments have heretofore done." Pas. Dig., art. 5087, note 1114. *Foster v. Champlin & Co.*, 29 Tex. 22, 30; *Courand v. Vollmer*, 31 Tex. 397, 401; *Clayton v. Mooring*, 42 Tex. 182.

This statute was evidently intended to embrace every instrument in the execution of which seals or scrolls had been before that time used. It is somewhat inartificially drawn, but its object was clearly to abolish and forever dispense with these "relics of ancient barbarism." Every bond must be made with respect to either real or personal property; and it is no strained construction to hold that a bond not under seal can be embraced within the language of the above statute. *Foster v. Champlin & Co.*, 29 Tex. 22, 30; *Courand v. Vollmer*, 31

Tex. 397, 401; *Clayton v. Mooring*, 42 Tex. 182.

The language here used in reference to bonds without a seal applies with equal force to a sequestration bond. *Clayton v. Mooring*, 42 Tex. 182. See, generally, the title SEQUESTRA-TION.

### 3. Recordation.

Where a bond was proved for record more than 10 years after execution by one of the subscribing witnesses, who had made his mark, testifying that, to the best of his knowledge and belief, he had signed as a witness, and that the obligor had acknowledged his signature for the purposes therein expressed, it was held that the bond was sufficiently authenticated for record, especially under the act of 1841 (Hart. Dig., p. 839). *Stramler v. Coe*, 15 Tex. 211.

## C. DELIVERY.

### 1. Necessity.

Where bonds had not been delivered to trustees but were in the hands of a corporation the court held they were not obligations of any kind, and had no effect until delivered. *Marble Falls Ferry Co. v. Spitler*, 7 Tex. Civ. App. 82, 84, 25 S. E. 985.

### 2. Conditional Delivery.

See the title ESCROW.

### 3. Delivery for Approval.

**Sufficient Delivery on Part of Obligors.**—The delivery of a sheriff's bond to the chief justice, for the approval of the county court, is a sufficient delivery on the part of the obligors; and a deposit and record of it in the proper office, fully evidences its delivery to an acceptance by the state, and renders it effectual, without other evidence of approval by the county court. *Wright v. Leath*, 24 Tex. 24.

## D. AGREEMENT AND CONSENT.

To sustain a bond under the common law, it must appear that the per-

son seeking to enforce the same, or those persons with whom they are in privity, agreed and consented to the contract evidenced thereby with the makers thereof. *Burge v. Hinds*, 46 Tex. Civ. App. 134, 136, 101 S. W. 855.

This applies to a bond taken by an officer under color of authority. *Wooters v. Smith*, 56 Tex. 198.

**The obligee of a bond must consent to its execution.** *Eichoff v. Tidball*, 61 Tex. 421, 425; *Gregory v. Goldthwaite*, 2 Tex. Civ. App. 287, 21 S. W. 413. See post, "Validity as Common-Law Voluntary Bonds," II, H, 2, d.

But it is not necessary for the obligee on an intervenor's bond, executed for the purpose of staying money in the hands of the court, to have consented to its execution in order to recover on it. *Tidball v. Eichoff*, 66 Tex. 58, 17 S. W. 263.

## E. CONSIDERATION.

### Sufficient to Support a Settlement.—

That the principal and surety in a bond given to secure the performance of a contract and involving matters of uncertainty are insolvent is a sufficient consideration to support a settlement and discharge of the bond for a less amount than that secured by it, and an action will not lie thereafter to recover the balance. *Shelton v. Jackson*, 20 Tex. Civ. App. 443, 49 S. W. 415, affirmed in 93 Tex. 671, no op.

## F. DURESS, MISTAKE, AND ACCIDENT.

See, generally, the titles, DURESS; MISTAKE AND ACCIDENT.

**Duress in General.**—A bond, being made under duress and without lawful authority, is void. *Leona, etc., Co. v. Roberts*, 62 Tex. 615, 616.

The doctrines respecting contracts extorted by duress of property have no application to a bond taken by an officer who holds property by virtue of legal process, and takes the bond

by authority of law. *Shirley v. Byrnes*, 34 Tex. 625, 626.

It is not such duress as will avoid settlement and the discharge of a bond for less than its amount that the obligor held money of the obligee advanced to him under a contract to secure the performance of which the bond was given, and that the obligor had transferred all his property and was insolvent. *Shelton v. Jackson*, 20 Tex. Civ. App. 443, 49 S. W. 415, affirmed in 93 Tex. 671, no op.

**Duress of Co-Obligor.**—A joint obligor on a bond can not take advantage of the fact that his co-obligor executed the bond while under duress. *Spaulding v. Crawford*, 27 Tex. 155.

**Bond More Onerous than Law Prescribes.**—While an officer holding property may not have taken a bond under such state of facts as would make the same void upon the ground of duress, if between parties contracting in their own right, yet the simple fact that an officer receives a bond more onerous than the law prescribes ought to be taken, in the absence of an averment to the contrary, as evidence of the fact that he refused to deliver the property unless the bond given was executed. The taking of such a bond under such circumstances would be, as to the maker, coercion and oppression. *Wooters v. Smith*, 56 Tex. 198, 209. See post, "Effect of Superadded Words and Conditions," II, H, 2, b.

**Bonds Extorted Colore Officii—Accidental Omissions.**—Generally, the omitted formal conclusion of a bond will be supplied by construction, if, from an inspection of the entire instrument, it is manifest that the omission was accidental. *Rose v. Winn*, 51 Tex. 545. See post, "Voluntary Bonds and Bonds Extorted Colore Officii," II, G.

#### G. VOLUNTARY BONDS AND BONDS EXTORTED COLORE OFFICII.

**General Rule.**—The general rule is

that a bond, whether required by statute or not, is good at common law if entered into voluntarily, and for a valid consideration, and if not repugnant to the letter or policy of the law. *Leona, etc., Co. v. Roberts*, 62 Tex. 615, 622.

Where a bond was not only voluntarily given by plaintiff but they solicited and requested the privilege of making it in order that one plaintiff might accomplish his purpose, the bond having had this effect, and being a valid and binding common-law obligation, plaintiff must be held to discharge the obligation imposed upon themselves by its terms. *Jones v. Hays*, 27 Tex. 1; *Colorado City Nat. Bank v. Lester*, 73 Tex. 542, 543, 11 S. W. 626; *Jacobs v. Daugherty*, 78 Tex. 682, 15 S. W. 160; *Edmiston v. Concho County*, 21 Tex. Civ. App. 339, 51 S. W. 353; *Hines v. Norris* (Civ. App.), 81 S. W. 791; *Mariany v. Lemaire*, 37 Tex. Civ. App. 151, 83 S. W. 215; *Hummel v. Greco*, 40 Tex. Civ. App. 510, 515, 90 S. W. 339.

**Deputy Collector's Bond.**—Where the law prescribes no bond for the deputy collector, but it does not forbid the collector from protecting himself by such bond, in requiring from his deputy, whether before or after his appointment, indemnity against loss through the defalcation of the latter, the collector has exercised a legitimate precaution and a bond to have been voluntarily given by the deputy, valid as a common-law bond, was rightly enforced. (*Marshall v. Bailey*, 27 Tex. 686.) *Dignan v. Shields*, 51 Tex. 322, 327.

**Statutory Bonds Not Conformable to Statute.**—See post, "Validity as Common-Law Voluntary Bonds," II, H, 2, d.

**Bonds Extorted Colore Officii.**—A bond given as a condition to be permitted to enjoy a right clearly given by law, demanded by an officer who has possession of property which he

has seized under process, can not be said to be a voluntary bond when it is more erroneous than the statute prescribes. *Wooters v. Smith*, 56 Tex. 198.

**Where a party had a right at common law** to do a certain thing, as to keep a ferry, and a statute exacts the giving of a bond as a condition precedent, the giving of the bond can not be called a voluntary act; and if the bond be not good as a statutory bond, it will not be binding as a voluntary bond at common law. *Johnson v. Erskine*, 9 Tex. 1.

**Irrigation Companies Bond.**—A bond was required by the governor of the state of a company which constructed an irrigation ditch, under the provisions of the act of March 10, 1875, entitled "An act to encourage the construction of canals and ditches for navigation and irrigation." It was made conditioned that the company would keep the ditch in proper repair, so that the water would flow freely through its length, and irrigate the land along the ditch for ten years; and it recited that its execution was required by the governor to satisfy him that the company had the ability, and intended to keep the ditch in proper repair for ten years, under the provision of the act above referred to. The bond was executed to satisfy the governor of facts as to which under the law he was to have proof, before the company could receive land certificates for constructing the ditch. In a suit by the state to recover upon the bond, held, the bond being executed *colore officii*, and not having been voluntarily executed, can not be enforced as a common-law bond. *Eichoff v. Tidball*, 61 Tex. 421; *Wooters v. Smith*, 56 Tex. 198, 199; *Dignan v. Shields*, 51 Tex. 322; *Leona, etc., Co. v. Roberts*, 62 Tex. 615, 616.

**Deputy Collector's Bond.**—A bond executed by a deputy collector of customs to his principal, for the faith-

ful performance of the duties of cashier in the custom-house office, does not impose on the deputy the performance of other or greater duties than are required by law, nor is it invalid because exacted *colore officii*. *Dignan v. Shields*, 51 Tex. 322.

**Construction of Bonds Extorted Colore Officii.**—See post, "Involuntary Bonds," III, D.

## H. STATUTORY BONDS.

### 1. Rule as to Substantial Compliance.

The general rule on the subject of statutory bonds is, that when directed to be made in a peculiar mode, that mode must be pursued. *Janes v. Reynolds*, 2 Tex. 250, 256; *Johnson v. Erskine*, 9 Tex. 1; *King v. Frazer*, 2 App. Civ. Cases, § 788; *Lawton v. State*, 5 Tex. 270.

It is not necessary, however, to the validity of any bond that the terms of the statute should be literally pursued. An essential or substantial conformity is all that can be required. *Janes v. Reynolds*, 2 Tex. 250, 256; *Mays v. Lewis*, 4 Tex. 1; *Haile v. Oliver*, 52 Tex. 443; *Johnson v. Erskine*, 9 Tex. 1.

Where a bond departs substantially in the condition from the terms prescribed by the statute, it will not have the attributes intended to be imparted by the statute. *Janes v. Reynolds*, 2 Tex. 250, 256; *Hanks v. Horton*, 5 Tex. 103.

When the statute requires a bond to be payable to the state, and it was taken payable to the governor, the bond was held to be invalid. *Lawton v. State*, 5 Tex. 270.

**Bond Must Embrace All Conditions Prescribed by Statute.**—When the conditions of a statutory bond are clearly and definitely stated in the law, if the bond does not literally follow the statute, it must fully and clearly embrace all the conditions prescribed by it. *Reid v.*

Fernandez, 52 Tex. 379; Johnson v. Erskine, 9 Tex. 1.

## 2. Bonds Not Conforming to Statute.

### a. Rule as to Validity.

Where a statutory bond must in its character be a substantial compliance with the statute, yet to render it void for want of conformity with the statute, it must be made so by express enactment, or else by a fraud on the obligors by color of law, by an evasion of the statute, or be more onerous on the obligors than the statute requires. Ward v. Hubbard, 62 Tex. 559, 560; King v. Frazer, 2 App. Civ. Cases, § 788; Johnson v. Erskine, 9 Tex. 1; Janes v. Reynolds, 2 Tex. 250, 256.

### b. Effect of Superadded Words and Conditions.

Where words are supe.added to the condition of a bond, rendering it more onerous than the law requires, the superadded words do not invalidate the bond, but it has the same effect as if it had been omitted. Williford v. State, 17 Tex. 653, 654; Johnson v. Erskine, 9 Tex. 1.

If a bond be more erroneous than the statute requires, the erroneous part will be regarded as surplusage, and the fact of invalidity must be recited in the face of the bond. Janes v. Langham, 29 Tex. 413, 415.

Where the statute specially sets forth certain things or conditions to be done and performed, and the bond sets out those conditions substantially in the terms of the statute, but proceed to set out other conditions, the bond will be good under the statute as to the conditions properly contained in it, the other conditions being considered surplusage; but where none of the conditions set out in the statute are contained in the bond, and the only condition set out collectively "to perform and to discharge all the duties," etc., the bond will not be valid under the statute. Johnson v. Erskine, 9 Tex. 1.

### c. Effect of Omission When Beneficial to Obligor.

The obligor in a statute bond can in no case be permitted to take advantage of the omission of conditions, where the omission is beneficial to himself. Seeligson v. De Witt County, 1 White & W. Civ. Cas. Ct. App. § 820.

### d. Validity as Common-Law Voluntary Bonds.

See ante, "Voluntary Bonds and Bonds Extorted Colore Officii," II. G.

If a bond intended to be taken by authority of a statute can not be sustained as a statutory bond it will not be valid as a common-law voluntary bond unless it will stand as such without the aid of the statute. There is a class of bonds that may well be sustained, from their form and structure, without the aid of any statute; injunction bonds, bail bonds, replevy bonds, forthcoming bonds, appeal and writ of error bonds, and all such as are made payable to the beneficiary or interested party, unless taken under coercion and oppression, or by fraudulent imposition; they would be valid at common law without resorting to the statute to give them effect. Johnson v. Erskine, 9 Tex. 1; Hillman v. Mayher, 38 Tex. Civ. App. 377, 379, 85 S. W. 818.

Sound policy forbids the court to sustain a bond, intended to be taken by authority of a statute, as a common-law bond except in cases which are very clear. Johnson v. Erskine, 9 Tex. 1.

### Bonds Not Agreed to by Obligee.—

A bond for appeal from the justice court to the county court was given by one Allison, which was not conditioned as required by law, and in the county court the appeal was dismissed, on motion of plaintiff, for want of a sufficient bond, and procedendo to enforce the justice judgment awarded. Upon appeal to the court of appeals upon a cost bond the judgment of dismissal, was affirmed,

and execution was promptly issued by plaintiff against Allison, when he was found insolvent. Thereupon, this suit upon the appeal bond from the justice court was filed against the sureties thereon to recover the amount of the plaintiff's judgment against Allison. Held, the bond was not good as a statutory bond, not being conditioned as required by law, and not good as a voluntary common-law bond, because it was never agreed to or ratified by plaintiff. *Gregory v. Goldthwaite*, 2 Tex. Civ. App. 287, 21 S. W. 413.

**Bond by Purchaser at Execution Sale.**—Where a party purchased at execution sale and gave a twelve months' bond for the payment of the purchase money, before the introduction of the common law, he will not be heard to object in opposition to an execution issued to enforce the bond, that the bond did not in all respects comply with the terms of the statute. *Cayce v. Curtis*, Dallam 403.

**Constable's Bond.**—See the title SHERIFFS, CONSTABLES AND MARSHALS.

A city charter provided that the city constable should give good and sufficient security in such form, manner and amount as the city council should direct, subject to the approval of the mayor. The city sued upon the bond of its constable, setting it forth in the petition and alleging that the city council directed that the constable should "give a bond with security in the form and manner of the foresaid bond, and for the sum therein specified," but without specifying more particularly the directions of the city council. Held, that even though the bond had not been executed in strict conformity to the directions of the city council, yet it was good as a common-law bond, and might have been proceeded on as such. *Marshall v. Bailey*, 27 Tex. 686.

An official bond of a constable made

payable to the county judge and not to the governor of the state, as required by the statute, is a good common-law obligation when the giving of it is voluntary, "and not under any coercion or extortion by color of office, not to enable the obligor to enjoy any common-law right from which he was otherwise restrained." *Marshall v. Bailey*, 27 Tex. 686; *Edmiston v. Concho County*, 21 Tex. Civ. App. 339, 51 S. W. 353; *Hines v. Norris* (Civ. App.), 81 S. W. 791.

**An official bond given by a county judge** to the county treasurer to secure performance of his official duties could not be treated as a common-law obligation so as to authorize an action thereon to recover fees wrongfully collected by the judge from the administration of an estate in course of administration; his conduct in collecting such fees not being official. *Rice v. Vasmer* (Civ. App.), 110 S. W. 1005. See, generally, the title COUNTIES.

**Bond for Delivery of Property Levied Upon.**—It is settled in the supreme court that a bond made to secure the possession of personal property seized by a sheriff under process, and conditioned that if the defendant is condemned in the action he or some other person will return the property or its value to satisfy the judgment, etc., is good as a common-law obligation. *Jacobs v. Daugherty*, 78 Tex. 682, 15 S. W. 160.

Though a bond made by a defendant in execution with sureties, conditioned for the delivery of property levied on to the sheriff on the day of sale, be void as a statutory delivery bond by reason of being made payable to the officer making the levy, instead of the plaintiff in execution, yet it is a valid obligation against the makers to the extent of the value of the property which, by its means, has been taken from the custody of the law; and upon proof of the breach



of the condition of such a bond, the party in whose favor it was made is entitled to recover from the obligors the value of the property for the use of the plaintiff in execution. *Jones v. Hays*, 27 Tex. 1.

**A Replevin Bond.**—A replevy bond for real estate sequestered which was not good under the statute could not be enforced as a common-law bond where the same was made solely between the sheriff levying on the property and the makers of the bond; the adverse party not being in privity therewith. *Broussard v. Hinds* (Civ. App.), 101 S. W. 855.

But where a replevin bond was prepared by the attorney of the defendant in attachment, who voluntarily tendered it to the sheriff in order to obtain possession of the attached property. The terms were more onerous than the statute required and it was defective as a statutory bond. Held, that since the defendant could only regain possession of the property by executing a bond the fact that through his attorney he tendered one more onerous than required by law did not invalidate it as a common-law obligation which could be enforced to the extent of the value of the property replevied in a separate action against the obligors. *Colorado City Nat. Bank v. Lester*, 73 Tex. 542, 11 S. W. 626.

**Claimant's Bond with One Surety.**—A claimant's bond with but one surety is not valid as a statutory bond, but will be sustained as a common-law obligation. *Jacobs, etc., Co. v. Shannon*, 1 Tex. Civ. App. 395, 21 S. W. 386.

**A liquor dealer's bond** does not fall within the class mentioned and can not be recovered upon as a common-law obligation. *Hillman v. Mayher*, 38 Tex. Civ. App. 377, 379, 85 S. W. 818. See the title INTOXICATING LIQUORS.

**Ferryman's Bond.**—Where the stat-

ute required ferrymen to give a bond to do certain things specifically, and the bond taken was conditioned "that they shall well and truly perform and discharge all the duties required of them as ferrymen," it was held that the bond, being more onerous than required by the statute, was void and would not sustain an action as a common-law bond. *Johnson v. Erskine*, 9 Tex. 1; *Janes v. Langham*, 29 Tex. 413, 417. See, generally, the title FERRIES.

Thus a ferryman who has not given a valid bond in conformity to the statute is liable as a common carrier. *Johnson v. Erskine*, 9 Tex. 1.

**But One Recovery Allowed.**—It seems to be well settled that if a bond be not good as a statutory bond, but be good as a common-law bond, there can be but one recovery on it. *Johnson v. Erskine*, 9 Tex. 1.

### III. Interpretation or Construction and Operation.

#### A. RESPECTING PARTIES.

**Nature and Extent of Liability Ascertained from Bond Itself.**—Where the makers of a bond agreed among themselves that if, "after each of us has paid our subscription in full heretofore made by us, and after we have collected all possible from the other subscribers to said railroad subsidy, and all that we may be able to collect from other sources, there should remain any money due by us on account of said bond, that we will prorate such sum \* \* \* according to the amount of our respective subscriptions to said railroad subsidy," the court held, that the purpose of this instrument was to fix the proportion in which the makers thereof were to contribute towards the payment of any deficiency that might exist after exhausting the subscription list rather than to regulate the time at which they could be called upon to make contribution to one of their known

number, who may have been required to pay the railroad more than his share. In fixing this amount the intention of the parties to the contract will be carried out by giving to the words, "after each of us has paid our subscription," the meaning, "after deducting each of our subscriptions." *Morris v. Davis* (Civ. App.), 31 S. W. 850, 854, affirmed in 93 Tex. 669, no op.

#### **Joint and Joint and Several Bonds.**

—A claimant of property levied on under two executions gave one claim bond for both. A motion to dismiss the claim upon the ground that separate bonds should have been given was denied, and no appeal was taken. Held that, as against the claimant, the bond was not joint as to the obligees, and that one of them could have a separate judgment thereon. *Green v. Banks*, 24 Tex. 508.

**Counties Acting in Capacity of Representative or Trustee.**—Where, in a bond for title, A. acknowledged that A., attorney in fact to B., was firmly bound in the sum of, etc., to make a good title, etc., signed, "A., Attorney in Fact to B.," with a scroll, it was held, in an action against A. to recover back the purchase money, that B. was bound, and not A. *Eckhart v. Reidel*, 16 Tex. 62.

### **B. PENAL BONDS.**

A penal bond, upon which a suit is brought for a penalty by the state, should be more strictly construed than a voluntary bond, which would be good at common law. *Johnson v. Erskine*, 9 Tex. 110; *Wooters v. Smith*, 56 Tex. 198; *Sacra v. Hudson*, 59 Tex. 207; *Hanks v. Horton*, 5 Tex. 103, 104; *Pierce v. Wallace*, 48 Tex. 399; *Warren v. State*, 21 Tex. 510; *Patton v. State*, 35 Tex. 92; *State v. Vinson*, 5 Tex. Civ. App. 315, 317, 23 S. W. 807, affirmed in 93 Tex. 739, no op. See the title **PENALTIES AND FORFEITURES.**

### **C. CONDITIONS.**

See the title **CONDITIONS.**

**Breach of Condition.**—When obligors bind themselves to pay the debts of the obligee upon consideration, and suffer a judgment to be obtained against the obligee for the debt for which they are bound, a breach of the bond immediately results; for the results of which the obligee may sue. *Pope v. Hays*, 19 Tex. 375, 377; *Browne v. French*, 3 Tex. Civ. App. 445, 453, 22 S. W. 581.

**Implied Condition.**—A covenant in a bond that the obligor will obtain for the obligee within a certain time title to certain land, provided it is vacant, or, if it is not vacant, that he will refund the money paid by the obligee, requires the obligee to appear before the proper authorities and make the proof required by law in order to enable the obligor to perform his part of the contract, though it is not expressly stipulated in the bond that he shall do so. *Hanks v. Pickett*, 27 Tex. 97.

**Extent of Liability.**—The mere addition of figures opposite the name of each surety, and a recital in the subsequent affidavit accompanying the bond that each is liable for the amount set opposite his name, do not restrict the express liability contained in the body of the bond. *Cordray v. State*, 55 Tex. 140.

Recovery can not be had on a bond conditioned for proper distribution of collections to be made, for misapplication of money previously collected. *Sabine Tram Co. v. Bancroft* (Tex. Civ. App.), 39 S. W. 177.

A bond executed by a vendor to his vendee, conditioned that he should protect the vendee from payment of a purchase-money note previously given by the vendor for the land conveyed, and from all other liens thereon, is not a warranty of title, and hence, though title fails, there can be no recovery on the bonds unless it is shown that the purchaser has paid such note, or some other lien. *Clayton v. Franco-Texas Land Co.*, 39 S. W. 645, 15 Tex. Civ. App. 365.

**Bond Conditioned to Pay Off Mortgage.**—Where a bond was conditioned that if defendant or any one for him, shall pay off and discharge a mortgage, on land in so far as the same affects 40 acres of land, then this instrument shall become null and void, and of no further force and effect; but, if the said defendant shall fail or refuse to pay off and discharge said mortgage when same becomes due and payable then, the aforesaid obligation shall at once become due and payable; the court held, as to the effect of this bond, that it "bound said defendant to save plaintiff harmless from said mortgage to the extent of the value of the land to which it related, and that it required the makers thereof to compensate the owner of the land for whatever sum he might be required to expend in saving it from the mortgage, not to exceed the sum of \$3,000, which was the extent of the penalty. *Jackson v. Steffens* (Civ. App.), 32 S. W. 862, 863. See the title MORTGAGES AND DEEDS OF TRUST.

**Powers of Legislature to Impose Additional Conditions.**—It was not competent for the legislature to impose additional and onerous conditions upon the makers of the bond by a law passed subsequent to the date of the bond. *Murphy v. Menard*, 14 Tex. 62, 65. See, generally, the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

#### D. INVOLUNTARY BONDS.

The construction of involuntary bonds, or those taken under color of office, or of the law, is also more rigorous than of bonds taken voluntarily, and they are required in form and substance to have a more exact conformity to the statute. *Janes v. Reynolds*, 2 Tex. 250, 256; *Hanks v. Horton*, 5 Tex. 103. See ante, "Voluntary Bonds and Bonds Extorted Colore Officii," II, G.

#### E. PAYMENT.

See the title PAYMENT.

##### 1. Place of Payment.

**Waiver.**—Where the only provision in a contract is to the effect that a bond should be payable to defendants at a certain place, such bond not being furnished defendants, by accepting a bond furnished at a different place, the court held defendants waived the place of payment. *Chamberlain v. Fox*, 54 S. W. 297 (see 93 Tex. 701, no op.).

##### 2. When Bond Matures.

A bond given to secure the delivery of a certain number of cattle before a specified date, conditioned for the payment of a definite amount upon failure to do so, matures on the close of the day when by its terms the delivery was to be completed. *Shelton v. Jackson*, 20 Tex. Civ. App. 443, 49 S. W. 415, affirmed in 93 Tex. 671, no op.

##### 3. Payment Presumed from Lapse of Time.

Where a suit was brought by the state, in 1853, on an official bond, for failure to pay over public money collected in 1840 and 1841, it was held that the claim, from the lapse of time, was presumed to be paid. *State v. Kroner*, 2 Tex. 492; *The Governor v. Allbright*, 21 Tex. 753; *State v. Purcell*, 16 Tex. 305, 306.

##### 4. Demand of Payment.

**Bond to Pay Freight—Liability under Estoppel.**—To secure dispatch in the loading of export cotton on their ships appellees executed to appellant, an agent of railways, a bond to secure him in the payment of freights for all cotton delivered at their ships sides and loaded. Cotton was transported to different consignees in Galveston, and shipped on appellees' vessels and the freights due the railways paid thereafter, on demand by appellees. This was not always true of cotton consigned to D. & Co., a firm from

which the appellant had not exacted prepayment of freights, a fact of which appellees were advised. The bill of one cargo of D. & Co. cotton shipped on their vessels was returned by appellees to railways indorsed that D. & Co. paid their own freight bills. Subsequently two cargoes of D. & Co. cotton were shipped on appellees' vessels, the freight bills of which were presented to D. & Co. and by them held up on questions of weights. Finally the appellant, as agent of the railways, withdrew the bills from D. & Co., who a few days later failed. The suit is against appellees on the bond, and the only issue submitted to the jury was that of estoppel in pais raised by the answer, and the verdict and judgment was for defendants, appellees here. On the whole case the supreme court holds that under the bond the railways waived but the one right to hold cotton for freights; that the bond covered all cotton received by the appellees for shipment; that estoppel does not apply, and that under the bond appellees were liable. *McFarland v. Parr & Co.*, 34 Tex. Civ. App. 292, 79 S. W. 76. See, generally, the title ESTOPPEL.

#### 5. Waiver of Notice by Surety.

Where a bond was given conditioned on the payment of all indebtedness that might become due from the principal therein to the obligee, whether evidenced by account, notes, or otherwise, expressly stipulated that the obligors waived "presentment for payment, notice of nonpayment, protest and notice of protest, and diligence, upon all such notes, accounts," etc., the sureties thereby waive notice of default in the payment of notes given by the principal under the terms of the bond. *Page v. White Sewing Mach. Co.*, 12 Tex. Civ. App. 327, 34 S. W. 988.

#### F. BONDS OF OFFICER, AGENT OR EMPLOYEE.

See, generally, the titles BANKS

AND BANKING, vol. 2, p. 690; CORPORATIONS; PUBLIC OFFICERS, and all titles which treat of particular officers as, for instance, the title SHERIFFS, CONSTABLES AND MARSHALS.

#### IV. Negotiability and Transfer.

See, generally, the title BILLS, NOTES AND CHECKS, vol. 2, p. 839.

##### A. NEGOTIABILITY.

**Government Bonds as Lawful Tender.**—Under the constitution of the Republic of Texas, no statute could have the effect of making the bonds of the government "a lawful tender." *Borden v. Houston*, 2 Tex. 594, 595.

**Defense Available—Accommodation Indorsee.**—It appearing that the plaintiff was the indorsee without consideration, and only for convenience, of a number of bonds, the defendants, the makers of such obligations, can make any defense they could if sued by the original payee or payees. *Elwell v. Tatum*, 6 Tex. Civ. App. 397, 24 S. W. 71, 25 S. W. 434, affirmed in 93 Tex. 682, no op.

##### B. ASSIGNABILITY.

**Assignee Takes Subject to All Defenses.**—The assignee of a bond for title takes it subject to all the defenses to which it may have been liable in the hands of the first obligee, notwithstanding a valuable consideration may have been given, and there may have been no notice of the equity or defense against the bond for title. *York v. McNutt*, 16 Tex. 13, 14.

**Sale—Time Essence of Contract.**—Where a contract for the sale of corporate bonds, between the corporation and the proposed purchasers, provided for their delivery in three separate installments, and that the last installment of \$132,000 should be delivered on March 1, 1893, or in blocks of \$25,000 or upwards at any time prior thereto, at the option of the pur-

chasers, time was of the essence, and the proposed purchasers who had, before that date, refused to take the bonds because they were invalid, were not bound to take valid bonds after the time specified. *Berg v. San Antonio St. Ry. Co.*, 42 S. W. 647, 17 Tex. Civ. App. 291.

**Bonds as Collateral Security.**—Title to a coupon railway bond of the state of Georgia, which really belonged to the wife, passed when delivered by the husband as collateral security for a debt due by him and future advances, when the delivery was bona fide, in the ordinary course of business, and with no notice of the wife's interest. *Texas, etc., Ins. Co. v. Turnley*, 61 Tex. 365.

If, however, the bond was transferred and delivered as a collateral security for future advances, and no advances were made until after the maturity of the bond, then the title of the holder would depend on the real ownership of the bond at the time the advances thus made after its maturity were received, and in such a case the rights of the wife as the true owner would be protected. *Texas, etc., Ins. Co. v. Turnley*, 61 Tex. 365.

## V. Performance and Discharge.

### A. PAYMENT.

See ante, "Payment," III, E.

### B. ESTOPPEL TO ENFORCE.

See ante, "Demand of Payment," III, E, 4.

## VI. Actions on Bonds.

### A. STATUTORY BONDS.

The mere fact that a bond may be a good statutory bond, which might be enforced in a summary method provided by the statutes, does not render it incapable of enforcement by suit according to the course of the common law. *Bullock v. Traweek* (Civ. App.), 20 S. W. 724.

But an action upon a liquor dealer's bond to recover penalties purely statutory can not be maintained on a bond good only as a common-law obligation. *Hillman v. Mayher*, 38 Tex. Civ. App. 377, 379, 85 S. W. 818. See the title INTOXICATING LIQUORS.

### B. LIMITATION OF ACTION.

Where a suit was brought by the state, in 1853, on an official bond, for failure to pay over public money collected in 1840, and 1841, it was held that the claim was barred by the statute of limitations. *State v. Purcell*, 16 Tex. 305, 306.

### C. PARTIES.

#### 1. Plaintiff.

##### a. Who May Sue.

Where a statutory bond was required to be made payable to the state of Texas, but was made payable "to Edmond J. Davis, governor of State of Texas," it was held that suit thereon could be maintained in the name of the governor for the use of the state. *Ward v. Hubbard*, 62 Tex. 559.

##### b. Joinder of Obligors on Two Bonds.

A sewing machine agent in 1884 executed with sureties a bond to the company guaranteeing his payment of all moneys "which may come into his hands by virtue of his employment under the present or any future contract." The agent for a time quit his employment, and thereafter in 1886 entered the service again but was required to execute a new bond as an additional security. After this he made default, and the sewing machine company sued for the deficit, joining the makers of both bonds. Held, that the joinder was proper, and that for default after the second bond the sureties on both were liable. *Singer Mfg. Co. v. Ponder*, 82 Tex. 653, 18 S. W. 152; *Deutschman v. Battaile* (Civ. App.), 36 S. W. 489.

#### 2. Defendant.

To have county bonds declared void,

the owners of the bonds should be made parties defendant. *Buie v. Cunningham* (Civ. App.), 29 S. W. 801, 804. See the title MUNICIPAL, COUNTY AND STATE SECURITIES.

#### D. NECESSITY FOR DEMAND.

In an action to recover of a railroad company, as principal and certain persons as sureties on a bond executed by them, obligating said railway company and said sureties to repay certain subscriptions, the court held, that a demand for repayment of subscription was not necessary before bringing the action. *Red River, etc., R. Co. v. Blount*, 3 Tex. Civ. App. 282, 22 S. W. 930.

#### E. PLEADING.

See, generally, the title PLEADING.

##### 1. Petition.

##### a. Petition on Bonds and Notes.

There is no distinction under the Texas statute between a petition on a bond and a petition on a note. *Tinnen v. Matthews*, Dallam 491.

##### b. Allegations.

**Consideration.**—Where the bond sued on recites no consideration, it is indispensable that a consideration be alleged. *Hall v. York's Adm'r*, 22 Tex. 641.

**Showing Right to Suit.**—A suit by R., "county judge," on a bond payable to plaintiff in such capacity, sufficiently shows that he sues for the benefit of the county, and warrants a judgment in his name, for the use of the county. *Day v. Johnson* (Civ. App.), 33 S. W. 675.

**Sustaining Statutory Bond.**—A city charter provided that the city constable should give good and sufficient security in such form, manner and amount as the city council should direct, subject to the approval of the mayor. The city sued upon the bond of its constable, setting it forth in the

petition and alleging that the city council directed that the constable should "give a bond with security in the form and manner of the aforesaid bond, and for the sum therein specified," but without specifying more particularly the direction of the city council. Held, that, upon general exception, the allegation was sufficient to sustain suit upon the bond as a statutory bond. *Marshall v. Bailey*, 27 Tex. 686.

##### Sustaining Treasurer's Bond.—

Where it is specifically alleged that I. was on June 6, 1891, elected treasurer of the lodge for the term ending on December 31, 1891, and gave the bond as principal, and appellants signed it as sureties; that, when he gave the bond, he had on hand \$865.84, and afterwards received \$982, which together with the amount on hand amounted to \$1,847.84, and it is further alleged that I. had out of the sum he had received accounted for only \$982.44, leaving unaccounted for the sum of \$573.39, held that the petition was full and explicit in all necessary allegations. *Kohlberg v. Fett* (Civ. App.), 29 S. W. 944.

**Specific Allegation Not Required to Admit Proof.**—A specific allegation that a person had been treasurer before was not required, and it was proper to admit proof that he had this money in charge as the old treasurer, and, in succeeding himself, held it, and the bondsmen for the new terms thus became responsible for it. *Kohlberg v. Fett* (Civ. App.), 29 S. W. 944.

##### c. Assignment of Breaches.

##### Must Establish Breach as Alleged.

—Suit was brought against the surviving widow and the sureties on her bond, given under the statute to manage the community estate, for breach of her bond, which required her "to faithfully administer such estate and may pay over one-half of the surplus thereof, after payment of all debts with which the whole is properly

chargeable." The alleged breach was that she had disposed of the property of the estate, and so transferred and secreted it that the judgment sued on could not be satisfied, though she had ample means in her hands to satisfy the same. Held it was necessary to a recovery that the plaintiff should have established the breach of the bond as alleged. *Bergstroem v. State*, 58 Tex. 92.

**Bond in Hæc Verba Need Not Be Set Out.**—It is not necessary to set out the bond in hæc verba, but it is sufficient to set out the substance of the condition alleged to have been broken, and on which recovery is sought. *Drake v. State* (Civ. App.), 23 S. W. 398.

**Sufficient Allegation Sustaining Breach of Sequestration and Replevin Bond.**—A petition in an action for breaches of a sequestration bond and a replevin bond, which alleges that defendant, having executed sufficient sequestration and replevin bonds, wrongfully sued out sequestration process, and levied upon and replevied premises while plaintiff was in peaceable and quiet possession of them under a lease, is sufficient. *McArthur v. Barnes*, 10 Tex. Civ. App. 318, 31 S. W. 212.

**Alleged Breaches Not Subject to Special Exception.**—Where the principal and sureties in a sequestration and a replevin bond are the same, a petition in an action against these parties, alleging breaches of these bonds, is not subject to special exception on the ground that it is uncertain upon which bond the plaintiff seeks to recover. *McArthur v. Barnes*, 10 Tex. Civ. App. 318, 31 S. W. 212.

**Allegation Not Showing Breach of Bond.**—Pending a suit to remove plaintiff from office, a bond was executed, conditioned that the principal therein, who was temporarily appointed instead of plaintiff, should pay to plaintiff all damages and costs sus-

tained by reason of the suspension from office in case it should finally appear that the causes alleged in said suit were insufficient. After plaintiff's term of office has expired, the suit was dismissed for failure to give security for costs. Held, in an action on said bond, that a petition alleging a breach thereof by reason of the failure of defendants to prosecute said suit for plaintiff's removal, and permitting the same to be dismissed without proving the truthfulness of the causes alleged therein was insufficient, the petition nowhere alleging that the causes for removal were untrue. *Hagan v. McClain* (Civ. App.), 36 S. W. 818.

## 2. Plea or Answer.

**Plea Must Be Supported by Affidavit.**—The language of the statute (Pas. Dig., art. 228), requiring pleas impeaching the consideration of sealed instruments to be under oath, is plain and unequivocal, and the courts can not create exceptions to its requirements; and the supreme court has by repeated decisions settled that they are imperative and must be obeyed. Therefore, notwithstanding, that a bond shows upon its face that there was no consideration to make it binding in law, that defense must be asserted by a plea supported by an affidavit, as required by the statute referred to, and is not available by means of a demurrer or exception. *Pierce v. Wright*, 33 Tex. 631.

In an action on bonds, an answer which admits the execution of the bonds, and sets up facts connected with their execution whereby defendants seek to avoid liability, is not a plea of non est factum, and need not be verified. *Elwell v. Tatum*, 6 Tex. Civ. App. 397, 24 S. W. 71, 25 S. W. 434, affirmed in 93 Tex. 682, no op.

**Answer Stating Good Defense.**—Where defendants answered, under oath, that they signed the bonds sued upon but further pleaded that it was expressly agreed between themselves,

that the instrument was not to be binding upon them, or delivered, unless it was signed by other persons named, held, the answers stated a good defense. *Wheeler, etc., Co. v. Briggs* (Sup.), 18 S. W. 555.

**Where a bond issued by an attorney** is excepted to because the power of attorney has not been filed, it is sufficient answer to file the power. *Drake v. Brander*, 8 Tex. 351.

#### F. PROFERT AND OYER.

See the title PROFERT AND OYER.

**Common-Law Distinctions Unknown.**—The distinction of the common-law system, by which oyer is granted of sealed and refused of unsealed instruments, is held to be technical, frivolous and unknown to our system. *Tinnen v. Matthews*, Dallam 491.

**Error to Refuse Prayer of.**—Nevertheless, in all cases where action or defense is founded on a written instrument, whether sealed or unsealed, the opposite party is, on motion before issue joined, entitled to inspection of the instrument, and hence it is error to refuse a prayer of oyer. *Tinnen v. Matthews*, Dallam 491.

#### G. EVIDENCE.

**Parol Evidence.**—Parol evidence to prove the nondelivery of a bond was admissible, and did not contravene the rule which forbids the introduction of parol evidence of contemporaneous agreements to vary the import of a written instrument. *Wheeler, etc., Mfg. Co. v. Briggs* (Sup.), 18 S. W. 555. See generally, the title PAROL EVIDENCE.

**As to Execution.**—The execution of the bond need not be proved, unless the defendant make affidavit of the truth of his plea. *Burleson v. Burleson*, 15 Tex. 423.

**Bond Itself.**—A bond executed by a county treasurer and sureties, payable

to the county judge, and conditioned that he faithfully execute the duties of his office and pay over, according to law, all moneys coming into the hands as county treasurer, is good as a common-law obligation, and admissible in an action for embezzlement of the funds of the county, though it did not bind the principal to render a just and true account to the commissioner's court of the county. *Edmiston v. Concho County*, 21 Tex. Civ. App. 339, 51 S. W. 353.

**Recitals.**—A recital in a bond is evidence against the maker, in an action on the bond. *Illies v. Fitzgerald*, 11 Tex. 417.

**Certificates of Acknowledgment.**—Where certificates of acknowledgment were attached to a bond sued on, and were set out in the petition, such certificates were admissible in evidence to obviate an objection on the ground of variance. *United States Fidelity & Guaranty Co. v. Fossati* (Civ. App.), 81 S. W. 1038.

**Self-Serving Declarations Inadmissible.**—A letter written by a defaulting treasurer to a member of the lodge, directing him to sell his property, and pay the proceeds to the lodge, would not be admissible in evidence against the lodge; and the fact that the lodge may have received some money on the account of the sale of the property did not render it bound by the declarations of a man who had appropriated the trust, the court holding the money placed in his charge. It would not do to lay it down as a precedent that a man could embezzle the funds of a benevolent institution, abscond, and then make testimony for the sureties on his bond by writing a letter to a member of the institution he had defrauded. The whole of the letter should have been excluded from the evidence. The declarations in the letter belong to the worst class of manufactured testimony, and could not bind the lodge. *Kohl-*



berg v. Fett (Civ. App.), 29 S. W. 944, 945. See, generally, the title DECLARATIONS AND ADMIS-

**Check-Book Stub Inadmissible.**—In an action on a treasurer's bond for the conversion of money by him, the stub of the treasurer's private check book is not admissible to show a conversion of such funds before the bond was executed. *Barry v. Screwmen's Benev. Ass'n*, 67 Tex. 250, 3 S. W. 261.

## H. VARIANCE.

See the title VARIANCE.

In an action on a bond purporting to be executed by M. B. C. as principal, and the other defendants as sureties, and conditioned that whereas the partnership between M. B. C. and F., under the firm name and style of C. & F., had been dissolved, and said M. B. C. had agreed to pay the debts of said firm of C. & T., now, if said M. B. C. shall pay his debts and hold said F., the obligation should be void, the partnership alleged and proved being one between G. H. C. and F. (G. H. C. being, as appeared by the evidence, though not by the pleadings, the husband of M. B. C.) and it being proved that G. H. C. had executed the bond in the capacity of principal and there being no allegation of proof that the name of M. B. C. had been by mistake inserted in the bond as principal thereof, and as member of the partnership and no attempt to reform the bond, judgment can not be sustained against the sureties. *Collins v. Chastain* (Civ. App.), 26 S. W. 503.

Plaintiff could not recover where any action brought is distinctly a suit on the bond as a statutory bond, with allegations appropriate to such an action, and not upon it as a common-law undertaking. *Hillman v. Mayher*, 38 Tex. Civ. App. 377, 379, 85 S. W. 818.

In an action to recover on bonds, a variance between those described in the petition and those offered in evidence is harmless, where the defendant was not misled or surprised thereby. *Thornburgh v. City of Tyler*, 43 S. W. 1054, 16 Tex. Civ. App. 439.

Where a bond sued on is referred to by an amended original petition filed November 7, 1878, as follows, "Herewith filed, marked 'Exhibit A,'" and the record contains a copy of a bond corresponding with that described in the petition, except that the file mark was September 14, 1878 (that being the date when the original suit was filed, as shown by the appellant's brief), such copy will be treated as the exhibit referred to in the petition, and it is admissible in evidence, although the petition is defective in failing to allege the tenor and effect of the bond. *Peveler v. Peveler*, 54 Tex. 53.

## I. DAMAGES AND AMOUNT OF RECOVERY.

### 1. Measure of Damages—Liquidated Damages.

#### a. In General.

A bond conditioned for the payment of a given sum in case the obligor fails to deliver cattle contracted for on a date specified, and for the payment of a proportionate amount upon his failure to deliver any part of them, is a liquidated demand. *Shelton v. Jackson*, 20 Tex. Civ. App. 443, 49 S. W. 415, affirmed in 93 Tex. 671, no op.

Where the sum named in a bond was a penalty, and was not agreed on as ascertained damages, the undertaking of plaintiff being illegal, no recovery could be had by defendant for its breach. *Doughty v. Cottraux*, 8 Tex. Civ. App. 125, 129, 27 S. W. 585.

#### b. Limited to Amount of Penalty.

In an action on a common-law bond no damages incurred can be recovered against any principal or surety beyond the penalty. *Grand Lodge v. Cleg-*

horn, 20 Tex. Civ. App. 134, 136, 48 S. W. 750.

And if it should be regarded as a statutory bond, the rule is, that "in all actions upon statutory bonds the penalty fixed in the bond is the absolute limit of the damages." Grand Lodge v. Cleghorn, 20 Tex. Civ. App. 134, 136, 48 S. W. 750.

**Actual Damages—Proper Measures.**—Where a county prepared a plan and specification for building a jail, and let the contract to the lowest bidder at public outcry, taking bond with security for the performance of the contract by a given time, and the contractor, having taken the contract at less than one-fourth of a fair price, failed to perform any part of it, and the county let it again at public outcry, after due advertisement, and sued the original contractor and his security on their bond, it was held that the difference between the prices at which the contract was let was not the measure of damages, but that the proper measure of damages was the actual damage to the county upon the basis of a fair price at each letting. Chambers v. Ft. Bend County, 14 Tex. 34.

A hirer of convicts gave a bond pursuant to Rev. Stat. 1895, art. 3746, so requiring, in the penal sum of \$2,500, conditioned that he would pay moneys to become due under his contract, and treat the convicts humanely, etc. The contract of hire provided for humane treatment, and stipulated that any violation of its covenants should give the county the right to forfeit the accompanying bond. Held, that even if the bond could be treated as a common-law obligation, so as to permit a recovery thereon for inhumane treatment, the amount of recovery must be limited to the actual damage resulting to the county. Ellis v. Ft. Bend County, 31 Tex. Civ. App. 596, 74 S. W. 43.

## 2. Interest.

In an action on a statutory bond plaintiff may recover interest in a proper case. Grand Lodge v. Cleghorn, 20 Tex. Civ. App. 134, 48 S. W. 750.

Where a judgment was recovered in 1838 for a certain amount, with interest at the rate of ten per cent per annum, from a date anterior to the judgment, until paid, upon which execution issued in 1839, under which there was a sale upon twelve months credit, the defendant being the purchaser and giving a bond with security for the principal, costs and interest at ten per cent, to date, held, in an action on the bond, that interest on the bond at the rate of five per cent per annum only was recoverable. Austin v. Townes, 10 Tex. 24.

## J. INSTRUCTIONS—APPLICABILITY TO PLEADINGS.

Where, in an action on a bond for liquidated damages for breach of contract, the petition prayed for judgment for the amount of the bond, without praying in the alternative for the actual damages sustained by the breach, and without praying for general relief, it was error to give a charge permitting a recovery of actual damages. Work v. Cross, 98 S. W. 208.

## K. JUDGMENT.

Where a suit was instituted upon a tax collector's bond payable in "good and lawful money of the republic of Texas," and verdict rendered against the defendant for the amount of the bond, held, that there was no error in the judgment, because it provided that such amount might be discharged in the promissory notes of the republic. Moore v. Texas, 1 Tex. 563.

In an action on a bond which shows on its face that one defendant is principal and the others sureties, it is proper to enter judgment against the former as principal and the others as

sureties. *Day v. Johnson* (Civ. App.), 33 S. W. 676.

A bond for the payment of "one thousand dollars—Texas money" is payable with bonds or notes of that republic and, the same being worth but 33 1-3 cents on the dollar, a judgment was properly rendered thereon for

\$333 1-3 lawful money, with interest. *Reece v. Smith*, Dallam 389.

### VII. Coupons.

Coupons are governed by the principles applied to the bonds from which detached. *Citizens Bank v. City of Terrell*, 78 Tex. 450, 14 S. W. 1003.

## Book Accounts.

As to best evidence of contents of account books, see the title **BEST AND SECONDARY EVIDENCE**, vol. 2, p. 800. Book accounts as evidence, see the title **DOCUMENTARY EVIDENCE**.

## Books as Evidence.

See the title **DOCUMENTARY EVIDENCE**.

## Border and Littoral Leagues.

See the title **PUBLIC LANDS**.

# BOUNDARIES.

BY ALBERT S. HOLTZ.

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#### CROSS REFERENCES.

See the titles ACCESSION, ACCRETION AND RELICTION, vol. 1, p. 50; APPEAL AND ERROR, vol. 1, p. 389; BEST AND SECONDARY EVIDENCE, vol. 2, p. 796; COUNTIES; DECLARATIONS AND ADMIS- SIONS; DEEDS; DEMURRERS; DOCUMENTARY EVIDENCE; EVIDENCE; ESTOPPEL; EXPERT AND OPINION EVIDENCE; FRAUDS, STATUTE OF; HEARSAY EVIDENCE; INSTRUCTIONS; JUDGMENTS AND DECREES; MUNICIPAL CORPORATIONS; NAVIGABLE WATERS; PAROL EVIDENCE; PLEADING; PRESUMPTIONS AND BURDEN OF PROOF; PUBLIC LANDS; PUBLIC OFFICERS; RES GESTÆ; SPECIFIC PERFORMANCE; TOWNS AND TOWNSHIPS; TRESPASS TO TRY TITLE AND EJECTMENT; VERDICT; WATERS AND WATERCOURSES; WITNESSES.

As to the extent of boundaries of land acquired by adverse possession, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION. As to fees of surveyor for running lines, see the title COSTS.

#### I. Definition.

The word "boundary" has no technical signification. It is a term in common use and of no doubtful meaning. *Cox v. Finks*, 91 Tex. 318, 320. See post, "What Constitutes," II, C, 1, a.

### II. Boundaries of Private Property.

#### A. DESCRIPTION AND INDICATION OF BOUNDARIES.

##### 1. In General—Necessity for.

Objects Not Called for of No Effect in Determining Boundaries.—Lines and boundaries can not be constructed

with reference to objects that may be found upon the ground as indicating the footsteps of the surveyor, when there are no calls in the grant for such objects. *Anderson v. Stamps*, 19 Tex. 460; *Ratliff v. Burleson*, 7 Tex. Civ. App. 621, 624, 26 S. W. 1003, 25 S. W. 983 (see 93 Tex. 694, no op.); *Missouri, etc., R. Co. v. Anderson*, 36 Tex. Civ. App. 121, 127, 81 S. W. 781, affirmed in 98 Tex. 624, no op.; *Hamilton v. Blackburn*, 43 Tex. Civ. App. 153, 95 S. W. 1094.

The limits embraced in a conveyance of right of way for a railroad are to be determined by the calls in

the deed, and evidence is not allowed to extend same by showing an actual survey of the boundary beyond the limits called for. Thus, a deed conveying to a railroad a twenty-five foot right of way can not be construed to include land beyond that limit by showing that a survey was actually made outside of that limit. *Missouri, etc., R. Co. v. Anderson*, 36 Tex. Civ. App. 121, 81 S. W. 781, affirmed in 98 Tex. 624, no op.

**Land Must Be Identified in the Grant.**—Primarily the land granted must be identified by the description given of it in the grant. *Bigham v. McDowell*, 69 Tex. 100, 102, 7 S. W. 315.

**Lines Must Be Established by Calls in Field Notes.**—The lines of a grant must be established by the calls in the field notes. *Thompson v. Langdon*, 87 Tex. 254, 258, 28 S. W. 931.

**As to Entry on Public Lands.**—"It is necessary to the validity of such an entry that it should be made with such certainty and precision that the adjacent lands remaining vacant may be located without confusion of the boundaries." *Weir v. Van Bibber*, 34 Tex. 226, 229.

But, if a rigorous construction were given to the provisions of the law relative to the duties of surveyors in running off land, and of the commissioner in obliging colonists to set landmarks upon their lands, with fixed and permanent boundaries (arts. 6 and 7 of instructions to commissioners, p. 71, L. C. & T.), a grantee could not claim unless under a survey actually made, and with permanent corners and boundaries. But such construction would be fraught with inconceivable mischief and calamity, and would be a departure from the rule adopted by other courts in relation to similar statutes in other states, the condition of whose surveys and land titles were not dissimilar to our own. *Williamson v. Simpson*, 16 Tex. 433,

434. See, generally, the titles PUBLIC LANDS; PUBLIC OFFICERS.

## 2. Classes of Calls.

Calls in grants, deeds, and surveys, which serve to designate and identify land, are divided into general, descriptive, and directory, or special and locative calls. *Phillips v. Ayres*, 45 Tex. 601, 605; *Stafford v. King*, 30 Tex. 257, 258.

As to the relative importance of these classes, see post, "Most Material and Certain Calls Govern," II, A. 5, a, (2), (c).

## 3. Omission of Call and Misdescription.

### Omission of Call Immaterial When It May Be Reasonably Supplied.

Though after locating the first two lines as called for, from the beginning point, and running the last back from the beginning point, three sides of the survey only are given and the requisite number of acres may be included by supplying either one of several conjectural lines, the probability that only one call was omitted presents such reasonable certainty as is acted on in the highest concerns of life, and is sufficient for the purposes of the law. *Mansel v. Castles*, 93 Tex. 414, 55 S. W. 559, reversing 54 S. W. 299.

A description of land by boundary lines running from the beginning point S. 45 degrees W. 906 varas; thence N. 45 degrees W. 555 varas; thence S. 45 degrees E. 550, to the beginning shows an obvious omission of one call, between the second and third, which may be supplied with reasonable certainty, and such description is sufficient in a partition and decree of foreclosure, as it would be in a deed. *Mansel v. Castles*, 93 Tex. 414, 55 S. W. 559, reversing 54 S. W. 299. And see *Brown v. McKee*, 80 Tex. 594, 16 S. W. 435.

**Misdescription Immaterial When Land Sufficiently Identified.**—Where the description in a deed called to commence at David Strickland's south-



west corner, and run west with D. Strickland's line, and further described the land by the name of the original grantee, by the number of acres, and by the adjoining surveys, and it was proved that the land corresponding to the last three calls began at David Strickland's southeast corner and ran west with David Strickland's line, it was held that the land was sufficiently identified. *Smith v. Chatham*, 14 Tex. 322.

**Diversity in Spelling One Call Immaterial.**—In a chain of title was a call, "1188 varas south 30 degrees east from the northeast corner of a 320 acres survey in name of — Meader." In some of the deeds the name was spelled Meadows. This diversity in spelling could not render the call uncertain, the other calls being correct. *Sloan v. Thompson*, 4 Tex. Civ. App. 419, 420, 23 S. W. 613. See, generally, the title DEEDS.

#### 4. Methods and Elements of Description.

As to the relative importance of various conflicting elements, see post, "Relative Importance," II, A, 5, a.

##### a. In General.

"The general rules to be observed in ascertaining boundaries or the locality or identity of lands, called for in a deed or grant, are well settled. Recourse is to be had, 1st, to natural objects; 2d, to artificial marks; 3d, to course and distance." *Bolton v. Lann*, 16 Tex. 96, 110; *Maddox Bros. v. Fenner*, 79 Tex. 279, 290, 15 S. W. 237; *Hubert v. Bartlett*, 9 Tex. 97, 104; *Stafford v. King*, 30 Tex. 257, 272. See post, "General Rules," II, A, 5, a, (1).

##### b. Monuments.

###### (1). Natural Monuments.

**What Constitute.**—Natural objects are mountains, lakes, rivers, creeks, rocks, and the like. *Barnard v. Good*, 44 Tex. 638, 640; *Stafford v. King*, 30 Tex. 257, 272; *Maddox Bros. v. Fenner*, 79 Tex. 279, 290, 15 S. W. 237.

A call for a bayou is a call for a

natural object. *Bland v. Smith* (Civ. App.), 26 S. W. 773.

###### (2) Artificial Monuments.

**What Constitute.**—Artificial objects are marked lines, trees, stakes, and the like. *Stafford v. King*, 30 Tex. 257, 272; *Barnard v. Good*, 44 Tex. 638, 640; *Maddox Bros. v. Fenner*, 79 Tex. 279, 290, 15 S. W. 237.

**What Is a Marked Tree.**—Where the beginning corner is fixed on the north boundary line of an established survey at one hundred and fifty varas east of an elm tree, if this tree has been marked so as that it could be ascertained and distinguished from other trees, this would have been a compliance with one of the usual and sufficient tests as to locality and identity, generally made by surveyors. If, however, under the circumstances, it otherwise could be reasonably identified, this would be sufficient. *Douthitt v. Robinson*, 55 Tex. 69, 74.

But, the identity of a tree relied on in fixing the northwest corner of the M. survey is not sufficiently shown to call for a change in the lines as fixed by surveyors 50 years ago, where the tree seems to have been recently marked, and the marks are not such as surveyors make in marking trees; where the south line of another survey on which such corner rests is a well-defined line, running much of the way through timber, and such tree is 30 rods south of such line; and where a surveyor who located a younger survey west of it in 1857 testified positively that he found an oak tree called for by the M survey as its northwest corner, on which he fixed the northeast corner of the younger survey, and that such tree was a bearing tree, the subsequent destruction of which was clearly shown. *Williams v. Beckham*, 6 Tex. Civ. App. 739, 26 S. W. 653.

###### (3) Identification.

**Monuments Should Be Described in Field Notes and Patent.**—A descrip-

tion of natural and artificial objects and marks of identity should be faithfully transferred into the field notes, and thence into the patent, to serve the purpose of identification. *Stafford v. King*, 30 Tex. 257, 271.

**Surveyor Should Designate Monuments.**—It was unquestionably the duty of the surveyor to make an accurate and exact survey of the land, as he represents himself to have done, to mark the lines where this could be done and to designate and call for the natural objects found by him in making the survey, and such artificial ones as he should make, which would be sufficient to locate and identify the survey as actually made upon the ground. *Phillips v. Ayres*, 45 Tex. 601, 605; *Westbrook v. Guderian*, 3 Tex. Civ. App. 406, 22 S. W. 59.

**Claimant May Show Location of Lost Trees.**—Where the bearing trees called for in a senior survey had disappeared, a claimant under a junior survey was entitled to show the location of the trees. *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.), 96 S. W. 64 (see 101 Tex. 645, no op.).

**Discrepancy in Distance as Affecting Identity of Object.**—A call for a stake and mound as the corner of one survey will be considered identical with a stone mound called for in another later survey made by the same surveyor, the two surveys being mapped as contiguous and having the stone mound as a common corner, even though there be a slight discrepancy in distance. *Graham v. Dewees*, 85 Tex. 395, 399, 20 S. W. 127.

### c. Course and Distance.

#### (1) In General.

**Establishment of Boundaries by Course and Distance.**—If there be a defined beginning point, the boundaries may be established by course and dis-

tance alone. *Stafford v. King*, 30 Tex. 257, 258. And see *Thompson v. Langdon*, 87 Tex. 254, 259, 28 S. W. 931; *Jones v. Andrews*, 62 Tex. 652.

If course and distance, called for in a deed, are the only means by which to ascertain boundaries, these must determine them. *Bolton v. Lann*, 16 Tex. 96, 111; *Booker v. Hart*, 77 Tex. 146, 12 S. W. 16. But see *Smith v. Jarvis*, 47 Tex. Civ. App. 185, 105 S. W. 1168, where this is held not to be a rule of law of universal application.

If no natural or artificial objects are called for in a grant by which its boundaries could be established, then the same would be established by course and distance. *Freeman v. Mahoney*, 57 Tex. 621, 625; *Ratliff v. Burleson*, 7 Tex. Civ. App. 621, 25 S. W. 983, 26 S. W. 1003 (see 93 Tex. 694, no op.).

Where the corners and boundaries of a survey could not be identified by marks and objects upon the ground, and there was an established and identified corner of another survey having such relation to the survey in controversy as that it could be constructed by following course and distance from such established and identified corner, the survey should be so constructed, even though the boundaries thus established should include land within the marked boundaries of the junior survey. *Griffith v. Rife*, 72 Tex. 185, 190, 12 S. W. 168.

#### Course of Line Determined from Course and Distance of Other Lines.

—The description of land sued for as contained in the pleadings, which fails to give the course of one of the lines of the survey, is not defective, when, from the course and distance of the lines described, its course is rendered certain. *Huff v. Webb*, 64 Tex. 284.

#### (2) Reversing Courses.

##### (a) In General.

The calls of a survey may always be reversed. *Maddox Bros. v. Fenner*,

79 Tex. 279, 292, 15 S. W. 237; *Davis v. Smith*, 61 Tex. 18, 22; *Griffin v. Roe*, 2 Posey 511, 512.

In determining boundary lines, the order in which the surveyor gives the lines and corners in his certificate of survey is of no importance to find the true position of the survey. Reversing the courses is as lawful and persuasive as following the order of the certificate. *Phillips v. Ayres*, 45 Tex. 601, 607; *Griffin v. Roe*, 2 Posey 511, 512; *Pierce v. Schram* (Civ. App.), 53 S. W. 716.

**(b) When Allowed.**

**Harmonizing All the Calls in a Grant.**—In seeking to ascertain the true locality of a survey which was actually made, controlling importance can not be given to the corner first described as the beginning corner in the grant, especially in a case where the surveyor had testified that he really began the survey at a different corner, and ran the lines on the ground, reversing the courses described in the grant. In such a case it is not error to instruct the jury that if, by reversing the calls and tracing the lines in a different direction from that called for in the field notes, they can more nearly harmonize all the calls of the grant, it is their duty to do so. *Ayers v. Harris*, 64 Tex. 296; *Ayers v. Harris*, 77 Tex. 108, 117, 13 S. W. 768; *Jones v. Andrews*, 72 Tex. 5, 16, 9 S. W. 170; *Miles v. Sherwood*, 84 Tex. 485, 19 S. W. 853; *Burge v. Poindexter* (Civ. App.), 56 S. W. 81.

**Lines Must Be Actually Run.**—When all lines of a survey were actually run and measured on the ground, then in ascertaining its boundaries the calls may be reversed, otherwise they should not be. Thus, where the evidence showed that the western and northern lines of a survey were actually run and measured on the ground in making the original survey, and the southeast corner was identified, held, that it would not be proper to

ascertain the true location of the northeast corner by reversing the calls and measuring distance on the east line from the southeast corner, if the east line was not actually run and measured. *Ayers v. Lancaster*, 64 Tex. 305.

But in the case of *Phillips v. Ayres*, 45 Tex. 601, 607, the courses were allowed to be reversed when there was no proof that two of the lines were actually traced and measured on the ground but in the opinion of the court they were treated as lost lines. In a subsequent case, discussing the case of *Phillips v. Ayres*, supra, the court said: "If it is permissible to reverse the calls and trace the lines a different way from that indicated in the field notes, in cases where the proof shows some of the lines were not actually run upon the ground, but their length was determined by estimation or calculation simply, it is infinitely less hazardous to adopt such a rule in a case where all the lines are shown to have been actually measured by the surveyor who made the original survey." *Ayers v. Harris*, 64 Tex. 296, 300. And see *Miles v. Sherwood*, 84 Tex. 485, 19 S. W. 853.

The rule as to reversing the calls of a survey in order to establish a disputed boundary does not apply when the only evidence tending to identify any corner or line of the disputed land is evidence in reference to one corner, and the other boundary can be established by running course and distance. *Pierce v. Schram* (Civ. App.), 53 S. W. 716.

**Fixing Line of Survey.**—A survey was situated on the left bank of the Colorado River. The northwest and southwest corners were sufficiently identified. The field notes called to begin at northwest corner, thence down the river; thence east, north, and west, to beginning. There was testimony showing that the north line had been run—marked line being

found as far as the timber extends. The east and south lines were not run. To run out the survey by following the calls as in the field notes placed the east line farther from the river than if survey were made by reversing the calls and measuring from the northwest corner thence east, south, west, and up the river. In either way run, the survey would be in excess in quantity. Held, that inasmuch as the north line appears to have been actually run, the trial judge was authorized to reverse the calls and thus fix the east line. *Swenson v. Willsford*, 84 Tex. 424, 19 S. W. 613; *Scott v. Pettigrew*, 72 Tex. 321, 328, 12 S. W. 161.

**Closing Survey.**—In a rectangular survey, so appearing in its calls and on the maps, three corners are known; the fourth is not ascertained otherwise than by course and distance from the third corner. The call is two hundred varas longer than the parallel line on the south. Held, that it was not error in the court to refuse to instruct the jury that the survey should be closed by connecting the first and fourth corners. It was not error to close the survey by reversing the last call from the first corner and running the proper course to the intersection with the third line. *Forbes v. Withers*, 71 Tex. 303, 9 S. W. 154.

**Curing Clerical Errors.**—Where a decree for title called for a beginning point, thence south to a given point, thence east to a given point, thence north to a given point, thence east to the place of beginning; held, that the course and point designated in the last call being inconsistent, the point should control the course, and as by running east the beginning point could never be reached but could by running west, the course should be reversed from east to west, the use of the word east being evidently merely a clerical error. *Tison v. Smith*, 8 Tex. 147, 148; *Sanger Bros. v. Roberts*, 92 Tex. 312, 317, 48 S. W. 1.

A call in a patent read, "Thence south 744 varas, to place of beginning." To reach such beginning it was necessary to go north 518 varas. Held, that the word "south" should read "north." *Warden v. Harris* (Civ. App.), 47 S. W. 834.

**Curing Ambiguity and Uncertainty.**—In construing field notes that show an apparent ambiguity resulting from an omitted call, by reason of which they do not close, it is proper to reverse the calls in the field notes, and to also consider a plat of the land contained in the deed. *Chew v. Zweib*, 29 Tex. Civ. App. 311, 69 S. W. 207. See post, "Plats," II, C, 4, b, (3), (h), bb.

A deed is not void for uncertainty by reason of the omission of one of the calls in the field notes, where by the description given and by reversing the calls in the field notes, the missing call can be supplied and the land identified. *Montgomery v. Carlton*, 56 Tex. 431, 433. See, generally, the title DEEDS.

### (3) Meander Lines.

When a bay shore with its meanders is given as a boundary line, the courses and distances according to the meanders should be given. *De Leon v. White*, 9 Tex. 598, 607. See post, "Meander Lines" II, 7, c.

### d. Corners.

**Call for Unestablished Corner.**—A call for a corner between two proprietors as a beginning corner is good, although such corner may not have been established, provided the titles of the two properties furnish the data for its establishment. *Berry v. Wright*, 14 Tex. 270.

**Incorrect Call for Corner Immaterial When Lines and Corners Actually Marked.**—If a tract of land has its lines and corners actually established on the ground and the claimant makes a deed to it in reference to those lines and corners, the deed covers the land and may be made the basis of five years limitation, though it may con-

tain an incorrect call for the beginning corner, estimated from a certain corner of a designated survey. *Jones v. Powers*, 65 Tex. 207.

**Establishment by Course and Distance from Known Corner.**—If any one corner, whether the first or the last be identified with certainty, it is sufficient to identify the survey, as the others can be fixed by the courses and distances when they have no natural boundary or bearing points. *De Leon v. White*, 9 Tex. 598, 607.

Where a survey is practically rectangular and two of its corners are identified, the others can be easily found by course and distance, as given in the field notes, from those two which are known, and thus the entire survey may be properly constructed with its appropriate areas as defined in the field notes. Thus, where the northwest line between its two known corners is established according to the course as stated in the field notes, for a base line, and then a line extended from the west and north corners respectively, the proper course (once reversed) and distance as given in the field notes will definitely and accurately locate the other corners, viz., the south and east corners of the survey. *Rand v. Cartwright*, 82 Tex. 399, 403, 18 S. W. 794. And see *Jones v. Andrews*, 62 Tex. 652; *Williams v. Winslow*, 84 Tex. 371, 375, 19 S. W. 513.

The field notes of the survey in suit and those of another tract, surveyed at about the same time, call for a common bearing tree at the southwest corner of the tract in suit. A marked tree was found, and the original bearing trees of adjoining surveys, calling for the southwest corner of the tract in suit, were identified. A line run by following the lines of an older survey towards the point where it had a common bearing tree with the southwest corner of the tract in suit fell short only 34 varas

of the point at which a surveyor appointed by the court had fixed such corner. Held, that the evidence sufficiently established the position of the southwest corner. *Stanus v. Smith*, 8 Tex. Civ. App. 685, 30 S. W. 262.

**Corner Indicated by Stake.**—Where a stake is placed to locate a corner of a survey, the stake fixes the corner as conclusively as if the corner was marked by a permanent object. *Thatcher v. Matthews*, 101 Tex. 122, 105 S. W. 317.

**Ascertainment of Corner by Surveyor.**—A surveyor, in ascertaining a corner, is not bound to obtain his information from the deed alone, but may avail himself of information obtained from any source as to the location of some known point described in the survey from which he can ascertain the precise boundaries. *De Leon v. White*, 9 Tex. 598, 607.

**Location of Original Corner by Subsequent Survey.**—The location of original corners by a subsequent survey is not conclusive where such location is not based on an actual discovery of then-existing corners. *Knippa v. Umlang* (Civ. App.), 27 S. W. 915.

#### e. Lines.

##### (1) In General.

**Characteristics of Lines of Survey.**—The lines of a survey do not always have a mathematical definition, length without breadth; they are as broad as the rivers and pass-ways which are appropriated as monuments for public as well as for private convenience, and, when so used in adjusting the legal rights of parties by them, the center or middle of them, whether a river, a creek, a spring, or a pass-way, fixes the limitation of the rights of parties, unless otherwise expressly provided for in the feoffment. *Muller v. Landa*, 31 Tex. 265, 266.

**Not Necessary That Lines Be Run by Surveyor.**—A grant should not be held void because its boundaries were not defined and marked by a scientific

surveyor with a chain and compass. If the boundaries were marked upon the ground, or otherwise indicated in the grant, so that the land can be identified with reasonable certainty, this is all that is required. *Johns v. Schutz*, 47 Tex. 578, 581.

**Need Not Be Actually Run When Land Can Be Identified.**—The fact that lines of a survey were not actually run, will not invalidate a patent, provided the land can be identified with reasonable certainty. *Jones v. Burgett*, 46 Tex. 284, 285. See, generally, the title PUBLIC LANDS.

## (2) Presumed Continuous.

Where a division line exists at its two extremities, and for a principal part of the distance, it will be considered a continuous line. *George v. Thomas*, 16 Tex. 74, 88.

Where a line has been marked only a part of the way, the boundary for the residue of the distance will be a direct line from the termination of the marked line to the point of intersection, or to the corner called for. *George v. Thomas*, 16 Tex. 74, 88.

## (3) Identification and Location.

### (a) Identification.

**What Constitutes Marked Line.**—Where, at one end of the line of an original survey, there was evidence of the remains of trees corresponding with the calls in the survey, it is to be regarded as a marked line, and its location can not be ascertained by running the lines of the original survey by course and distance. *Wiley v. Lindley* (Civ. App.), 56 S. W. 1001; *Steuoff v. Jackson*, 40 Tex. Civ. App. 328, 89 S. W. 445, 447.

The only work actually done on the ground in locating sections of two tracts of land was to establish a corner of one section in one tract and the corner of another section in the other tract, then found to be a designated number of miles apart east and west, and to meander streams

and to run lines two miles apart through the territory intended to be appropriated by the sections to form the tracts. From data furnished by such work the tracts were platted and their field notes made in the surveyor's office. Held, that no one of the sections forming the tracts could be regarded as having been actually surveyed, and its lines and corners fixed on the ground. *Austin v. Espuela Land, etc., Co.* (Civ. App.), 107 S. W. 1138.

**Unmarked Lines Must Be Identified by Calls in Field Notes.**—If no marks whatever were found identifying the north line of the Smith survey (one of the lines called for in a survey), such north line could only be identified by the calls in its field notes, or those of adjacent surveys made about the same time; certainly not by a survey made many years later, and whose calls make no reference to the Smith survey. *Kuechler v. Wilson*, 82 Tex. 638, 18 S. W. 317.

### (b) Location.

#### aa. How Located.

**By Lines Actually Run.**—The location of lines of a survey is to be determined by the lines as actually run upon the ground, where there can be ascertained; nor will this rule be varied by the fact that an adherence to it would give to the locator less land than he was entitled to by his certificate. Nor is the rule varied by the fact that a call is made to run to the line of an older survey, if that line was never reached in the survey actually made, but the surveyor stopped at another line which was mistaken for it. *Burnett v. Burriss*, 39 Tex. 501, 502; *Bolton v. Lann*, 16 Tex. 96, 111.

**By Natural Objects.**—A call in field notes for a line of an adjoining survey does not necessarily imply that the grantee recognizes that the location of that line should be fixed

by the calls of the adjoining tract, but on the other hand may mean that it should be located according to the natural objects designated in the deed under which he claims. *Hull v. Woods*, 14 Tex. Civ. App. 590, 38 S. W. 256, affirmed in 90 Tex. 228, affirmed in 93 Tex. 664, no op.

In a suit involving the boundaries of Burnet's colony, they were thus described in the record, and in Pas. Dig., art. 248: "Beginning at the town of Nacogdoches; thence on a north course, the distance of fifteen leagues, to a point clear of the twenty boundary leagues parallel with the river Sabine, where a landmark shall be made; and thence on a line run west to Navasoto creek; thence down said creek with its menderings, by its left bank, to the place where it is crossed by the road leading from Bexar to Nacogdoches; thence with said road to fork of the Bull's Hill (Lomo del Toro) road, before arriving at the military post on the Trinity, with said road to its junction with the old road; and with said old road to the town of Nacogdoches and place of beginning. Leaving at the right, all the lands granted yesterday to citizen John Lucius Woodbury, attorney for Messrs. Jose Vehlein & Company." To determine the northern boundary of the colony, a line should be run directly west, from the termination of the first line, in a northern direction from Nacogdoches, and the evidence should be confined to a direct west line from the point of intersection of the line from Nacogdoches with the line of the twenty leagues west from the east boundary of the state. If the northern line being run directly west, would pass north of Navasoto creek, it must be so varied as to strike the most northern branch of that creek. *Elliot v. Mitchell*, 28 Tex. 105, 106; *Elliot v. Mitchell*, 47 Tex. 445. See, generally, the title PUBLIC LANDS.

**Locating Line in Conformity to**

**Other Lines.**—A surveyor's map represented the land surveyed as being in the form of a square, with a straight line midway extending north and south across it, on either side of which line, and perpendicular to it, were eight rectangular parallelograms. Such north and south base line was the only work actually done upon the ground, the other lines being projected from it. A subsequent survey showed that it was not straight; the southwest corner of the northernmost league and the northwest corner of the league adjoining on the south, in the east tier of the block, being east of the line as described in the original survey. Held, in a boundary suit between the owners of the respective leagues, that the division line should be established by extending a line from said corner in an easterly direction, parallel with the north and south lines of the other league surveys in that tier of the block. *Wise v. Sayles*, 38 Tex. Civ. App. 229, 86 S. W. 775.

**By Prolongation of Line.**—Where the western boundary of two surveys as described in patents is north, thirty degrees west, and northwest corner of one is southwest corner of the other, the prolongation north thirty degrees west, of the west boundary line of the former survey, is the west boundary of the latter. *Bullard v. Watkins* (Civ. App.), 58 S. W. 205.

**Variation of Needle in Field Notes Must Be Followed.**—Where there is a call in the field notes of a younger survey for the west line and southeast corner and northwest corner of an older survey, the west line of such older survey can not be run at a different variation than that called for in its field notes, to reach an unmarked tree which can not be clearly identified as the original corner. In such a case the west line of the older survey should be run at its proper course and distance. *Anderson v. Stamps*, 19 Tex. 460; *Browning v. Atkinson*, 37

Tex. 633; *Williams v. Beckham*, 6 Tex. Civ. App. 739, 743, 26 S. W. 652.

Where a boundary of a section line road sought to be opened was disputed, the authorities properly ran the disputed line upon the variation of the needle proved by test to have been employed in the blocks from which the complaining landowners' surveys take their connections. *Smith v. Jarvis*, 47 Tex. Civ. App. 185, 105 S. W. 1168.

**By Course and Distance from Known Point.**—The north line in the Lamar survey is in an open prairie, with no monuments locating it. The only way of fixing such line is by course and distance from some known points in the survey. The defendant rested his defense upon a survey from the southwest corner, reversing the call for course and distance. Held, error to refuse to charge the jury upon such theory of the survey. The jury should have been allowed to ascertain the north line of the survey by running from any established corner of the survey they, under the facts and circumstances, may have regarded as the more certain and reliable calls in the field notes. *Reast v. Donald*, 84 Tex. 648, 19 S. W. 795.

Where a deed called for a boundary line as commencing at the southeast corner of a survey as established on a certain river, and thence running S., 60 degrees W., with the lower line of the survey a certain distance, and in a suit involving a boundary line it was necessary to determine the line by measuring from the corner, it was error to charge that the line should be found by measuring from the river, instead of instructing to find the corner, and run S., 60 degrees W., the required distance. *Stacy v. Greenwade*, 26 Tex. Civ. App. 277, 63 S. W. 1059.

**Location Must Not Be Oscillatory.**

—A line can not be said to be traced and identified which oscillates, so to speak, between two locations and

courses 54 varas distant the one from the other. With reference to a line so uncertain, the footsteps of the surveyor can not be said to have been traced. *Williams v. Winslow*, 84 Tex. 371, 377, 19 S. W. 513.

**Location Not Affected by Excess in Quantity.**—Where title has issued to two surveys for a league of land, each located and surveyed at the same time, and which call for a common marked corner and a common divisional line, the location of the dividing line is not affected by the fact that, by observing it, an excess of one thousand acres would be contained in one of the surveys. *Bunton v. Cardwell*, 53 Tex. 408.

**How Littoral Lines Located.**—In fixing the interior line of coast leagues which have for their exterior line the continuous line of the shore with every imaginable curvature and sinuosity, it is highly impracticable to establish a line parallel to the coast line; and a straight line between the two corners on the coast would disregard the quantity in the survey; a straight line is practicable only where the line is short and no great curvature of coast. A series of straight lines approximating the curvature is the most practicable mode and sufficiently accurate. *Hamilton v. Menifee*, 11 Tex. 718, 754.

**bb. Evidence.**

To determine the location of a boundary line, as fixed by a judgment, evidence is admissible to show the actual location on the ground of the boundaries so fixed, and to explain ambiguities in such judgment disclosed by attempting to locate the lines in accordance with it. *Dillingham v. Smith*, 30 Tex. Civ. App. 525, 70 S. W. 791. And see post, "In General," II, C, 4, b, (1).

**f. Calls for Adjoining Tracts.**

**Call for Adjoining Tract Good.**—The line of a tract of land may as



well be the subject of a call as any other object. *Bolton v. Lann*, 16 Tex. 96, 110; *Ridgell v. Atherton* (Civ. App.), 107 S. W. 129; *Johns v. Schutz*, 47 Tex. 578; *Booth v. Strippleman*, 26 Tex. 436, 442; *Buford v. Gray*, 51 Tex. 331, 335; *Marshall v. Crawford*, 2 Posey 477, 479.

**Survey May Be Located by Surrounding Surveys.**—A survey may be located by surrounding surveys, notwithstanding its own corners and lines may not be found, and it is immaterial that there will be an excess in the survey as thus located. *Longoria v. Shaeffer*, 77 Tex. 547, 551, 14 S. W. 160.

**g. Reference to Maps, Field Notes and Surveys.**

**Map and Field Notes Referred to as an Aid to Description.**—Where a grant refers to a map and field notes of the surveyor as defining the boundaries of the grant, such field notes and map may be considered in aid of the description contained in the grant and to supply words omitted therefrom. *Goodson v. Fitzgerald*, 40 Tex. Civ. App. 619, 90 S. W. 898.

A description of land as part of a tract or survey is general, and will be controlled by boundaries indicated on a plat or map referred to and embodied in the deed. *Bogges v. Allen* (Civ. App.), 56 S. W. 195 (see 93 Tex. no op.).

The line of a survey made over twenty years, called to run "east 8,000 varas to a stake in the head of Tonkawa branch, from which an elm bears N. 33 degrees, E. 36 varas." The elm tree was found marked as called for, at the distance of only 5,200 varas. It was shown that the survey was begun, not at a corner, but at a point from which it was intended to measure 4,800 varas west, and 3,200 varas east, forming a continuous straight line, at the eastern termination of which the elm bearing tree was called for. The elm tree was found at the distance of

only 400 varas, instead of 3,200 varas, from where the survey was really begun. The facts showed that the eastern line and corners of the survey were not actually surveyed and marked. The maps of the survey and those adjoining had always located the corner according to distance, and if thus located the proper quantity would be given, and the survey harmonize with cotemporaneous surveys. Held, the discrepancy of distance was so great as to be improbable and the deficiency in quantity was a circumstance entitled to weight, as was also the location of the survey, as always recognized on the surveyor's maps of surveys, and in view of these facts to give superior dignity to the call for the natural object would defeat the reason and object of the general rule, which would require it. *Robinson v. Doss*, 53 Tex. 496.

**Map Should Be Followed as Closely as Possible.**—Where the issue is the location of a boundary line between adjoining lands, that method of constructing the line should be adopted which will present an arrangement of several surveys as nearly identical with that shown by the original map as possible, instead of an observance of courses and distances, which would result in the destruction of the original configuration of the surveys. *Lyon v. Waggoner*, 37 Tex. Civ. App. 205, 83 S. W. 46, affirmed in 101 Tex. 665, no op.

**Field Notes Govern When Calls Omitted.**—The rights of a party acquired by virtue of a location and survey of a valid land certificate and return of field notes to the general land office can not be affected by the action of the commissioner in changing or leaving out from the patent any of the calls of the survey. In such case, the location of the land is determined by the field notes of the survey as made on the ground, and not by the patent. *Morrill v. Bartlett*, 58 Tex. 644.

See, generally, the title PUBLIC LANDS.

**Surveyor May Adopt Previous Survey.**—A surveyor may adopt a previous survey which he thinks correct; but the court can not oblige him to adopt one shown to be incorrect. *Horton v. Pace*, 9 Tex. 81, 82.

#### **h. Calls for Quantity.**

**When Resorted to.**—In the absence of calls either for monuments or courses and distances, then calls for quantity may be resorted to. *Weider v. Hunt*, 34 Tex. 44, 45.

**Claimant Entitled to Quantity Called for.**—In a suit for a league of land, if a beginning corner on a navigable stream be established, and the others could not be found, the plaintiff was entitled to a league with the proper front on the river, the parallel lines being run back, from the points of such front, a sufficient depth to include the quantity. *Williamson v. Simpson*, 16 Tex. 433, 435.

**Call for Adjoining Tract as Affected by Quantity.**—An action of trespass to try title to land involved the question of whether the land sought to be recovered was a part of the Mary Beacham league or a vacancy between that survey and the Punchard league. In the field notes of the Mary Beacham its west line called for the east line of league No. 3. League No. 3 was afterwards resurveyed, and called the "Punchard League." There was not so much land in the new survey, and the distances and boundaries were not the same, and the north line of the Mary Beacham, on being run from its north-east corner, as called for by witness trees, gets its complement before reaching the east line of the Punchard survey, leaving vacant the amount of land sought to be recovered, except about eight acres, conceded to be in the Mary Beacham. Held, that such land, with the exception of the eight acres specified, did not form a part of the Mary Beacham league, but was a va-

cancy between that survey and the Punchard league. *Moore v. McCown* (Civ. App.), 20 S. W. 1112.

### **5. Conflicting Elements.**

#### **a. Relative Importance.**

##### **(1) General Rules.**

**Rules Well Settled.**—The rules governing the construction of grants upon questions of boundary are well settled. *Anderson v. Stamps*, 19 Tex. 460, 464; *Urquhart v. Burleson*, 6 Tex. 502; *Hubert v. Bartlett*, 9 Tex. 97; *George v. Thomas*, 16 Tex. 74; *Bolton v. Lann*, 16 Tex. 96.

#### **Relative Dignity of Various Calls—**

**Rules Stated.**—The dignity or importance of the calls usually employed in the grants, surveys and entries of land have been graded or classified by the courts, and it is now settled that the highest in importance and weight is natural objects, as rivers, creeks, etc.; second, artificial objects, as marked lines, monuments, etc.; third, course and distance. *Bigham v. McDowell*, 69 Tex. 100, 102, 7 S. W. 315; *Hubert v. Bartlett*, 9 Tex. 97, 104; *Bolton v. Lann*, 16 Tex. 96, 110; *Booth v. Upshur*, 26 Tex. 64; *Booth v. Strippelman*, 26 Tex. 436; *Stroud v. Springfield*, 28 Tex. 649, 674, *Phillips v. Ayres*, 45 Tex. 601, 606; *Thatcher v. Matthews*, 101 Tex. 122, 105 S. W. 317; *Ridgell v. Atherton* (Civ. App.), 107 S. W. 129; *Weston v. Meeker* (Civ. App.), 109 S. W. 461; *Wilkins v. Clawson*, 50 Tex. Civ. App. 82, 110 S. W. 103; *Staford v. King*, 30 Tex. 257, 272; *Maddox Bros. v. Fenner*, 79 Tex. 279, 290, 15 S. W. 237; *Schley v. Blum* (Civ. App.), 22 S. W. 264, 266, (see 85 Tex. 551); *Stephens v. Mott*, 82 Tex. 81, 18 S. W. 99; *Mayfield v. Williams*, 73 Tex. 508, 11 S. W. 530.

##### **(2) Modifications of General Rules.**

#### **(a) Effect Should Be Given to All Calls Possible.**

**As Few Should Be Disregarded as May Consistently Be Done.**—In ascertaining the boundaries of surveys,

where all of the calls made by the surveyor can not be strictly observed, as few should be disregarded as can be consistently done. *Hill v. Smith*, 6 Tex. Civ. App. 312, 321, 25 S. W. 1079; *Phillips v. Ayres*, 45 Tex. 601, 606. And see *Roberts v. Helm*, 1 Tex. Civ. App. 100, 20 S. W. 1004; *Richardson v. McCullough* (Civ. App.), 60 S. W. 974; *Couch v. Tex. & Pac. Ry. Co.*, 49 Tex. Civ. App. 188, 190, 107 S. W. 872.

**Calls Producing Fewest Conflicts Should Be Selected as Being Mistakes.**

—Where, on an issue as to the location of a boundary line, it appears that some of the calls in the field notes of the surveyor must be treated as mistakes, those should be selected as made by mistake which will produce the fewest possible conflicts. *Lyon v. Waggoner*, 37 Tex. Civ. App. 205, 83 S. W. 46, affirmed in 101 Tex. 665, no op.

**Effect Should Be Given to Call Most in Harmony with Other Calls of Grant.**

—In determining the position of a corner which is called for as being located a given course and distance from a bearing tree, and which has no other proximate natural or artificial object to fix its exact location, that call is entitled to no greater dignity than a call for course and distance from another corner of the same survey which is fixed and identified by a natural object called for and found; for in each instance the corner sought can only be found by measurement from the known object. When in such a case it is found that such calls are conflicting, and can not both be harmonized, then effect should be given to the one which is most in harmony with the other calls of the grant, and with the lines of contiguous surveys called for. *Davidson v. Killen*, 68 Tex. 406, 4 S. W. 561.

**(b) Rule Most Consistent with Intention of Instrument Should Be Adopted.**

**Intention Apparent on Face of In-**

**strument of Controlling Effect.**—The true and correct location of the land is ascertained by the application of all or any of the general rules to the particular case. And when they lead to contrary results or confusion, that rule must be adopted which is most consistent with the intention apparent upon the face of the patent, read in the light of the surrounding facts and circumstances. The most material and most certain calls shall control those which are less material and less certain. *Stafford v. King*, 30 Tex. 257, 272; *Hubert v. Bartlett*, 9 Tex. 97, 103; *Anderson v. Stamps*, 19 Tex. 460, 465; *Harrell v. Morris* (Sup.), 5 S. W. 625; *Lockett v. Scruggs*, 73 Tex. 519, 521, 11 S. W. 529; *Phillips v. Ayres*, 45 Tex. 601, 606; *Booth v. Strippleman*, 26 Tex. 436; *Booth v. Upshur*, 26 Tex. 64, 70; *Barnard v. Good*, 44 Tex. 638, 641; *Lilly v. Blum*, 70 Tex. 704, 6 S. W. 279; *Huff v. Crawford*, 89 Tex. 214, 223, 34 S. W. 606, reversing 32 S. W. 592.

In actions to establish boundary lines, courts should not confine themselves to the abstract principles of law, that calls for natural objects take precedence of all other calls, and that calls for artificial objects control course and distance; the true rule to be observed is, that the call should be adopted which is most consistent with the intent apparent on the face of the deed. *Browning v. Atkinson*, 37 Tex. 633; *Lockett v. Scruggs*, 73 Tex. 519, 521, 11 S. W. 529; *Fenley v. Flowers*, 5 Tex. Civ. App. 191, 194, 23 S. W. 749; *Hitchler v. Boyles*, 21 Tex. Civ. App. 230, 234, 51 S. W. 648.

**Intention of Parties to Be Ascertained.**—The rules adopted in the construction of boundaries are those which will best enable the courts to ascertain the intention of the parties. Thus, preference is given to monuments because they are least liable to mistake, and the degree of importance given to natural or artificial monu-

ments, courses and distances is just in proportion to the liability of parties to err in reference to them. But they do not occupy an inflexible position in regard to each other. To hold otherwise would be to give a greater importance to the rule itself than to the reason of the rule. It may sometimes happen, in case of a clear mistake, an inferior means of location will control a higher." *Robinson v. Doss*, 53 Tex. 496, 507; *Sellman v. Sellman* (Civ. App.), 73 S. W. 48; *Kingston v. Pickins*, 46 Tex. 99.

"When it can be ascertained which is the mistaken call, it will be rejected and the other adopted as that expressive of the true intention of the parties." *Baker v. Light*, 80 Tex. 627, 633, 16 S. W. 330.

When it is clearly shown that no actual survey was ever made, the rules applicable to the determination of boundaries of actual surveys do not apply in regard to the lines and corners of other surveys called for in the patent. In such a case, all matters of description must be looked to, in connection with facts surrounding the parties, and if, considering them in connection with transactions to which the parties looked when the patent issued, the land can be clearly identified, the grant will not be held void. In such a case, descriptive calls, evidently inserted through mistake, will be disregarded, and effect given to those calls that are certain and are found, which, in connection with other matters of description in the grant, will make it conform to the evident intention of the parties. *Boon v. Hunter*, 62 Tex. 582; *Booth v. Upshur*, 26 Tex. 64; *Urquhart v. Bureson*, 6 Tex. 502; *Hubert v. Bartlett*, 9 Tex. 97, 98; *Booth v. Strippleman*, 26 Tex. 436; *Texas, etc., R. Co. v. Thompson*, 65 Tex. 186; *Huff v. Crawford*, 89 Tex. 214, 223, 34 S. W. 606, reversing 32 S. W. 592.

**Intention of Parties Is Legal Meaning as Expressed in Instrument**—The intention which courts seek to ascertain in determining which of two conflicting calls in a survey (lines of older surveys or course and distance) shall have controlling effect, is not that which exists only in the mind of the surveyor, but that which may be gathered from the language of the grant—its legal meaning when considered in the light shed upon it by the acts constituting the survey. *Blackwell v. Coleman County*, 94 Tex. 216, 59 S. W. 530.

**(c) Most Material and Certain Calls Govern.**

**General Rules Relative in Application.**—The rules as to the importance of calls are rules of evidence, and are relative in their application. Calls for rivers and well-defined streams are held to be of highest dignity. Next in order are calls for artificial objects. Next are calls for course and distance. Standing thus to each other their relative force as evidence is defined, but by the aid of other facts the weakest may in a given case overcome the force of the call of highest dignity. *Goodson v. Fitzgerald*, 40 Tex. Civ. App. 619, 90 S. W. 898, 900; *Schley v. Blum* (Civ. App.), 22 S. W. 264 (see 85 Tex. 551).

**Most Certain Calls Control.**—Where the actual survey can be found and identified as the same called for in the grant, the general rule is that the most material and certain calls will control those which are less certain and material. *Robertson v. Mosson*, 26 Tex. 248, 249; *Bass v. Mitchell*, 22 Tex. 285; *Schley v. Blum* (Civ. App.), 22 S. W. 264 (see 85 Tex. 551); *Fenley v. Flowers*, 5 Tex. Civ. App. 191, 194, 23 S. W. 749.

A line called for in a survey may be entirely disregarded in determining the location of the survey, when other calls in conflict therewith are found

to be more material and certain. *Jones v. Andrews*, 62 Tex. 652.

While natural objects control course and distance, as a general rule, yet neither of these should absolutely control the other when that other most truly indicates the proper locality of the tract. *Jones v. Burgett*, 46 Tex. 284; *Linney v. Wood*, 66 Tex. 22, 23, 17 S. W. 244.

**Special Locative Calls Control Directory Calls.**—There is also a distinction made between calls that are descriptive or directory, and special locative calls. The former, though consisting of rivers, lakes and creeks, must yield to special locative calls, for the reason that the latter, consisting of the particular objects upon the lines or corners of the land, are intended to indicate the precise boundaries. *Lilly v. Blum*, 70 Tex. 704, 710, 6 S. W. 279; *Phillips v. Ayres*, 45 Tex. 601, 605; *Minor v. Kirkland* (Civ. App.), 20 S. W. 932. See also, *Stafford v. King*, 30 Tex. 257, 273.

A call for "the mouth of the lane" is a locative call, capable of accurate and unmistakable ascertainment, and therefore of superior weight and dignity to the call for "405 varas with the meanders of the lake," the determination of which must depend on the distance from the margin of the lake that the line of 405 varas was run. *Jackel v. Reiman*, 78 Tex. 588, 590, 14 S. W. 1001.

**(d) Footsteps of Surveyor Should Be Followed.**

**Object of Rules to Ascertain What Surveyor Actually Did.**—The object of all rules which have been formulated by the courts for locating, fixing and determining boundaries has been to ascertain and discover, if possible, the footsteps of the surveyor, and in this way identify the survey that was actually made. *Ayers v. Harris*, 64 Tex. 296, 300; *Stafford v. King*, 30 Tex. 257, 273; *Booth v. Upshur*, 26 Tex. 64; *Booth v. Strippleman*, 26

Tex. 436; *Hubert v. Bartlett*, 9 Tex. 97; *Jones v. Burgett*, 46 Tex. 284; *Goodson v. Fitzgerald*, 40 Tex. Civ. App. 619, 90 S. W. 898.

In cases involving the true location of the disputed lines of a survey, the effort should be to ascertain as near as practicable from the evidence what was done on the ground by the surveyor who made the survey, and in doing this it is important to determine which line was first run or which corner first established. *Ayers v. Lancaster*, 64 Tex. 305; *Ayers v. Harris*, 77 Tex. 108, 117, 13 S. W. 768; *Cheek v. Foster*, 50 Tex. Civ. App. 387, 110 S. W. 765.

**All Classes of Calls Inferior to Footsteps of Surveyor.**—The actual survey as made upon the ground, if it can be found and identified, controls. The real object in applying the various calls is to find the footsteps of the surveyor. When these are found and identified, all classes of calls must yield to them. *Fulton v. Frandolig*, 63 Tex. 330, 333. And see *Converse v. Langshaw*, 81 Tex. 275, 16 S. W. 1031.

The purpose of the inquiry, and the end to which all evidence is addressed, in a boundary suit, is to find the footsteps of the original surveyor. If, notwithstanding a call for a river, it is shown, by other evidence that the surveyor did not reach the stream, but by mistake supposed a tributary of the stream was the stream itself, the call for the river will yield. So of a call for a marked line of an older survey. *Booth v. Upshur*, 26 Tex. 64; *Booth v. Strippleman*, 26 Tex. 436; *Hubert v. Bartlett*, 9 Tex. 97; *Jones v. Burgett*, 46 Tex. 284; *Goodson v. Fitzgerald*, 40 Tex. Civ. App. 619, 90 S. W. 898.

Though a call for course and distance is unquestionably of greater weight than one for an unmarked prairie line, yet, if from all the facts and circumstances of the given case

it reasonably appears that the original surveyor ascertained the location of the unmarked line called for, actually went to it, and intended by his field notes to include the land thus bounded, the distance will be extended. *Maddox Bros. v. Fenner*, 79 Tex. 279, 15 S. W. 237; *Steuoff v. Jackson*, 40 Tex. Civ. App. 328, 89 S. W. 445; *Goodson v. Fitzgerald*, 40 Tex. Civ. App. 619, 90 S. W. 898.

**Actual Survey Requisite to Application of Rule as to Surveyor's Footsteps.**—The oft-announced doctrine, that the actual identification of the survey, the footsteps of the surveyor upon the ground, should always be followed, by whatever rule they may be traced, however, can not be invoked unless the facts show it to be applicable. The actual survey must be found and identified—the footsteps of the surveyor must be traced before course and distance should be ignored. *Anderson v. Stamps*, 19 Tex. 460, 465; *Robertson v. Mossom*, 26 Tex. 248; *Williams v. Winslow*, 84 Tex. 371, 376, 19 S. W. 513.

### (3) Monuments.

#### (a) Generally Superior to Other Elements.

**Monuments Govern Course and Distance.**—In the ascertainment of disputed boundaries, it is a fixed rule of law that monuments shall govern courses and distances. *Wilder v. Hunt*, 34 Tex. 44, 47; *Urquhart v. Burleson*, 6 Tex. 502, 511; *Davis v. Smith*, 61 Tex. 18, 21; *Stafford v. King*, 30 Tex. 257; *Hubert v. Bartlett*, 9 Tex. 97.

Where the calls of the survey can not all be satisfied, the general rule controlling such cases undoubtedly is, that course and distance must yield to natural or artificial monuments or objects. *Robinson v. Doss*, 53 Tex. 496; 506; *Freeman v. Mahoney*, 57 Tex. 621, 625; *Smith v. Russell*, 37 Tex. 247, 255.

**Superiority of Monuments Does Not Impair Value of Course and Distance.**

—The courts, in grading the dignity of the different classes of calls found in deeds descriptive of land, intended only to establish a rule for arriving at the location of the boundaries actually established, and the rules that monuments and natural objects are superior to courses and distances does not impeach the sufficiency of course and distance to locate a boundary, but course and distance must yield to the superior grade in cases of conflict. *Jaggers v. Stringer*, 47 Tex. Civ. App. 571, 106 S. W. 151.

#### **Monuments Do Not Govern in Case of Mistake in Location or Description.**

—The general rule that monuments and natural objects will prevail over calls for course and distance, in cases of conflict, does not apply where the surrounding circumstances show that the superior marks were placed by inadvertence, or that there was a verbal mistake in the description of the monument or natural object. *Jaggers v. Stringer*, 47 Tex. Civ. App. 571, 106 S. W. 151.

**Nature of Case May Affect Superiority of Monuments.**—While natural objects and artificial boundaries will generally prevail over course and distance, yet the former will often, from the nature of the case, be compelled to yield to the most inferior call. *Jones v. Andrews*, 72 Tex. 5, 17, 9 S. W. 170.

#### (b) Locative Calls Therefor.

**For Monuments to Govern, Calls Therefor Must Be Locative.**—Distances called for between corners to creeks or roads unless specially designated in such manner as to show the intention to make them locative, are not such, and will not ordinarily have precedence over a call for course and distance. *Jones v. Andrews*, 72 Tex. 5, 17, 9 S. W. 170.

An instruction that "a call for a natural object, such as a creek, or for an artificial object, such as a well marked and long established public

road, will control course and distance, and also the lines of the survey unless such lines are actually marked upon the ground," where the calls for the road and creek are only incidental and not locative and would force the survey south 2,500 varas, is properly refused. *Jones v. Andrews*, 72 Tex. 5, 16, 9 S. W. 170.

**Locative Calls Control.**—The court charged the jury that "a well-known tree standing alone in a prairie and marked and called for in an original survey is a natural object, and when called for upon a line it is a locative call and should control calls for course and distance." There being testimony to such a marked tree, the charge was properly given. *Schunior v. Russell*, 83 Tex. 83, 84, 18 S. W. 484.

When the locative calls of the patent are so coincident with many of the objects found on the ground—the creek on the east line at precisely the proper distance, the creek on the north line at substantially the proper distance, the northwest corner identified by the call for the northeast corner, old and well established, of the Williams survey, the call at the proper distance on the west line for the southwest corner of the Stephens, the locative calls should control. According to the field notes of the patent, the land thereby covered can without difficulty be so identified as to locate it where it is claimed by the appellant to be. *Boon v. Hunter*, 62 Tex. 582, 588; *Williams v. Winslow*, 84 Tex. 371, 377, 19 S. W. 513.

**(c) Natural Monuments.**

**Call for Natural Object of Highest Dignity; Though Rule Not Inflexible.**

—A call for a natural object is the call of the highest dignity, because such an object is the most permanent and conspicuous, and the least likely to have given rise to a mistake. But such a call is not absolute; it may be shown to be a mistake like any other. There is not such importance

or sanctity attached to it as to require the courts to depart from the cardinal rule in determining boundaries, that the lines actually run by the surveyor, whenever they can be ascertained by any competent testimony, are always the true limits of the survey. *Koepsel v. Allen*, 68 Tex. 446, 447, 4 S. W. 856. See, also, *Jones v. Burgett*, 46 Tex. 284, 285; *Castleman v. Pouton*, 51 Tex. 84; *Booth v. Upshur*, 26 Tex. 64; *Booth v. Strippleman*, 26 Tex. 436.

Everything being equal, the call for natural objects would have precedence, because most enduring and less liable to change, and are supposed to be selected as landmarks because of their immutability. This is only true when they are selected as locative calls, and are then not always absolute; when they are noted in the field notes as mere incidental calls in passing, their reliability is weakened and sometimes rendered wholly worthless. *Jones v. Andrews*, 72 Tex. 5, 17, 9 S. W. 170; *Fenley v. Flowers*, 5 Tex. Civ. App. 191, 194, 23 S. W. 749.

There is no rule of law which makes a call for a natural object, under all circumstances, the controlling call, so as to preclude the consideration of other evidence as to the true locality of the land. *Jones v. Burgett*, 46 Tex. 284, 285.

While it must be admitted that when surveys are actually made or ascertained, calls for a river will usually prevail over calls for another survey, or for course and distance, the rule is not inflexible. *Sanborn v. Gunter*, 84 Tex. 273, 285, 17 S. W. 117, 20 S. W. 72.

**Control Artificial Objects.**—Natural objects control artificial objects. *Bar-nard v. Good*, 44 Tex. 638, 640.

Where the western line of a tract was described in the field notes as along said western wall of the river from the southwest corner to the

northwest corner, the call for a line running from a corner on the river up the river to another corner on the river must be held to be a call for the river as a line, in the absence of evidence showing that there was a wall running from the southwest corner of the lot to the northwest corner thereof. *Umscheid v. Scholz*, 84 Tex. 265, 271, 16 S. W. 1065.

A contention that plaintiffs were not entitled to the made land, even though it were alluvion, and that their boundary should stop at a stake in the bank of the river as it existed when the original survey was made, is untenable, where such survey called for the river and its meanders as a boundary. *Denny v. Cotton*, 3 Tex. Civ. App. 634, 22 S. W. 122, affirmed in 93 Tex. 682, no op.

**Control Course and Distance.**—A call for a natural object, as a river, a known stream, a spring, or even a marked tree, will control course and distance. *Anderson v. Stamps*, 19 Tex. 460, 465; *Hubert v. Bartlett*, 9 Tex. 97, 103; *Urquhart v. Burleson*, 6 Tex. 502; *Robertson v. Mosson*, 26 Tex. 248; *Johnson v. Archibald*, 78 Tex. 96, 192, 14 S. W. 266; *Lockett v. Scruggs*, 73 Tex. 519, 621, 11 S. W. 529; *Fenley v. Flowers*, 5 Tex. Civ. App. 191, 194, 23 S. W. 749; *Burge v. Poindexter* (Civ. App.), 56 S. W. 81; *Warden v. Harris* (Civ. App.), 47 S. W. 834; *Davis v. Smith*, 61 Tex. 18, 21; *Smith v. Russell*, 37 Tex. 247, 255; *Webb v. Brown*, 2 Posey 36, 38; *Galveston County v. Tankersley*, 39 Tex. 651, 660; *Stafford v. King*, 30 Tex. 257, 258.

When the surveyor points out to the owner rivers, lakes, creeks, marked trees, and lines on the land, for the lines and corners of his land, he has the right to rely upon them as the best evidence of his true boundaries, for they are not liable to change and the fluctuations of time, to accident or mistake, like calls for course and dis-

tance; and hence the rule, that when course and distance, or either of them, conflict with natural or artificial objects called for, they must yield to such objects, as being more certain and reliable. *Stafford v. King*, 30 Tex. 257, 272.

One line of the survey in controversy is described as running "with the edge of the main high land and edge of marsh." Courses and distances were also given. It was shown that the surveyor did not make an actual survey, but intended to include the land as bounded by the edge of the high land and marsh. Held, it being in evidence that the calls for course and distance did not concur with that for edge of the high land and marsh, the court should have instructed the jury to disregard the call for course and distance even without the testimony that the line was not actually run by the surveyor, the edge of the high land and marsh being a well-known natural landmark. *Richardson v. Powell*, 83 Tex. 588, 589, 19 S. W. 262.

Where a surveyor, after having run one line and established a corner at a natural object, returned to the beginning and proceeded to run the opposite lines, and having established another corner, called thence by course and distance for the natural object so established by him as a corner, but a line run upon the course and distance so prescribed would materially deflect from the natural object called for, held, that the natural object was the controlling call and must prevail over the course and distance, even though the survey was made to include a much greater area than the certificate was entitled to. *Robertson v. Mosson*, 26 Tex. 248, 249.

A description of land in a survey began at the corner of another survey, and ran along certain courses and distances to a certain bayou, thence up the bayou by courses and



distances to the point of beginning. The line by courses and distances would not reach to the bayou, and the first call, after reaching it, would, according to the course and distance, have crossed the stream. It was not shown that the starting point was marked on the ground. Held, that the survey extended to and along the bayou, since the bayou, being a natural monument, controlled the courses and distances. *Bland v. Smith* (Civ. App.), 26 S. W. 773.

If lines of a survey are indicated by natural or artificial objects, such objects furnish a guide for locating the land, which will control calls for mere course, even when scientific instruments have been used for fixing the supposed course of the lines. Therefore, a call for a line on the "side of the north, at the foot of the hills, and leaving inside all that can be cultivated," must control a call for a line "taking the course from west to east." *Johns v. Schutz*, 47 Tex. 578, 582.

**Control Call for Adjoining Survey.**—Where the field notes of a survey called for a fixed and marked natural object, and also, in the same call, for the line of another survey, the former is the controlling call; and especially so when the line called for is itself of uncertain locality. *Jones v. Leath*, 32 Tex. 329. And see *Duren v. Presberry*, 25 Tex. 512.

**(d) Artificial Monuments.**

**Second in Importance.**—Artificial objects such as monuments, adjacent surveys, marked lines, and courses, etc., are second in importance. *Luc-kett v. Scruggs*, 73 Tex. 519, 521, 11 S. W. 529; *Maddox Bros. v. Fenner*, 79 Tex. 279, 290, 15 S. W. 237.

**Control Course and Distance.**—Artificial objects control course and distance. *Barnard v. Good*, 44 Tex. 638, 640; *Johnson v. Archibald*, 78 Tex. 96, 102, 14 S. W. 266; *Anderson v. Stamps*, 19 Tex. 460, 465; *Stafford v.*

*King*, 30 Tex. 257, 272; *Freeman v. Mahoney*, 57 Tex. 621, 625; *Johns v. Schutz*, 47 Tex. 578, 582; *Hubert v. Bartlett*, 9 Tex. 97; *Davis v. Smith*, 61 Tex. 18, 21; *Smith v. Russell*, 37 Tex. 247, 255; *Urquhart v. Burleson*, 6 Tex. 502, 511; *Coughran v. Alderete* (Civ. App.), 26 S. W. 109; *Thatcher v. Matthews* (Civ. App.), 105 S. W. 1006; *Bullard v. Watkins* (Civ. App.), 58 S. W. 205; *Utley v. Smith* (Civ. App.), 32 S. W. 906, 907; *Kirkland v. Guinn*, 26 Tex. Civ. App. 39, 62 S. W. 1101.

Where there was testimony tending to show that a corner with bearing trees was found, and that the corner indicated by course and distance was at a different place, it was error to refuse to charge that where there is a conflict in the calls of a survey for artificial objects on the one hand and distance and quantity on the other, the latter must give way to the former where the former can be known and determined; and this though the general rules as to the dignity of calls were correctly given. *Titterington v. Trees*, 78 Tex. 567, 14 S. W. 692.

Land had been conveyed to plaintiffs, less "a certain piece or parcel of land heretofore conveyed to W. K. B. (defendant), referring for description to record of deed." The calls for such deed made the north and south lines of the land (a parallelogram) each 135.6 varas long, commencing at the "west boundary line of the Parker county survey," whereas that line, as established by objects, and with reference to which, as so established, the parties had contracted, was 70 varas further east than the calls of the deed for distance. Plaintiffs claimed the intervening strip. Held, that the line as established by objects, and not by the calls of the deed for distance, should prevail, and that defendant was entitled to judgment. *Davis v. Baylor* (Sup.), 19 S. W. 523.

A tract was surveyed, and the corners of blocks, lots, streets, and alleys were marked by stakes. The surveyor died soon after, and another surveyor was employed to prepare a plat from the one made at the time of the survey and put it in a condition for record. The corner of a lot as located by the course and distance called for by the plat did not coincide with the corner located by the surveyor's stake. Held, that the stake fixed by the surveyor controlled the calls for course and distance in the plat. *Werkheiser v. Foard* (Civ. App.), 108 S. W. 983. And see *Allen v. Worsham* (Civ. App.), 49 S. W. 525.

**Control Footsteps of Surveyor Not Indicated.**—Where a deed calls for certain well-known and established objects, such calls will not be controlled by objects found upon the ground as indicating the footsteps of the surveyor in making the survey, when not called for in the deed. *Watts v. Howard*, 77 Tex. '71, 13 S. W. 966; *Cavin v. Hill*, 83 Tex. 73, 76, 18 S. W. 323; *Missouri, etc., R. Co. v. Anderson*, 36 Tex. Civ. App. 121, 81 S. W. 781, affirmed in 98 Tex. 624, no op.; *Anderson v. Stamps*, 19 Tex. 460; *Ratliff v. Burleson*, 7 Tex. Civ. App. 621, 624, 25 S. W. 983, 26 S. W. 1003 (see 93 Tex. 694, no op.); *Jamison v. New York, etc., Land Co.* (Civ. App.), 77 S. W. 969 (see 98 Tex. 622, no op.); *Hamilton v. Blackburn*, 43 Tex. Civ. App. 153, 95 S. W. 1094; *Brodbeck v. Carper* (Civ. App.), 100 S. W. 183, 185, affirmed in 102 Tex. 578, no op.

**Control Merely Descriptive Calls.**—To ascertain the true corner and boundary line of a party's land, recourse may be had to the call for the marked bearing trees, and marked lines of the actual survey, described in his deed, and this will control descriptive calls, founded on supposition, for corners mentioned in other

deeds. *Mitchell v. Burdett*, 22 Tex. 633. See *Soape v. Doss*, 18 Tex. Civ. App. 649, 45 S. W. 387.

#### **Must Be Called for in Field Notes.**

—The jury can not regard a rock mound, as testified to by some of the witnesses, as the northeast corner of a survey, as an object found upon the ground indisputably fixing its northeast corner and the north line of the survey, where the rock mound is not called for in the field notes. *Anderson v. Stamps*, 19 Tex. 460, 464; *Schaeffer v. Berry*, 62 Tex. 705, 714; *Robertson v. Mosson*, 26 Tex. 248; *Reast v. Donald*, 84 Tex. 648, 653, 19 S. W. 795. See ante, "In General—Necessity for," II, A, 1.

**Misdescription of Notorious Landmark Immaterial.**—Where one of the corners of a survey on a navigable stream is well known in the neighborhood as a notorious landmark of the survey in controversy, a subsequent locator can not claim priority on the ground that the call misdescribed the corner, and that the survey did not appear on the county map. *Williamson v. Simpson*, 16 Tex. 433, 435.

#### **(4) Lines Marked and Surveyed.**

##### **(a) Constitute True Boundaries.**

It is a matter of law which juries can not control, but which must control them, that where the lines of a survey have been run and can be found, they constitute the true boundaries, which must not be departed from or made to yield to course and distance, or to any less certain and definite matter of description or identity. The lines actually traced on the ground, as shown by the landmarks, and not those produced by the courses and distances, constitute the boundaries of the grant, whether by the government or by an individual. *Bolton v. Lann*, 16 Tex. 96, 112; *Dalby v. Booth*, 16 Tex. 563; *Thatcher v. Matthews*, 101 Tex. 122, 105 S. W. 317; *Shelton v. Bone* (Civ. App.),

26 S. W. 224; *Atkins v. Goode*, 78 Tex. 126, 14 S. W. 243; *Ayers v. Lancaster*, 64 Tex. 305; *Vogt v. Geyer* (Civ. App.), 48 S. W. 1100; *Mitchell v. Burdett*, 22 Tex. 633; *State v. Texas Land, etc., Co.*, 34 Tex. Civ. App. 460, 462, 78 S. W. 957.

When one purchases land, described in the deed in general terms as in the northeast corner of a large tract, but also described by lines actually run by the surveyor, and marked upon the ground, the actual survey must determine the locality of the land, and will control the general call for the unascertained corner of the larger tract. *Koenigheim v. Miles*, 67 Tex. 113, 115, 2 S. W. 81.

In surveying and subdividing a grant, the northern line was established and marked on the ground south of the true northern line. The northeastern subdivision was conveyed to plaintiff according to the plat made of the survey, the deed also calling for a certain number of acres; the number contained in it taking the line as established and marked, for its northern boundary. Plaintiff had not seen the line on the ground, and bought according to the plat, which indicated the subdivision to be in the extreme northeast of the grant; but, for a long time thereafter, he supposed the line as marked to be the true line. Held, that the line as marked fixed the northern boundary of plaintiff's purchase. *Smith v. Boone*, 84 Tex. 526, 19 S. W. 702.

A line actually marked for the survey is to govern the boundary, although not a right line from corner to corner. *George v. Thomas*, 16 Tex. 74, 88.

**(b) Superiority over Other Elements.**  
**aa. In General.**

**Other Calls Must Yield.**—When the actual survey as made upon the ground, is shown with certainty, the object of search is found. Calls in the deed, made through mistake, must yield.

*Oliver v. Mahoney*, 61 Tex. 610; *McAninch v. Freeman*, 69 Tex. 445, 447, 4 S. W. 369; *Smith v. Boone*, 84 Tex. 526, 19 S. W. 702; *Allen v. Koepsel*, 77 Tex. 505, 14 S. W. 151; *Koepsel v. Allen*, 68 Tex. 446, 4 S. W. 856; *Castleman v. Pouton*, 51 Tex. 84; *McCown v. Hill*, 26 Tex. 359, 361; *Shelton v. Bone* (Civ. App.), 26 S. W. 224, 225; *Busk v. Manghum*, 14 Tex. Civ. App. 621, 37 S. W. 459; *Williams v. Mayfield*, 57 Tex. 364.

**bb. Control over Various Elements.**

**Control Course and Distance When Actual Survey Is Identified.**—The lines of the survey, as actually marked upon the ground, if they can be found and traced, will control course and distance. But that is where the actual survey can be found and identified as the same called for in the grant. It is not meant that where the grant calls for certain known and established natural or artificial monuments and boundaries, these may be controlled by parol proof of a survey entirely inconsistent and repugnant to all the calls of the grant. No case has gone to any such extravagant length as that. That would be virtually to destroy the written evidence of title, and substitute parol evidence in its stead. *Anderson v. Stamps*, 19 Tex. 460; *Schaeffer v. Berry*, 62 Tex. 705, 714; *Robertson v. Mosson*, 26 Tex. 248, 253; *Montague County v. Clay County Land, etc., Co.*, 80 Tex. 392, 396, 15 S. W. 902; *McCown v. Hill*, 26 Tex. 359; *Cottingham v. Seward* (Civ. App.), 25 S. W. 797; *Thaxton v. Wadsworth* (Civ. App.), 95 S. W. 91; *Besson v. Richards*, 24 Tex. Civ. App. 64, 58 S. W. 611; *Browning v. Atkinson*, 37 Tex. 633; *Woods v. Robinson*, 58 Tex. 655; *Steuoff v. Jackson*, 40 Tex. Civ. App. 328, 89 S. W. 445, 447.

When a marked line is called for in a grant, it is only when the line can be identified on the ground as the one made by the surveyor that it

will control a call for course and distance. *Fagan v. Stoner*, 67 Tex. 286, 3 S. W. 44; *Goodson v. Fitzgerald*, 40 Tex. Civ. App. 619, 90 S. W. 898; *Bigham v. McDowell*, 69 Tex. 100, 7 S. W. 315. And see *Moore v. Whitcomb* (Sup.), 4 S. W. 373.

**Prevail over Open Line.**—A marked line and clearly identified corners prevail over an open and definite line, and especially is this the case where the line was actually run and corners were made, and the footsteps of the surveyor can be followed. *Moore v. Reiley*, 68 Tex. 668, 670, 5 S. W. 618; *Oliver v. Mahoney*, 61 Tex. 610, 612; *Fordtran v. Ellis*, 58 Tex. 245.

If at the distance called for, the surveyor establishes a line or corners while calling for an open line not reached, the actual corners and line established will control and the call for the line be disregarded. *Baker v. Light*, 80 Tex. 627, 16 S. W. 330.

**Superior to Call for Line of Another Survey.**—Where two surveys made by the same surveyor within a few days of each other have a common line, and that line is fixed by actual calls ascertained upon the ground, it is not competent against the identity of such common line to show that it does not occupy the place as may be ascertained by measurement from a distant survey. *Booker v. Hart*, 77 Tex. 146, 12 S. W. 16.

A survey of plaintiff's land called for the well-established corner of another survey, and did not indicate that the north line extended beyond that corner. At the time of the survey it was accepted that that corner marked the western boundary of another survey adjacent to plaintiff on the east, which the owner occupied, but it was later discovered that the true boundary of such survey was a considerable distance further east. The line from the corner to plaintiff's south line marking his eastern bound-

ary was well established by the marks and calls for distances, but the survey called for the western boundary of the adjacent survey. Held, that plaintiff's eastern boundary did not extend to the western boundary of such survey. *Morgan v. Mowles* (Civ. App.), 61 S. W. 155.

**Controls Mistaken Call for Another Survey.**—Where the north line of a survey is established and identified and it is evident that other calls were made by mistake, the remaining lines should be ascertained by course and distance from this line, though this may involve a disregard for another survey called for through mistake. *Boon v. Hunter*, 62 Tex. 582; *Duff v. Moore*, 68 Tex. 270, 4 S. W. 530; *Gerald v. Freeman*, 68 Tex. 201, 4 S. W. 256; *Freeman v. Mahoney*, 57 Tex. 621, 626; *Gregg v. Hill*, 82 Tex. 405, 409, 17 S. W. 838.

The boundaries of land as actually made and marked on the ground by the surveyor will control over a call in the field notes for the boundary of another tract, erroneously supposed by the surveyor to be identical with the one marked by him. *Busk v. Manghum*, 14 Tex. Civ. App. 621, 37 S. W. 459.

**Marked Line Conforming Best to Description Superior to Initial Corner.**—The initial corner called for in a survey can not be made to control a call for a marked line when the line answers best to the rest of the description. The corner of a survey, though a good call and one which may control mere course and distance, is not necessarily a more certain and material object than a marked line or marked trees called for in a grant. *Duren v. Presberry*, 25 Tex. 512, 517; *Harrell v. Morris* (Sup.), 5 S. W. 625, 626.

A call for a marked line as a boundary, which is well marked and defined, controls a call for a beginning corner evidently not on the true

boundary line, but in all probability located after the location of the surveys of the land. *Tarleton v. Orr*, 40 Tex. Civ. App. 410, 90 S. W. 534, affirmed in 101 Tex. 662, no op.

**Control General Description of Natural Object.**—Where land is actually surveyed, and its lines marked, they control the general description "up the bayou." *Lutcher, etc., Lumber Co. v. Hart* (Civ. App.), 26 S. W. 94.

**Immaterial That Line Was Ascertained Subsequent to Deed.**—A call in a deed for a partition line will follow that line, even if such line was ascertained subsequent to the deed making such call in absence of any other locative call. *Dean v. Blount*, 71 Tex. 270, 271, 9 S. W. 168.

#### cc. Application of Rule of Superiority of Marked Lines.

**Possession Thereunder Enhances Their Importance.**—The rules in favor of marked lines are more especially true where there has been long continued occupation in reference to the lines as marked. *George v. Thomas*, 16 Tex. 74, 75.

**Property Applies Where Line Sought Has Never Been Established.**—The rule that a call for a marked line will control course and distance, finds its proper application in cases where the line which is sought has never been established on the ground; or, if established has been lost. *Oliver v. Mahoney*, 61 Tex. 610, 612.

**Applicable Where Surveyor Attempts to Enlarge Survey without Making Marks.**—The rule that the lines marked on the ground will control course and distance applies where the surveyor, after running and marking the lines and corners of a survey, and finding it too small, seeks to enlarge it by extending the lines without making corresponding marks upon the ground, or defacing the marks first made, so far as inapplicable to the survey as enlarged, or noting the change in the field notes; at all events,

where subsequent surveyors are misled by the marked lines, and about their surveys thereon, and the controversy arises after patent. *Bartlett v. Hubert*, 21 Tex. 8, 9.

**Inapplicable to Unmarked Line Determinable Only by Course and Distance.**—It is laid down in this state that the rule that a call for a marked line or corner of an older survey will prevail over a call for course and distance, is not applicable to an unmarked line or corner which can only be found by running course and distance from some other marked line or corner or well-known object. The reason of the rule is, that in each instance the boundary is ascertained by calls for course and distance, and hence effect should be given, where such calls are conflicting, to the one which is most in harmony with the other calls of the grant. *Gerald v. Freeman*, 68 Tex. 201, 4 S. W. 256; *Duff v. Moore*, 68 Tex. 270, 4 S. W. 530; *Davidson v. Killen*, 68 Tex. 406, 4 S. W. 561; *Robertson v. Mooney*, 1 Tex. Civ. App. 379, 381, 21 S. W. 143.

**Not Applicable to Office Survey.**—The rule that, in determining the location of a survey, marked trees and lines, when found upon the ground and identified, control calls for course and distance, does not apply when the survey was not in fact made upon the ground, but was office work, the surveyor intending to call for the lines and corners of surveys previously made, and in doing so may have made mistakes. *Bell v. Preston*, 19 Tex. Civ. App. 375, 47 S. W. 375, 753.

#### (5) Calls for Adjoiners.

**Control Course and Distance.**—A call for an adjoining tract will control course and distance. *Bolton v. Lann*, 16 Tex. 96, 110; *Blumberg v. Maues*, 37 Tex. 2; *Ridgell v. Atherton* (Civ. App.), 107 S. W. 129; *Langermann v. Nichols* (Civ. App.), 32 S. W. 124; *Webb v. Brown*, 2 Posey 36;

*Marshall v. Crawford*, 2 Posey 477, 479; *Graham v. Dewees*, 85 Tex. 395, 399, 20 S. W. 127; *Isaacs v. Texas Land, etc., Co.* (Civ. App.), 99 S. W. 1040, affirmed in 102 Tex. 585, no op.; *Warden v. Harris* (Civ. App.), 47 S. W. 834; *Bennett v. Latham*, 18 Tex. Civ. App. 403, 45 S. W. 934, affirmed in 93 Tex. 635, no op.; *Booth v. Strippleman*, 26 Tex. 436; *Shindler v. Lutcher, etc., Lumber Co.* (Civ. App.), 107 S. W. 941; *Texas v. Russell*, 38 Tex. Civ. App. 13, 85 S. W. 288, affirmed in 101 Tex. 660, no op.

Where a survey calls for adjacent grants that bound it, without dispute, upon four or more sides, and where five of the corners of such survey are established, the boundaries of such survey must be determined by the calls for the previous adjacent grants, and by a line run so far as to establish the sixth and last corner as called for in the grant, and from that corner run the closing lines, disregarding both course and distance, if absolutely necessary, so as to embrace within the lines of the patent all of the land lying between the adjacent surveys called for in the patent as constituting the outer boundaries of the grant. *Woods v. Robinson*, 58 Tex. 655. And see *Coleman County v. Stewart* (Civ. App.), 65 S. W. 383, affirmed in 95 Tex. 445.

Where there was evidence to warrant the jury in concluding that the boundaries of a survey extended to all the adjacent surveys called for in its field notes, the calls for course and distance should be disregarded when in conflict with calls for these other surveys. *Musselman v. Strohl*, 53 Tex. 473, 484, 18 S. W. 857.

The only locative call in a deed being the east line of another survey, the land, being described by lines with only courses and distances from said line, will be located upon such boundary wherever it may be found. *Keller v. Hollingsworth*, 78 Tex. 653, 15 S. W. 110.

A call for an intermediate corner, to be S. 45 degrees W., 160 varas from a certain corner of another tract, will control the calls of the survey for course and distance, although such corner is not established on the ground, and can only be found by running the lines of said other tract. The call for "Cole's southwest corner" is a good call, inasmuch as it was capable of being certainly ascertained by tracing lines of the survey, which were known and recognized and established by landmarks, to their intersection at that corner. *Hoxey v. Clay*, 20 Tex. 582, 587.

**Superior to Call for Distance.**—Distance ordinarily must yield to the calls for the corners and lines of surrounding surveys. *Wyatt v. Foster*, 79 Tex. 413, 420, 15 S. W. 679; *Maddox Bros. v. Fenner*, 79 Tex. 279, 15 S. W. 237; *Worsham v. Morgan* (Civ. App.), 28 S. W. 918; *Worsham v. Chisum* (Civ. App.), 28 S. W. 905.

When a survey calls for a known and established corner of another survey, in the absence of proof that an actual survey was made and that the corner was not actually reached, but was called for by mistake, the distance must be made to yield to the call for the corner. *McAninch v. Freeman*, 69 Tex. 445, 4 S. W. 369.

When the evidence gives the very acts and intentions of the surveyor and shows his intention to reach the line of another survey it should not be made to yield to distance, especially when the error in distance is so slight—only fifty to fifty-six varas in a line nearly thirteen hundred varas long. The evident intention of the surveyor was to leave no vacancy, and that intention should prevail, even though the line of the adjoining survey is unmarked. *Brown v. Bedinger*, 72 Tex. 247, 249, 10 S. W. 90.

Unexplained the call for the right of way of a railroad must be treated as if it had been a call for another tract of land and will control a call

for distance. *Couch v. Texas Pac. R. Co.*, 99 Tex. 464, 468, 90 S. W. 860, reversing, 87 S. W. 847.

Upon an issue of boundary the trial court did not err in concluding from the facts and circumstances shown, and in the absence of evidence as to how the original survey was made, that a call for the line of an adjoining survey, which line was ascertained and fixed with certainty, should prevail over a call for distance which, if followed, would make a shortage in the quantity of land called for in the grant. *Besson v. Richards*, 24 Tex. Civ. App. 64, 58 S. W. 611.

**Unmarked Line of Adjoining Survey Controls Course and Distance.**—Whether or not course and distance shall yield to the unmarked line of another survey which is called for does not seem to be entirely settled, and probably no general rule on the subject can be safely announced. In the case of *Gerald v. Freeman*, 68 Tex. 201, 4 S. W. 256, it was proved that the lines which called for the unmarked line of another survey were actually run as the law required, and that the surveyor only assumed that he had found the unmarked line of the survey called for as the boundary line, and the supreme court gave preference to the course and distance. But when unmarked lines of adjacent surveys are called for, and when from the other calls of such adjacent surveys the position of such unmarked lines can be ascertained with accuracy, and when in the absence of all evidence as to how the survey was actually made there arises a controversy as to whether course and distance or the unmarked line of another survey shall prevail, there is no good reason why the survey line should not be given the dignity of an "artificial object" and prevail over course and distance. *Maddox Bros. v. Fenner*, 79 Tex. 279, 291, 15 S. W. 237; *Groesbeck v. Harris*,

82 Tex. 411, 19 S. W. 850; *Waggoner v. Daniels*, 4 Tex. Civ. App. 354, 23 S. W. 738; *King v. Mitchell*, 1 Tex. Civ. App. 701, 21 S. W. 50; *Steuoff v. Jackson*, 40 Tex. Civ. App. 328, 89 S. W. 445, 447.

A call in a survey for the line of another survey, which is an open line on the prairie at the point of intersection, will not yield to a conflicting call for distance, when the location of the open line is certainly determined by natural objects, marked lines, and fixed corners of abutting surveys; as where the open line is but the prolongation of a line called for in an adjoining survey, and which line of such adjoining survey starts from a corner consisting of a permanent natural object, and is a marked line on the proper course before it becomes an open line on the prairie. *Fordtran v. Ellis*, 58 Tex. 245.

A call for a line or point within a survey for a given distance to the boundary line of the tract of which the survey is a part, will extend to the line so called for although at a greater distance than called for, and notwithstanding such line called for is an open line, or not actually run and marked upon the ground. *Baker v. Light*, 80 Tex. 627, 16 S. W. 330.

The rule laid down in the case of *Maddox Bros. v. Fenner*, 79 Tex. 279, 15 S. W. 237, that when an unmarked line of an adjacent survey is called for, and such unmarked line can be ascertained by running course and distance from established calls and corners of the survey, and when there is an absence of evidence showing how the survey was actually made, the presumption is that the surveyor actually surveyed all the lines called for by him in the field notes, and that the call for the unmarked line will be given the dignity of an "artificial object," and will prevail over course and distance, is criticised in *Ware v. McQuinn*, 7 Tex. Civ. App. 107, 109,

26 S. W. 126 and the court said that the correct rule upon this subject is laid down in the cases of *Booth v. Strippleman*, 26 Tex. 436; *McCown v. Hill*, 26 Tex. 359; *Gerald v. Freeman*, 68 Tex. 201, 4 S. W. 256; *Duff v. Moore*, 68 Tex. 270, 271, 4 S. W. 530; *Fagan v. Stoner*, 67 Tex. 286, 3 S. W. 44, and other kindred cases, holding that the call for the open and undefined line of another survey should yield to the call for course and distance. *Ware v. McQuinn*, 7 Tex. Civ. App. 107, 109, 26 S. W. 126, criticising *Maddox Bros. v. Fenner*, 79 Tex. 279, 15 S. W. 237, but bound by that decision and following same.

**Mere Excess Does Not Overcome Call for Adjoiners.**—Mere excess does not always indicate a vacancy. When the limits of a survey can be certainly known by its own description, or by other undisputed contiguous surveys, the excess, unless considerable, will not constitute a vacancy. *Booker v. Hart*, 77 Tex. 146, 153, 12 S. W. 16; *Freeman v. Mahoney*, 57 Tex. 621, 622; *Reeves v. Roberts*, 62 Tex. 350; *Booth v. Upshur*, 26 Tex. 64, 70; *Fagan v. Stoner*, 67 Tex. 286, 3 S. W. 44; *Lilly v. Blum*, 70 Tex. 704, 6 S. W. 279; *Graham v. Dewees*, 85 Tex. 395, 399, 20 S. E. Rep. 127; *Standlee v. Burkitt*, 78 Tex. 616, 14 S. W. 1040; *Texas v. Russell*, 38 Tex. Civ. App. 13, 85 S. W. 288, affirmed in 101 Tex. 660, no op.

Three surveys were made in 1848 on land believed to be vacant, and patents issued thereon. The field notes of each survey called for the northern line of an older survey of a two-league grant as its southern boundary. The northern line of the older grant could not be identified by a marked line or by established corners at either end thereof, though in the grant its northeast corner was described with marked bearing trees, which after the lapse of years could not

be found. The distance from the southern line (identified on the ground) to the northern line of the two-league grant was five thousand varas, as called for in the grant; but measuring from its southern line to the southern marked line of the three surveys made in 1848, the distance was about five thousand, two hundred and forty varas. The supposed excess of two hundred and forty varas was located on and a patent issued. In trespass to try title between those claiming under the two-league grant and the patentee of the supposed vacant strip, held, the discrepancy of two hundred and forty varas in a line of such length should not be given conclusive effect in determining whether there was vacant land between the old grant and the three later surveys. *Freeman v. Mahoney*, 57 Tex. 621.

Where from the irregular and peculiar shape of a survey it is apparent that the surveyor intended it to be bounded by adjacent surveys, mere excess will not vitiate the survey actually made. The call for the adjoiners will control. *Maddox Bros. v. Fenner*, 79 Tex. 279, 292, 15 S. W. 237. See, also, *Wyatt v. Foster*, 79 Tex. 413, 420, 15 S. W. 679.

A call in a survey for the unmarked lines of surrounding surveys is not overcome by the mere fact of excess in distance and in the quantity of land called for. *Waggoner v. Daniels*, 18 Tex. Civ. App. 235, 44 S. W. 946.

Where two surveys made by the same surveyor at about the same time call for a common division line, and are mapped as adjoining, the fact that an excess exists in the amount of land included in one or both along the line of junction is not sufficient reason for separating them in favor of one subsequently locating on such excess. *Stanus v. Smith*, 8 Tex. Civ. App. 685, 30 S. W. 262.



**Mistaken Call for Adjoiners Does Not Govern.**—When the surveyor actually established all the lines of the land by an actual survey, but makes the mistake of supposing that one of the lines coincides with a line of a neighboring survey and calls for that line, the mistaken call for the adjoining line must be disregarded, for the location of the land is determined by "following the footsteps of the surveyor." *Oliver v. Mahoney*, 61 Tex. 610, 613. And see *Burnett v. Gault* (Civ. App.), 54 S. W. 268.

A line or corner of another survey called for in a patent, which issued without an actual survey being made, will be disregarded, if evidently called for by mistake, when to regard it would involve a disregard of other calls found on the ground, and inconsistent therewith, and when the call for such line or corner is inconsistent with course and distance called for, as well as the manifest intention ascertained by the other calls in the grant, and the circumstances under which the grant issued. *Boon v. Hunter*, 62 Tex. 582.

A mistaken call for the line of another survey, when such line is in the open prairie, and unmarked or undefined, should not prevail over a call for course and distance from an established corner. *Freeman v. Mahoney*, 57 Tex. 621, 626.

**Excess Showing Mistake.**—Where an excess is so large as in itself to show that the call for another grant was a mistake, course and distance would control. *Freeman v. Mahoney*, 57 Tex. Civ. App. 621, 627.

Where in order to give effect to calls for unmarked lines of surrounding surveys, surveyed about the same time, the configuration of three out of the four surveys would have to be changed and also all calls, except the one requiring the surveys to connect, among which would be included a corner marked by bearing trees,

would have to be disregarded, and the north and south lines of the surveys increased 10 per cent, it is proper to disregard the calls for the surveys to connect. *Texas Town-Site Co. v. Hunnicutt* (Civ. App.), 31 S. W. 520.

**Vacancy between Surveys Called for as Adjoiners Must Be Clearly Established.**—Adjoining surveys made by the same surveyor within a few days of each other, mapped with a common division line and calling for each other, will appropriate the land the one to the other. Very clear evidence would have to be adduced to justify the conclusion that any vacancy existed between the surveys as actually run. *Wyatt v. Foster*, 19 Tex. 413, 15 S. W. 679; *Stanus v. Smith*, 8 Tex. Civ. App. 685, 30 S. W. 262.

**Adjoiners Superior to Erroneous Actual Survey.**—Where a survey is in the form of a parallelogram, and calls for previous surveys on three of its sides, the boundaries of such survey are determined by the calls for the previous surveys, and by a fourth line closing the survey according to the calls; and if a mistake has been made in making the survey, so that the actual survey was not made according to the calls, the actual survey must be disregarded, not merely as to the three sides, but, it seems, as to the fourth side also. *Anderson v. Stamps*, 19 Tex. 460, 461. And see *Layton v. New York, etc., Land Co.* (Civ. App.), 29 S. W. 1120.

Under article 4269, Rev. Stat. and possibly independent of the statute, the boundaries of a grant of county school land are fixed by the calls for adjoining older surveys as shown by its field notes returned into the general land office, though by mistake of the surveyor in running lines not shown or called for by the field notes so returned, to determine the width of the vacancy between such older surveys, the vacant strip was thought to be narrower than it was in fact,

and the survey returned included, between the lines and corners of the older surveys called for in its field notes, more than the league of land intended to be granted. *Stewart v. Coleman County*, 95 Tex. 445, 67 S. W. 1016, affirming 65 S. W. 383.

**Superior to Office Survey.**—Where a survey is not actually made on the ground, but platted with reference to other surveys which are actually made and marked on the ground, and the boundaries of which are undisputed, such surveys actually made will govern the calls of the survey thus platted. *Fenley v. Flowers*, 5 Tex. Civ. App. 191, 23 S. W. 749.

A surveyor, assuming that the lines, corners and distances of old surveys were correct, adopted them with the intention to include all the vacant land between the boundaries of surrounding surveys; and platted the vacant lands into surveys without going upon the ground, calling for the older surveys. It does not appear that more land was embraced in the field notes than was intended, or that the configuration of the land was changed; under such circumstances the abutting survey called for would be the correct boundary. *Moore v. Reiley*, 68 Tex. 668, 670, 5 S. W. 618; *Boon v. Hunter*, 62 Tex. 582; *Jones v. Andrews*, 62 Tex. 652, 660.

#### (6) Calls for Corners.

##### **Corners Should Not Be Disregarded.**

—The beginning corner of a survey called for in a known line and at a given and short distance from a well-known corner, should not be disregarded in the endeavor to ascertain the true situation of the survey, some of whose lines are unmarked. *Randall v. Gill*, 77 Tex. 351, 354, 14 S. W. 134.

Effect should be given to all the several corners of a survey if it can be done, and a second or third corner may be as useful in locating the survey as the beginning corner. *Hord v. Olivari (Sup.)*, 5 S. W. 57.

**Ordinarily All Corners of Equal Importance.**—"The beginning corner, as given in the field notes, is of no more dignity than any other corner; and the survey may be constructed from any corner found on the ground. *Phillips v. Ayres*, 45 Tex. 601, 607; *Davis v. Smith*, 61 Tex. 18, 21; *Scott v. Pettigrew*, 72 Tex. 321, 329, 12 S. W. 161; *Miles v. Sherwood*, 84 Tex. 485, 489, 19 S. W. 853." *Cox v. Finks (Civ. App.)*, 41 S. W. 95, 99 (see 91 Tex. 318); *Lockett v. Scruggs*, 73 Tex. 519, 521, 11 S. W. 529; *Rand v. Cartwright*, 82 Tex. 399, 403, 18 S. W. 794; *Wilkins v. Clawson*, 37 Tex. Civ. App. 162, 83 S. W. 732; *Griffin v. Roe*, 2 Posey 511, 512; *Ayers v. Harris*, 77 Tex. 108, 117, 13 S. W. 768; *Lilly v. Blum*, 70 Tex. 704, 710, 6 S. W. 279.

The beginning corner of a survey is of no higher dignity or importance than any other; and where a natural object called for is found at any corner, the lines of the survey may be determined by commencing at that point instead of the beginning corner. *Davis v. Smith*, 61 Tex. 18, 21; *Phillips v. Ayres*, 45 Tex. 601.

The beginning corner of a survey is of no greater weight or importance in determining its boundaries than any other corner, if other corners are as well established and identified as the beginning corner, unless the jury should believe from the evidence that the line from one of these corners was actually run and measured, and not from the other. In that event the corner from which the line was run would be of greater importance, because of the certainty of the locality of the line so run. *Scott v. Pettigrew*, 72 Tex. 321, 329, 12 S. W. 161. And see *Lancaster v. Ayres (Sup.)*, 12 S. W. 163; *Hord v. Olivari (Sup.)*, 5 S. W. 57.

**Marked Beginning Corner of Controlling Weight.**—Where in a boundary suit, the question at issue was the true locality of defendant's older

survey, whose beginning corner was at a wild china tree, with its other lines and corners unmarked, and the evidence showed such a tree on the land in controversy, but was conflicting as to its identity with the one called for in the older field notes, an instruction that: "If, after considering the above general rules, there is still uncertainty and confusion as to the true lines, then that rule should be adopted which is most consistent with the intention apparent from the field notes made by the locating surveyors, as ascertainable from all the surrounding circumstances; but a beginning corner is of no higher dignity or importance than any other corner of the survey. If, however, there are known, recognized, and identified original corners established upon the ground around a survey, they will control the other calls which may be conflicting and contradicting," is misleading, for under the proof in this case, the beginning corner was undoubtedly controlling, and the general principle announced in the charge, be it ever so correct in a proper case, was inapplicable and materially erroneous. *Ayers v. Beaty*, 5 Tex. Civ. App. 491, 492, 24 S. W. 366.

**Marked Corner Controls Contradictory Calls.**—If there are well-known and undisputed original corners established upon the ground around the survey, they would control the other calls of the survey which are conflicting and contradicting, if there are any such calls. *Lockett v. Scruggs*, 73 Tex. 519, 521, 11 S. W. 529. But see *Masterson v. Ribble*, 34 Tex. Civ. App. 270, 78 S. W. 358.

**Marked Corner Superior to Object Call for Conjecturally.**—When, in making an original survey intended to segregate a particular tract from the public domain, the surveyor establishes and marks a corner, so that it can thereafter be identified on the ground as called for in his field notes,

such corner is, as matter of law, of greater dignity, and will control a call for another object, as another corner, when it is shown, as in this case, that he did not go on to the ground, and establish such other corner, but merely supposed that course and distance from the corner established would reach it. *Bolton v. Lann*, 16 Tex. 96, 112; *Bass v. Mitchell*, 22 Tex. 285, 294; *Stafford v. King*, 30 Tex. 257, 273; *Fulton v. Frandolig*, 63 Tex. 330, 333; *Brown v. Bedinger*, 72 Tex. 247, 249, 10 S. W. 90; *Hubert v. Bartlett*, 9 Tex. 97, 104; *Duren v. Presberry*, 25 Tex. 512; *Schunior v. Russell*, 83 Tex. 83, 96, 18 S. W. 484; *Gregg v. Hill*, 82 Tex. 405, 407, 17 S. W. 838; *Booth v. Strippelman*, 26 Tex. 436; *Gerald v. Freeman*, 68 Tex. 201, 203, 4 S. W. 256." *Cox v. Finks* (Civ. App.), 41 S. W. 95, 99 (see 91 Tex. 318).

**Ascertained Corner Superior to Distance.**—A call for a corner which is ascertained by marked lines intersecting as such corner, will prevail over a call for distance. *Woods v. Robinson*, 58 Tex. 655; *Buford v. Gray*, 51 Tex. 331; *Galloway v. State Nat. Bank* (Civ. App.), 56 S. W. 236, affirmed in 93 Tex. 661, no op.

A corner called for, will, if identified, be accorded the weight and dignity of a marked line and will control a call for distance, unless it be overcome by force of other circumstances and shown to be a mistaken call. *Goodson v. Fitzgerald*, 40 Tex. Civ. App. 619, 90 S. W. 898.

**Established Corner of Equal Dignity with Line of Another Survey.**—The call for the well-established corner of an older survey, is of equal dignity with a call for the established line of another survey, and, in a case where the plaintiff shows no ground for a recovery except a conflict in the two calls, he is not entitled to recover. *Morgan v. Mowles* (Civ. App.), 61 S. W. 155.

**Unascertained Corner Can Not Control Lines Actually Established.**—A call for a corner, which had not been found, can not be the controlling call, when established corners and lines of the survey, actually traced upon the ground, are found to correspond with the calls of the deeds. *Bass v. Mitchell*, 22 Tex. 285; *George v. Thomas*, 16 Tex. 74, 96; *Hubert v. Bartlett*, 9 Tex. 97; *Anderson v. Stamps*, 19 Tex. 460; *Duren v. Presberry*, 25 Tex. 512.

**(7) Metes and Bounds.**

**Control General Description.**—Where a grantor conveys specifically by metes and bounds, so there can be no controversy about what land is included and really conveyed, a general description as of all of a certain tract conveyed to him by another person, or, as in this case, all of a survey except a tract belonging to another person, can not control, for there is a specific and particular description about which there can be no mistake and no necessity for invoking the aid of the general description. *Cullers v. Platt*, 81 Tex. 258, 263, 16 S. W. 1003.

**Superior to Recital of Number of Acres.**—It is a well-established principle, that where land is sold by metes and bounds, the recital of the number of acres is mere matter of description, and is not supposed to influence the contract of the parties; inasmuch as men may easily err in their estimate of the number of acres within certain lines, but can not err as to where marks or monuments, or natural objects, are on the earth's surface. *Dalton v. Rust*, 22 Tex. 133, 155; *Leon, etc., Land Co. v. Dunlap*, 4 Tex. Civ. App. 315, 23 S. W. 473.

**No Equitable Relief for Deficiency When Land Sold by Metes and Bounds.**

—It is also well settled that courts of equity can not relieve against a mistake as to the number of acres contained in a tract or parcel of land, sold by metes and bounds, where

there is no element of fraud. *Dalton v. Rust*, 22 Tex. 133, 155.

Where land was sold by defined and specific boundaries, without any representation as to the quantity, and where the quantity turns out to be less than as described in the deed, there is no ground for rescinding the contract. *Hatch v. Garza*, 22 Tex. 176, 188.

**(8) Course and Distance.**

**(a) General Principles.**

**Course and Distance Most Unreliable of Calls.**—Of all the indicia of the locality of the true line, as run by the surveyor, course and distance are regarded as the most unreliable, and generally distance more than course, for the reason that chain carriers may miscount and report distances inaccurately, by mistake or design. At any rate, they are more liable to err than the compass. The surveyor may fall into an error in making out the field notes, both as to course and distance (the former no more than the latter), and the commissioner of the general land office may fall into a like error by omitting lines and calls, and mistaking and inserting south for north, east for west. And this is the work of the officers themselves, over whom the locator has no control. *Stafford v. King*, 30 Tex. 257, 272; *Maddox Bros. v. Fenner*, 79 Tex. 279, 291, 15 S. W. 237. And see *Boon v. Hunter*, 62 Tex. 582; *Roberts v. Helm*, 1 Tex. Civ. App. 100, 102, 20 S. W. 1004.

**Course Superior to Distance.**—It is generally considered that distance is more unreliable than course. *Lilly v. Blum*, 70 Tex. 704, 710, 6 S. W. 279; *Sloan v. King*, 29 Tex. Civ. App. 599, 601, 69 S. W. 541; *Welder v. Hunt*, 34 Tex. 44; *Ayers v. Harris*, 64 Tex. 296, 302.

Distance must ordinarily yield both to course and marked lines and corners. *Stafford v. King*, 30 Tex. 257, 258; *McAninch v. Freeman*, 69 Tex. 445,

447, 4 S. W. 369; *Booker v. Hart*, 77 Tex. 146, 12 S. W. 16; *Rand v. Cartwright*, 82 Tex. 399, 404, 18 S. W. 794.

In determining boundary lines, in general, distance yields to course, or, in the absence of any circumstances bringing the mind to a contrary conclusion, the courses shall be first pursued, contracting or extending the distances, as the case may require, to make the survey close. *Phillips v. Ayres*, 45 Tex. 601, 607; *Shindler v. Lutchter*, etc., *Lumber Co. (Civ. App.)*, 107 S. W. 941; *Randall v. Gill*, 77 Tex. 351, 354, 14 S. W. 134.

Course is the third in importance, and distance the fourth. *Lockett v. Scruggs*, 73 Tex. 519, 521, 11 S. W. 529.

**Distance Most Unreliable Call.**—The call for distance is the weakest and most unreliable of all the classes of calls. *Woods v. Robinson*, 58 Tex. 655, 661; *McCown v. Hill*, 26 Tex. 359; *Stafford v. King*, 30 Tex. 257; *Wyatt v. Foster*, 79 Tex. 413, 420, 15 S. W. 679.

**Distance Superior to Course When More Conformable to Intent of Parties.**—Where the description in a deed contains no patent ambiguity, but, on its application to the land described, it results in a lot of the most singular shape, plainly never intended by the parties, there is no error in ignoring the calls for courses, and applying only the calls for distance, where the land which the evidence shows was intended to be conveyed may be thereby fully identified. *Talkin v. Anderson (Sup.)*, 19 S. W. 350.

Where calls of a survey appear inconsistent, and it appears that course should yield to distance in a call in order to conform to the intent of the parties, and if the land was so pointed out in the negotiations, course may properly be disregarded. *Scott v. Weisburg*, 3 Tex. Civ. App. 46, 21 S. W. 769.

**Govern Calls for Quantity.**—Courses and distances govern calls for quantity. *Welder v. Hunt*, 34 Tex. 44, 47; *Stafford v. King*, 30 Tex. 257; *Ayers v. Harris*, 64 Tex. 296, 302.

**(b) Circumstances Rendering Course and Distance Superior.**

**When Call for Natural or Artificial Objects Erroneous.**—Whenever the evidence is sufficient to induce the belief that the mistake is in the call for natural or artificial objects and not in the call for course or distance, the latter will prevail and the former will be disregarded. *Johnson v. Archibald*, 78 Tex. 96, 102, 14 S. W. 266; *Sloan v. King*, 33 Tex. Civ. App. 537, 542, 77 S. W. 48; *Hamilton v. Blackburn*, 43 Tex. Civ. App. 153, 95 S. W. 1094; *Barnett v. Mahon (Civ. App.)*, 31 S. W. 329, 332.

**When Natural Objects Called for by Conjecture or Mistake.**—Course and distance, under certain circumstances, may become more important than even natural objects—as when, from the face of the patent, the natural calls are inserted by mistake or may be referred to by conjecture and without regard to precision, as in the case of descriptive calls—still they are looked upon and generally regarded as mere pointers or guides, that will lead to the true lines and corners of the tract, as, in fact, surveyed at first. *Stafford v. King*, 30 Tex. 257, 273; *Hubert v. Bartlett*, 9 Tex. 97, 98, 103.

It often occurs that course and distance will control natural objects, as where it is apparent on the face of the grant that these were inserted by mistake. *Barnard v. Good*, 44 Tex. 638, 641.

Where from actual corners, lines not marked are run by course and distance, and a stream is found where called for, but of a different name from that called for in the field notes, it may be inferred that the call for the stream was a mistake, and to that extent course and distance would

be regarded, instead of the call for a stream elsewhere made in the field notes. *Jones v. Burgett*, 46 Tex. 284, 285.

The rule that course and distance will be made to yield to natural objects called for can have no application in cases where the natural object is left indeterminate and incapable of being applied to the call. *Yoacham v. McCurdy*, 27 Tex. Civ. App. 183, 65 S. W. 213, affirmed (see 95 Tex. 336).

**When Monuments Called for Not Established.**—It is proper to instruct the jury that if the location of stakes or bearing trees is not satisfactorily established by the evidence, then they shall be governed by the course and distance as called for in the patent. *Boydston v. Sumpster*, 78 Tex. 402, 405, 14 S. W. 996; *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.), 96 S. W. 64 (see 101 Tex. 645, no op.); *Griffith v. Rife*, 72 Tex. 185, 12 S. W. 168.

An office survey was intended to follow the line of an older survey, and called for a monument which was not located on the ground. By following the call for course and distance, the original shape of the older survey would be preserved, while, following the call for the monument, the original shape of the older survey would be destroyed. Heid, that the call for course and distance governed, and the boundary of the office survey must follow the call for course and distance. *Holdsworth v. Gates*, 50 Tex. Civ. App. 347, 110 S. W. 537. Compare *Gilbert v. Harris* (Civ. App.), 109 S. W. 392.

**When Monument Called for Lost.**—Where a monument called for in a survey is lost, courses and distances will prevail in determining a disputed line. *Tippen v. McCampbell* (Civ. App.), 26 S. W. 647.

**When Course and Distance Most Certain Evidence of Locality.**—There are many cases where the course and dis-

tance will control natural marks or boundaries, as where it is apparent on the face of the grant that these were inserted by mistake, or were laid down by conjecture, and without regard to rule; and so of a variety of cases which may be supposed to exist. In the abstract, all other things being equal, a river prevails over a marked line, and a marked line over course and distance. Still, the lowest grade, to wit, course and distance, is made to prevail over the highest grade, to wit, rivers, creeks, etc., when, upon applying the calls of the grant to the land, the surrounding and connected circumstances adduced in proof to explain the discrepancy show that course and distance is the most certain and reliable evidence of the true locality of the grant. *Robinson v. Doss*, 53 Tex. 496, 506; *Sanborn v. Gunter*, 84 Tex. 273, 285, 17 S. W. 117, 20 S. W. 72; *Stephens v. Mott*, 82 Tex. 81, 18 S. W. 99; *Booth v. Upshur*, 26 Tex. 64, 70; *Booth v. Strippleman*, 26 Tex. 436; *Browning v. Atkinson*, 37 Tex. 633; *Hubert v. Bartlett*, 9 Tex. 97, 104; *Davis v. Smith*, 61 Tex. 18, 21; *Fagan v. Stoner*, 67 Tex. 286, 287, 3 S. W. 44; *Bigham v. McDowell*, 69 Tex. 100, 102, 7 S. W. 315; *Stroud v. Springfield*, 28 Tex. 649, 674; *Webb v. Brown*, 2 Posey 36; *Freeman v. Mahoney*, 57 Tex. 621, 625.

**When Call for Artificial Object Fictitious.**—The moment that it is ascertained that a stake or other artificial object called for was not placed in its position by the surveyor, but is merely an office call, it is robbed of its importance, and course and distance would be of equal dignity with it, and when a call for course and distance maintains the integrity of an older survey, it will take precedence over the fictitious call for an artificial object. *Williams v. Winslow*, 84 Tex. 371, 19 S. W. 513; *Holdsworth v. Gates*, 50 Tex. Civ. App. 347, 110 S. W. 537, 539. And see *Matthews v. Thatcher*, 33 Tex. Civ. App. 133, 76 S. W. 61.

**When Call for Adjoining Survey Erroneous.**—Where the testimony shows as a fact that the surveyor established a corner upon the ground, but, by mistake or otherwise, called for a survey not there, but which would be reached by prolonging the line farther, held, that the line and corner established in fact by course and distance control the erroneous call for the survey. *Castleman v. Pouton*, 51 Tex. 84; *Aransas Pass, etc., Co. v. Flipping* (Civ. App.), 29 S. W. 813.

**When Unmarked Line Called for.**—In determining the bounds of a survey, a call for course and distance will not yield to a call for an unmarked prairie line, which can not itself be ascertained except by running the boundaries of another survey according to course and distance. *Gerald v. Freeman*, 68 Tex. 201, 4 S. W. 256; *Johnson v. Archibald*, 78 Tex. 96, 102, 14 S. W. 266; *Duff v. Moore*, 68 Tex. 270, 4 S. W. 530. And see *Bragg v. Lockhart*, 11 Tex. 160.

Ordinary when there is proof that the calls in a deed are taken from the field notes of an actual survey, a call for distance will control a call for an unmarked line, especially when the circumstances tend to show that the surveyor was unacquainted with the true locality of the line and called for it by mistake. *Baker v. Light*, 80 Tex. 627, 633, 16 S. W. 330; *McCown v. Hill*, 26 Tex. 359, 361.

It has been held by the supreme court in a number of decisions that a call for distance, when the evidence shows the surveyor actually stopped at the distance called for, will prevail over a call for an unmarked line or corner of a survey in the prairie. *McAninch v. Freeman*, 69 Tex. 445, 447, 4 S. W. 369. See also, *Castleman v. Pouton*, 51 Tex. 84; *Oliver v. Mahoney*, 61 Tex. 610. But see ante, "Calls for Adjoiners," II. A. 5, a, (5).

**Where Parties Intended Course and Distance to Control.**—Where the evidence shows it was the intention of the

parties to a deed that only the land comprised within the description by courses and distances should be included, such description will control one by number of lot and block. *Mulaly v. Noyes* (Civ. App.) 26 S. W. 145, affirmed in 93 Tex. 715, no op.

**When No Evidence of Surveyor's Footsteps.**—In a case of conflicting boundaries where there is no evidence of the footsteps of the surveyor, of either survey, or of possession or of acquiescence, course and distance must control, and the junior survey must yield to the senior. *Hornberger v. Giddings*, 31 Tex. Civ. App. 283, 71 S. W. 989.

**Course and Distance Superior to Random Calls.**—Surveys beginning at a known point were platted in a block without actual survey upon the ground. The initial point was upon a river. Guessing at its course, a number of the surveys called for it on both sides. Each survey had calls for course and distance. Held, that while the surveyor may have intended to appropriate the land up to and across the river, but not knowing where it actually was, no random calls therefor will control course and distance. The surveys must be run out as platted, disregarding the imaginary calls for the river. *New York, etc., Land Co. v. Thomson*, 83 Tex. 169, 170, 179, 17 S. W. 920; *Ratliff v. Burleson*, 7 Tex. Civ. App. 621, 25 S. W. 983, 26 S. W. 1003 (see 93 Tex. 694, no op.); *Bridgeport Coal Co. v. Wise County Coal Co.*, 44 Tex. Civ. App. 369, 99 S. W. 409; *Jones v. Andrews*, 72 Tex. 5, 9 S. W. 170.

#### (9) Calls for Quantity.

**Call for Quantity Merely Descriptive.**—It is well settled that when boundaries of a parcel of land are defined, a statement of the quantity of the land does not generally have any effect. Such statement is considered merely as descriptive, and, as the quantity is the least certain part of description, that must yield to the bound-

aries, or other definite description, by name or number or by map of survey. *Jordan v. Young* (Civ. App.), 56 S. W. 762, 764.

Where there was no obscurity about the dividing line between tracts of land conveyed by deed and containing in reality only 124 acres, and adjoining land in the same survey, and such line and the respective corners called for in the deed were distinctly marked and established, the grantee was limited to the lands described in the deed, and the mere recital, following the description calling for such line and corners, "Containing 160 acres, being the north half of said survey," did not control, since a general description can not control a particular description, about which there is no doubt. *Ridgell v. Atherton* (Civ. App.), 107 S. W. 129.

**Quantity Can Not Be the Sole Consideration in Locating Line.**—It is error to charge the jury that if they could not fix the location of a line from the evidence, they could make it depend upon the quantity of land, without reminding them that they could determine the location of lines by course and distance, for the call for quantity is subordinate to the call for course and distance. *Ayers v. Harris*, 64 Tex. 296, 302.

In settling a boundary line dispute, its location is not controlled by quantity of land in the respective parcels, where the proper course from a known starting point is given, though quantity may be considered in solving a doubt as to the true variation to be adopted in running the line. *McDonald v. McCrabb*, 47 Tex. Civ. App. 259, 105 S. W. 238.

**Fixed Boundaries Govern Call for Quantity.**—Where a tract, as bounded, in fact contained an excess of 80 acres over 571 acres, called for in the deed, and it not being made manifest that the calls of boundary in the deed were merely conjectural, and that the land was sold by the acre, or that just so

many acres, and no more, were intended to be conveyed, there is no authority for restricting the title of the plaintiff to just 571 acres of the land described in the deed, and excluding therefrom the excess of 80 acres claimed by the defendants. *Johnson v. Garrett*, 25 Tex. Supp. 13, 14.

**When No Boundary Fixed, Call for Quantity Governs.**—If upon one side of the eldest grant no boundary line was described, either by calls for monuments or for courses and distances, and the line had not otherwise been established, then the holder of that grant would be entitled, as against subsequent locators, to claim upon that side so much of the public land as his grant called for. *Welder v. Hunt*, 34 Tex. 44, 45.

Where land is in a triangular shape, and two lines, the length of which are not given, diverge from a point on the south, the course of the north boundary being furnished, its location will be fixed by a definite call for quantity. *Wells v. Heddenberg*, 11 Tex. Civ. App. 3, 8, 30 S. W. 702.

It would seem that where a tract of land is a trapezoid, fronting on a navigable stream and running back by parallel lines, and the grantee sells one-half thereof to be divided by "a line from the river parallel with the side lines," the half so sold "to include half of the front on the river," a compliance with all of said calls being impossible, the call for half of the front on the river must yield to the other two calls for half the tract, and for a division line parallel with the two sides; unless there be other terms, or perhaps extraneous circumstances in proof, showing that such was not the intention of the parties, and there were none in this case. *Swisher v. Grumbles*, 18 Tex. 164.

#### (10) Grant of Tract by Name.

**Tract Passes Regardless of Erroneous Calls.**—If a deed contains such a description of the land conveyed as to show that it was intended thereby to



convey a certain tract, in accordance with a survey actually made, the tract would pass regardless of the erroneous call for a line referred to. *Jones v. Powers*, 65 Tex. 207.

**Description Controls Other Contradictory Calls.**—A deed described a tract of land as 200 acres of land, part of the John Cauble headright survey, the other part of which survey having been sold to Gilliland, that sold to Gilliland having been identified, held, a sufficient description of land, and to control contradictory calls for beginning corner, curves, and distance. *Ragsdale v. Robinson*, 48 Tex. 379, 380.

**b. Where Maps, Plats and Field Notes Referred to.**

**Survey Prevails Over Map in Case of Discrepancy.**—A map which, by reference to monuments established, or by some other mode, refers to a survey, is presumed to correctly represent the survey as actually made; but if there is a discrepancy between the map and the survey, the survey must prevail, if the position of the points and lines established by the survey can be proved. *Smith v. Boone*, 84 Tex. 526, 528, 19 S. W. 702.

**Actual Survey Governs Office Survey.**—Where the calls in an office survey are based on another survey actually made on the ground and established at the time, both surveys recognizing a landmark which could only be known by an actual survey, the fact that the field notes of the office survey were dated one day earlier than the field notes of the actual survey did not affect the priority of the actual survey. *Shindler v. Lutchter, etc., Lumber Co.* (Civ. App.), 107 S. W. 941.

**Corrected Field Notes Evidence the Survey.**—Where the intent of a surveyor in correcting the field notes of a survey are manifest and the corrected field notes are carried into the patent, such intention must prevail, rather than whether such correction

should have been made, that is, the corrected field notes evidence the survey. *Keyser v. Meusback*, 77 Tex. 64, 13 S. W. 967.

**Mistake in Patent May Be Corrected by Field Notes and Map.**—A mistake in the description of land as given in a patent therefor, may be corrected by the field notes of the survey as actually made on the ground, in connection with the map thereof required by statute, as they appear among the records of the county and in the general land office. *Morrill v. Bartlett*, 58 Tex. 644. And see *Perry v. Stevens*, 44 Tex. Civ. App. 108, 97 S. W. 1075.

**Map Does Not Control Field Notes in Case of Discrepancy.**—A map accompanying and forming part of a report by commissioners making partition of land, will not necessarily control field notes also forming part of such reports, where there is a difference in the length of lines as given in figures on the map, and as written in the field notes. *Hurt v. Evans*, 49 Tex. 311. And see *Koenigheim v. Sherwood*, 79 Tex. 508, 16 S. W. 23.

**Erroneous Description in Field Notes Should Be Rejected.**—When the field notes describing land are incorporated in a deed, and a mistake is manifest from the fact that the survey, as described, will not close, it is the duty of the court, when the deed is offered in evidence to give effect to it, if the land really intended to be conveyed can be ascertained from the deed itself, without a resort to extraneous evidence, and in that event that portion of the description manifestly false will be rejected. *Coffey v. Hendricks*, 66 Tex. 676, 2 S. W. 47. And see *Koch v. Poerner* (Civ. App.), 55 S. W. 386. See, also, *Barnard v. Good*, 44 Tex. 638.

**Mistakes Resulting from Field Notes Not Necessarily Fatal to Patentee.**—Mistakes of surveyors which are flagrant and controlling in the description of boundaries, and which follow

the field notes into the patent, sometimes occur, and are not necessarily fatal to the patentee, but will be corrected according to the lines which were manifestly intended to be the true boundaries. *Urquhart v. Burleson*, 6 Tex. 502; *Jones v. Andrews*, 62 Tex. 652, 660.

**Original Surveys Agreeing with Old Maps Superior to Later Resurveys.**—Where the original surveys agree with maps that have been in use for many years, they should not be held erroneous because they do not agree with resurveys made long afterwards, and based upon the assumption that information furnished by living persons as to the locality of lines and corners is absolutely correct. *McCombs v. Sheldon* (Civ. App.), 26 S. W. 1114.

**Plat Fixing Line Must Be Regarded.**

—An original plat called for a tree that was identified by marks made on it by the maker of the original survey, and, starting from the point fixed by the tree, the plat fixed the direction of a line which plaintiff claimed was the boundary in controversy, and on which defendants had erected a stone wall. Defendants' surveyors fixed another line, but they did not deny the existence of the tree nor explain why they disregarded it in making their survey. Held, that a judgment for defendants was not sustained. *Ostrom v. Layer* (Civ. App.), 48 S. W. 1095.

**c. Relative Importance of Conflicting Grants and Surveys.**

**Elder Grant Prevails Over Younger.**

—The act of February 1, 1845, requiring the owners of land in the counties of Refugio and San Patricio to cause their lines to be designated and marked, was not compulsory; and where, from a failure of the owner of land in said counties to avail himself of the provisions of that act, the grant was not delineated on the county map and the land was patented to another, it was held, in a controversy between

the two titles, that the elder grant, if capable of identification, must prevail over the junior patent. *Byrne v. Fagan*, 16 Tex. 392.

In a conflict between two grants issued to colonists, one in 1832 by the commissioner of the colony of De Witt, and the other in 1835 by the commissioner of the colony of Austin and Williams, which arose from the uncertainty and confusion of the boundary between the colonies, the elder grant will prevail, though it may afterwards appear that the elder grant was located a few miles within the limits of the colony of Austin and Williams. *Ledyard v. Brown*, 27 Tex. 393.

Where older grants contain in their own calls the elements of complete description and identity, and are at variance with junior surveys, the latter can not be made to control and change the location of the older grants. *Hord v. Rivas* (Sup.), 6 S. W. 183. See, generally, the title PUBLIC LANDS.

**Lines of Older Survey Constitute Boundaries of Junior.**

—Where there was no material excess of land over the amount called for, by permitting a junior survey to appropriate all the land surrounded by lands patented and called for in the field notes, the lines of the older surveys must constitute the boundary of the junior survey calling for them. *Moore v. Reiley*, 68 Tex. 668, 5 S. W. 618.

**6. General Rules as to Construction.**

See, generally, the title INTERPRETATION AND CONSTRUCTION.

**Prime Object to Discover the Intention of the Parties.**

—All the various rules of construction of calls in deeds which have, from time to time, been adopted and acted upon, are designed for the purpose of arriving at and carrying out the intention of the contracting parties. Where that is manifest, all else must yield to and

be governed by it. *Swisher v. Grumbles*, 18 Tex. 164, 165; *Woods v. Robinson*, 58 Tex. 655; *Hubert v. Bartlett*, 9 Tex. 97, 104; *Robertson v. Mosson*, 26 Tex. 248, 251; *Robinson v. Doss*, 53 Tex. 496, 506; *Boon v. Hunter*, 62 Tex. 682; *Booth v. Upshur*, 26 Tex. 64; *Urquhart v. Burleson*, 6 Tex. 502; *Booth v. Strippleman*, 26 Tex. 436; *Anderson v. Stamps*, 19 Tex. 460, 467.

It is, however, not believed that the same rules in regard to the lines and corners of other surveys called for in a patent can be applied when it clearly appears that no actual survey was ever made, and in such cases it becomes necessary to look to all matters of description contained in the patent, in order to determine what particular land was conveyed and intended by the state and the grantee to be conveyed by the patent. If, in such case, from a consideration of all these, in connection with the facts surrounding the parties, and the transactions to which the parties looked at the time the patent issued, the thing granted can be with certainty identified, the grant ought not to be held void; but such matters of description as were evidently given by mistake should be disregarded, and effect given to the calls which are certain and are found, which, in connection with other matters of description contained in the grant, will make it conform to the evident intention of the parties. 'The language used in the patent must be considered with reference to the understanding of the parties at the time it issued, as to the true locality of the several surveys mentioned in it, if this understanding can be clearly arrived at; for otherwise we do not arrive at the real intention of either the grantor or grantee, which in cases of this kind, is the real and important question. *Lilly v. Blum*, 70 Tex. 704, 710, 6 S. W. 279.

**Survey Construed Most Strongly against Claimant.**—In determining

boundary lines, that construction is to prevail which is most against the party claiming under the uncertain survey. It is his duty to show and establish his corners. From which it will follow, that he who sets up and relies on an outstanding claim must show that it embraces the land in contest, and should not succeed by using it when it is uncertain whether it embraces it or not. *Phillips v. Ayres*, 45 Tex. 601, 607; *Schaeffer v. Berry*, 62 Tex. 795.

**Entire Description Must Be Considered.**—The entire description in a patent must be taken, and the identity of the land ascertained by a reasonable construction of the language used. If there be a repugnant call, which by the other calls in the patent clearly appears to have been made through mistake, that does not make void the patent. But if the land granted be so inaccurately described as to render the identity wholly uncertain, it is admitted that the grant is void. *Welder v. Carroll*, 29 Tex. 317, 318, 330; *Barnard v. Good*, 44 Tex. 638, 640.

**Particular Description Prevails Over General.**—Where there is a repugnance between a general and a particular description in a deed, the latter will control, although whenever it is possible the real intent must be gathered from the whole description, including the general as well as the particular. *Cullers v. Platt*, 81 Tex. 258, 263, 16 S. W. 1003; *Sanger Bros. v. Roberts*, 92 Tex. 312, 48 S. W. 1. See, generally, the title DEEDS.

## 7. Waters and Watercourses as Boundaries.

### a. In General.

#### Middle of Stream the Boundary.

When a fresh water stream is made the boundary between two riparian possessors the middle of the stream is the lineal partition between them, unless, by the express terms of the grant to the first possessor, this conclusion of law is excluded. *Muller v. Landa*,

31 Tex. 265; *Spears v. State*, 8 Tex. Cr. App. 467, 470.

Generally speaking, every riparian proprietor is entitled to the land to the middle of the stream, or, as it is commonly expressed, *usque ad filum aquæ*. *Rhodes v. Whitehead*, 27 Tex. 304, 309.

**Shore of Sea Not Included in Grant.**

—When a grant is described as extending to the seashore, and bounded by it, the shore will not be considered as included in the grant. *Galveston, etc., Bathing Co. v. Heidenheimer*, 63 Tex. 559. See, generally, the title **WATERS AND WATERCOURSES**.

**b. Navigable Waters.**

See, generally, the title **NAVIGABLE WATERS**.

**(1) In General.**

**Same Rules Apply to Statutory Navigable River as to One Navigable under General Definition.**—The grant of a tract of land upon the margin of a stream which retains an average width of thirty feet gives title to the grantee only to the water line of such stream, the title to the bed of the stream being reserved to the state and subject to its control, for article 4147, Rev. Stat., gives to such streams the character of navigable streams, and a grant made upon a stream declared by the statute to be navigable would confer title only to the same extent as if the stream were navigable under the general definition given to such watercourses. *Austin v. Hall*, 93 Tex. 591, 57 S. W. 563.

**Lines Can Not Cross a Navigable River.**—A survey described as lying on the left bank of a navigable river will be so run that none of the lines shall cross the river; course and distance crossing the river will be disregarded to the extent interfered with by the river. *Phillips v. Ayres*, 45 Tex. 601, 602.

Where a survey is located in the angle formed by the confluence of two navigable streams, the law which re-

quires surveys on navigable streams to front one-quarter of the square on the stream and run back for quantity, is inapplicable. *Ruis v. Chambers*, 15 Tex. 586, 587.

**(2) Common-Law Rule.**

**High-Water Mark the Boundary**

**Line.**—The well-established doctrine of the common law, which is more favorable to private appropriation, than the civil law, is, that an ordinary grant of land upon a bay, whose tide ebbs and flows, does not convey the shore or any of the land of the bay covered with water. The rule at common law would restrict the grant to the line of ordinary high tide. *Galveston v. Menard*, 23 Tex. 349, 396, 400.

The rule at common law is that a grant of land bordering on the coast where the tide ebbs and flows conveys title only to the line of ordinary high tide, unless there be something to indicate an intention to extend the grant beyond that line. *Rosborough v. Picton*, 12 Tex. Civ. App. 113, 34 S. W. 791, 43 S. W. 1033; *De Merit v. Robinson*, 102 Tex. 358, 361, 116 S. W. 796.

The Rio Grande, while spoken of as a navigable stream, is not so in the sense of the common law, where the tide ebbs and flows. The high-water mark is not the limit of the appellees' boundary, as would be the case if the Rio Grande was a navigable stream within the meaning of the common law. *Denny v. Cotton*, 3 Tex. Civ. App. 634, 643, 22 S. W. 122, affirmed in 93 Tex. 682, no op.

In navigable streams, in which the tide ebbs and flows, the boundary of a riparian proprietor extends to the high-water mark. *Bland v. Smith* (Civ. App.), 43 S. W. 49; *Galveston v. Menard*, 23 Tex. 349, 396, 400; *Rosborough v. Picton*, 12 Tex. Civ. App. 113, 34 S. W. 791, 43 S. W. 1033; *De Merit v. Robinson*, 102 Tex. 358, 361, 116 S. W. 796; *Denny v. Cotton*, 3 Tex. Civ. App. 634, 643, 22 S. W. 122, affirmed in 93 Tex. 682, no op.

### c. Meander Lines.

#### May Determine Boundary Line.—

Where a river is the north boundary line of a grant of land, and in a muniment of title the call for that line is "with the meanderings of the river," this is equivalent to the numerous calls for such meanders in the original survey, and is sufficiently definite to define the north line. *Henry v. McNew*, 29 Tex. Civ. App. 288, 69 S. W. 213, affirmed in 97 Tex. 636, no op.

#### Superior to Course and Distance.—

Where the meanders of a river are called for in a survey, and also courses and distances, the former will control. *Galveston County v. Tankersley*, 39 Tex. 651, 652. And see *Griffin v. Barbee*, 29 Tex. Civ. App. 325, 68 S. W. 698.

**Difference in Distance Explained by Meander Lines.**—The only question in an action to try title was whether the south line of lot 3 of a certain league extended to the south line of the league. A decree in partition had established six lots, the calls of lot 6 commencing at the northwest corner of the league; thence south 5,891 varas to the south boundary of the league; thence east; thence north to a certain bayou. The west line of each succeeding lot in descending numbers commenced at the northwest corner of the next higher-numbered lot, and it was the same as the east line of such lot, and the second call was east. The north line of each of the lots was on the bayou. The field notes of lot 3 showed the first course to be south only 5,830 varas. Held, that the south boundary of lot 3 was at the league boundary, since the difference in distance was accounted for by the meander of the bayou on the north boundary. *Lincoln v. Waddell* (Civ. App.), 59 S. W. 613 (see 94 Tex. 691, no op.).

#### How Littoral Leagues Measured.

—The littoral leagues are measured from the contact of the main land with the main sea, where no bay intervenes, and with the latter wherever one in-

tervenes, and from the mouths of rivers, whether these be in the heads or lower down in the bays. *Hamilton v. Menifee*, 11 Tex. 718, 719.

### d. Shifting of Shore or Channel.

#### Does Not Change the Original Boundary.—

When a deed calls for a line along the bank of a river, and after the date of the deed the bank of the river is changed by excessive floods or high water producing violent or visible alterations, the boundary line will not shift according to the changes of the river, but will be where the bank was at the time of the date of the deed. If a river by degrees gains upon the land of a person on one side, and thereby leaves the other dry, the owner who loses his ground has no remedy. *Collins v. State*, 3 Tex. Cr. App. 323, 325; *Meade v. Blum Land Co.* (Civ. App.), 22 S. W. 298 (see 85 Tex. 513). See the title ACCESSION, ACCRETION AND RELICTION, vol. 1, p. 50.

### e. Construction of Particular Calls.

#### Line Along Shore as Boundary.—

The call in the title to run from the beginning corner, as therein described, "due north 150 varas to a stake; thence eastwardly with the channel of the harbor in the bay of Galveston, and with the general course of the island, at the distance of at least 150 varas from the shore, to a stake 150 varas from the extreme eastern point of said island," should be construed, considered with reference to the object of the grant, that the line should run from the beginning point, eastwardly, keeping at least 150 varas from the shore, to the channel, and not in a direct line to the nearest point of it. *Galveston v. Menard*, 23 Tex. 349, 351.

#### Meanders of Marsh as Boundary.—

Where the surveyor in running the lines of a survey made the meanders of a marsh bordering on a bayou as the boundary, the evidence shows that, at the point at which the surveyor first reached the bayou, the line called for,

if extended its full length would carry the survey across the bayou, contrary to law; while if the line is stopped at the bayou and it is made the boundary until it intersects the next line called for in the field notes, it is then evident from a map of the survey that the surveyor intended this land to be a part of the survey in controversy; it is clear, as a matter of law, in a survey of great size, bordering on a marsh or lake, that a strip of three acres of land extending into the water beyond a straight line called for by the surveyor, and shown upon a map of the land, is part and parcel of the survey; and in so holding the rule of law which requires the footprints of the surveyor in determining the boundary of a given tract of land to be followed, is not violated. *Bland v. Smith* (Civ. App.), 43 S. W. 49.

### 8. Roads and Streets.

See, generally, the title **STREETS AND HIGHWAYS**.

#### a. Rights Passed.

##### **Under Civil Law No Rights Pass.**—

According to the civil law a grant of land calling for a public road as a boundary conveyed no title to the soil covered by the road; the title to the road bed remained in the sovereignty, and on the abandonment of the road as a highway the land covered by it became vacant public domain, subject to entry and did not belong, as it would at common law, to proprietors whose lands were bounded by the road. *Mitchell v. Bass*, 26 Tex. 372.

**At Common Law Fee Passes.**—The established doctrine of the common law is, that a conveyance of land bounded on a public highway carries with it the fee to the center of the road as part and parcel of the grant. Such is the legal construction of the grant unless the inference that it was so intended is rebutted by the express terms of the grant. The owners of the land on each side go to the center of the road, and they have the exclusive right to the

soil, subject to the right of passage in the public. Upon the discontinuance of the highway the soil and freehold revert to the owner of the land. *Mitchell v. Bass*, 26 Tex. 372, 380. And see *Bell v. Wright* (Civ. App.), 59 S. W. 615 (see 94 Tex. 577).

The sale of land bounded by an alley carries to the purchaser the fee to the center of the alley, unless otherwise provided expressly or by clear implication; that the grantor, after conveying the land, intended to withhold his interest in the alley, being never presumed. *Wiess v. Goodhue*, 46 Tex. Civ. App. 142, 102 S. W. 793, affirmed in 102 Tex. 597, no op.

A deed conveying the blocks on each side of a street passes the title to the fee of the street to the grantee. *Cocke v. Texas, etc., R. Co.*, 46 Tex. Civ. App. 363, 103 S. W. 407, affirmed in 102 Tex. 580, no op.

**Rule Inapplicable to Right of Way of Railroad.**—The right of way of a railroad is not a public highway, within the rule of construction of deeds to lands bounded by a public highway, in such sense as to make a deed calling for a right of way as a boundary convey the owner's interest in the land between the boundary of the right of way and the railroad track. *Couch v. Texas Pac. R. Co.*, 99 Tex. 464, 90 S. W. 860, reversing 87 S. W. 847, on other grounds. See, generally, the title **RAILROADS**.

#### b. Effect of Particular Calls.

**Effect of Dedication.**—An owner platted his land into lots, blocks, and streets. The location of the streets on the ground could not be fixed from information derived from the unrecorded plat or from any defined monuments, either natural or placed on the ground by the surveyor of the plat. The dedicatory sold and pointed out the lines of streets to lots sold and the city opened the streets in accordance with such designation. Held, that the lines pointed out by the dedicatory should

govern as to subsequent purchasers. *Haynes v. Dallas* (Civ. App.), 94 S. W. 434. See, generally, the title DEDICATION.

**Extension of Street.**—The language, "thence along said extension (of a street) till it crosses the most northern spring of the Comal springs," meant the extension of the south side of the street, and not the line which the surveyor might run across the stream. *Muller v. Landa*, 31 Tex. 265.

#### 9. Location of Land.

**Proper Method of Location.**—Where the beginning point of a survey is established and all the calls in the patent can not be observed, the proper way to locate the survey is to commence at the beginning corner and run in both directions, following the calls in the patent as long as it can be done, and then close the gap in the manner which seems most consistent with all the calls. *Hills v. Smith*, 6 Tex. Civ. App. 312, 321, 25 S. W. 1079.

**Land Located by Lines Actually Run.**—If the surveyor locating land does not run the lines on the ground, but adopts lines run by a former surveyor, the location is determined by following the lines actually run—the "footsteps" of such former surveyor. *Lester v. Hays*, 14 Tex. Civ. App. 643, 38 S. W. 52.

**Location by Field Notes of Adjoiners.**—Where, in trespass to try title, plaintiffs claimed under the P. grant and a witness who was a surveyor, civil engineer, and chief draftsman in the general land office testified that the P. survey could not be identified, mapped, or patented because it did not call for any other surveys or objects that appeared on the official map by which its relative position could be determined, and that he was unable to locate the P. survey by the calls for its lines contained in two adjoining surveys, the field notes of the latter surveys shown to be delineated on official maps, which called for the boundary

lines of the P. survey, did not necessarily establish the location of such survey on the ground with such certainty as to require a finding that the land described in plaintiffs' petition was part of the P. grant. *McDonald v. Downs*, 45 Tex. Civ. App. 215, 99 S. W. 892.

**Specific Location an Appropriation of the Land.**—A location which is sufficiently specific and certain to identify the land which it is intended to appropriate, if followed by a timely survey, is an appropriation of the land, as well before as after the survey. *Hollingsworth v. Holshousen*, 17 Tex. 41, 44.

#### B. ESTABLISHMENT BY ACT OF PARTIES.

##### 1. By Agreement.

###### a. In General.

**Agreements Encouraged by Courts.**—Settlements of boundary by agreement are common, beneficial, approved and encouraged by courts, and ought not to be disturbed, though it was afterwards shown that they had been erroneously settled, if they have been acquiesced in for a number of years. Convenience, policy, necessity, justice, all unite in favor of supporting such an amicable adjustment. It is beneficial to all concerned, as well married women and minors as others. *George v. Thomas*, 16 Tex. 74, 89.

**Boundary Lines May Be Established by Agreement.**—While the large majority of cases passed upon in this state present questions of acquiescence, partition, compromise, and arbitration, still agreements of a recent date, where there was doubt, and whether the parties were right or wrong in their belief that the line they established and agreed upon as the boundary of their land was precisely where it ought to be, have been encouraged, favored, and upheld. *Levy v. Maddox*, 81 Tex. 210, 212, 16 S. W. 877.

A boundary line may be established by agreement. *Wardlow v. Harmon* (Civ. App.), 45 S. W. 828.

**Agreement Valid.**—Agreements settling disputed boundaries in the absence of allegation and proof of fraud or mistake, are valid and binding. *Masterson v. Bokel*, 32 Tex. Civ. App. 509, 514, 75 S. W. 42.

**Agreement May Be Implied from Circumstances.**—An agreement as to a boundary line may be implied from the acts and long acquiescence of a party in regard to it, and compliance with it should be enforced when, without such enforcement, injury would result to others who have been induced to buy by such acts evincing acquiescence, or where the owners of adjacent tracts have been induced to make valuable improvements, which would not have been made but for such implied agreement. *Hunter v. Malone*, 49 Tex. Civ. App. 116, 108 S. W. 709, 712.

But where one adjoining owner occupied up to a certain line, and allowed the other owner to do so, under the belief, induced by a mistake in a survey, that such was the true line, it can not be presumed that such line was agreed on as the boundary. *Stier v. Latreite* (Civ. App.), 50 S. W. 589.

**Right to Agree on Boundary Not Affected by Homestead.**—The right of adjoining landowners to agree as to their common boundary is not affected by the fact that one of the lots is a homestead, such an agreement not being a sale. *McKeon v. Roan* (Civ. App.), 106 S. W. 404.

**Parol License Not an Agreement.**—A license by parol by one party to the other, being interested in a disputed division line, to occupy part of the land in dispute to a designated line, is not equivalent to an agreement upon such line as a division line. *Wright v. Lassiter*, 71 Tex. 640, 10 S. W. 295.

**Agreement Must Purport to Adjust Line.**—Where no adjustment of boundaries was ever attempted, it would be a palpable absurdity to apply the rules as to agreed boundaries to a case where

appellants are not seeking an adjustment of boundaries between their land and that of appellee, but, are seeking to hold the whole of the land belonging to appellee. It would be a singular agreement of boundary between two owners that gave both tracts to one of the parties to the agreement. *Lewis v. Brown*, 39 Tex. Civ. App. 139, 87 S. W. 704, 706, affirmed in 101 Tex. 646, no op.

#### b. Parol Agreement.

**Agreement May Be by Parol.**—An express parol agreement made by the owners of contiguous lands, as to their boundary line, will be recognized as binding between such persons. *Houston v. Sneed*, 15 Tex. 307, 310; *George v. Thomas*, 16 Tex. 74, 89; *Hefner v. Downing*, 57 Tex. 576, 580; *Edwards v. Smith*, 71 Tex. 156, 9 S. W. 77; *Mitchell v. Nix*, 1 Posey 126.

Disputed boundary lines may be settled by parol agreement or by long acquiescence of the parties concerned; and the courts will not disturb such settlements, but will encourage them as a means of suppressing vexatious litigation, and of banishing from peaceful communities a fruitful source of discord. Such settlements are obligatory upon the heirs of the parties concerned, although they were minors at the time, and the fact that contiguous proprietors derive their titles from the same source imparts additional force to the doctrine that their dividing line may be established by parol agreement between them, or by their acquiescence in it, whether it was the true line or not. *McArthur v. Henry*, 35 Tex. 801, 802.

Where parties are in doubt as to the location of the line dividing their lands, they may fix it by parol agreement, which would be mutually binding. *Harn v. Smith*, 79 Tex. 310, 15 S. W. 240.

And where a boundary line has been established by agreement, it may be afterwards changed without an agreement in writing signed by the adjoining



ing landowners. *McDonald v. McCrabb*, 47 Tex. Civ. App. 259, 105 S. W. 238.

**Not Obnoxious to Statute of Frauds or Statute Regulating Conveyances.**—

An oral agreement between adjoining owners establishing a dividing line between their lands and a parol partition of lands are held not to be prohibited by the statute or frauds, nor are they within the meaning of the provisions of the law that regulate the manner of conveying real estate. *Aycock v. Kimbrough*, 71 Tex. 330, 12 S. W. 71; *Wardlow v. Miller*, 69 Tex. 395, 398, 6 S. W. 292; *Cooper v. Austin*, 58 Tex. 494, 496; *Stuart v. Baker*, 17 Tex. 417, 420; *George v. Thomas*, 16 Tex. 74, 89; *Houston v. Sneed*, 15 Tex. 307, 309; *Lecomte v. Toudouze*, 82 Tex. 208, 213, 17 S. W. 1047; *Masterson v. Bockel*, 20 Tex. Civ. App. 416, 51 S. W. 39; *Hoxey v. Clay*, 20 Tex. 582; *Elberling v. Weyel*, 2 Posey 501, 507.

The reason for sustaining parol agreements as to disputed boundaries is based upon the idea that the parties do not undertake to acquire and pass the title to real estate, as must be done by written contract or conveyance; but they simply by agreement fix and determine the situation and location of the thing that they already own; the purpose being simply by something agreed upon to identify their several holdings and make certain that which they regarded as uncertain. *Lecomte v. Toudouze*, 82 Tex. 208, 214, 17 S. W. 1047.

An agreement between adjoining landowners as to their common boundary is not within the statute of frauds, in that it is not a conveyance of land within the meaning of the statute. *McKeon v. Roan* (Civ. App.), 106 S. W. 404; *Roberts v. Fellman Dry Goods Co.*, 42 Tex. Civ. App. 590, 92 S. W. 1060. See, generally, the title **FRAUDS, STATUTE OF.**

**Acquiescence Not Necessary to Validity.**—Long acquiescence is not necessary to give binding effect to a

parol agreement between adjacent landowners fixing the division line between them. Acquiescence for any definite time is not necessary. *Bailey v. Baker*, 4 Tex. Civ. App. 395, 23 S. W. 454; *Cooper v. Austin*, 58 Tex. 494; *Levy v. Maddox*, 81 Tex. 210, 16 S. W. 877; *Lecomte v. Toudouze*, 82 Tex. 208, 212, 213, 17 S. W. 1047.

In ascertaining the effect of parol agreements establishing boundary lines, it is not necessary in order to give the agreement validity that it should be supported by acquiescence or acts from which an estoppel may spring; for if the agreement is made under circumstances free of facts that would authorize a court of equity to set it aside, it must stand, although the parties may have been mistaken in their belief that the line agreed upon approximates the line of the survey where it is really found to exist. *Cooper v. Austin*, 58 Tex. 494, 496; *Lecomte v. Toudouze*, 82 Tex. 208, 214, 17 S. W. 1047.

In trespass to try title, where the question of boundary was raised, and where there was evidence to show an agreed boundary, an instruction that, if the jury find the line was agreed upon, and that a fence was erected thereon, and was acquiesced in as the true line, until defendant had moved her house, they would find for defendant, was erroneous, as it made the agreed boundary depend on subsequent acquiescence. *Merrell v. Kenney* (Civ. App.), 45 S. W. 423.

**Can Not Contradict Deed.**—Where owners of adjoining lands settle their conflicting claims as to the boundary by the execution of a deed, such deed can not be contradicted by evidence of a previous parol agreement. *Lackey v. Bennett* (Civ. App.), 65 S. W. 651.

Evidence can not be received to show a parol agreement by the parties to a deed, contemporaneous with its execution, that the boundary lines of the land conveyed should run elsewhere than where the calls in the deed fix

them. *Sloan v. King*, 29 Tex. Civ. App. 599, 69 S. W. 541.

**c. Validity Not Dependent upon Accuracy.**

**Line Agreed upon Need Not Be Accurate.**—The validity of an agreement for the settlement of a boundary does not depend on the accuracy with which the line is run; whether the parties were right or wrong in locating the agreed line properly was immaterial, if there was doubt or dispute as to its correct location on the ground, and they settled that agreement by a compromise line. *Cooper v. Austin*, 58 Tex. 494; *Harn v. Smith*, 79 Tex. 310, 15 S. W. 240.

In a suit between parties involving a question of boundary, it was shown that after different surveyors had disagreed as to the true locality of the dividing line, the parties agreed themselves on a line which should be the dividing line between their adjacent lands, and one of them afterwards built his fence and constructed his houses with reference to the agreed line as the true boundary, held, the fact that one of the parties would not have assented to the agreed line but for the belief that it was the true line, and, discovering his error, attempted to repudiate the agreement, afforded no ground for his relief; he was bound by the agreed line. *Cooper v. Austin*, 58 Tex. 494.

When an agreement, though verbal, is made by the owners of adjoining lots, for the purpose of fixing a disputed boundary line between them, and the line is established in pursuance of the agreement, the parties are bound by it, whether the line as so fixed is the true line or not. *Cooper v. Austin*, 58 Tex. 494, 501; *Coleman v. Smith*, 55 Tex. 254, 259; *Levy v. Maddox*, 81 Tex. 210, 16 S. W. 877; *Kampmann v. Heintz* (Civ. App.), 24 S. W. 329; *McKeon v. Roan* (Civ. App.), 106 S. W. 404.

**Compromise Line Not Disturbed Because of Mistake.**—When the parties

have acted with entire good faith, a court of equity will not disturb a compromise line on the ground of mistake of fact. The rule which enforces such agreements rests on the soundest principles of public policy and justice. *Cooper v. Austin*, 58 Tex. 494.

**d. Who Are Bound.**

**Parties and Assigns.**—A dividing line fairly agreed upon, and marked out by the owners of adjoining tracts of land, will be conclusive upon both, and those claiming under them, as to the true locality of their dividing line, though it may subsequently, after long acquiescence, be ascertained to vary from the course called for in the deeds, under which the parties claimed prior to agreeing upon the line; and the rule is the same, whether the marked line be recognized and called for in a deed, or whether it be subsequently marked and established by the parties. *Browning v. Atkinson*, 46 Tex. 605.

Where the boundary between two lots of land is in dispute, the owners may agree upon a division line as the true boundary between them, and the agreed line is binding upon them and those claiming under them, whether it be the true boundary or not. *McKeon v. Roan* (Civ. App.), 106 S. W. 404.

Where a division line was run for the purpose of making partition by the mutual consent of all the parties in interest, and at their instance, and they were present superintending the work, it is to be deemed their joint act. Where they all appear to have had equal means of information, but to have been at the same time equally uninformed as to the exact position of a corner in dispute, they are bound by the boundaries they have agreed upon. *Hoxey v. Clay*, 20 Tex. 582, 587.

A verbal partition line established and acted on is binding on parties and their assigns. *Dement v. Williams*, 44 Tex. 158. See the title PARTITION.

**Only Parties to Agreement Bound.**—Where one of adjoining owners con-

veys his land to a third person, the location of the division line must be determined by the facts and conditions existing at the time of the conveyance, and can not be subsequently shifted by an agreement to which all persons interested in the lands are not parties. *Donaldson v. Rall*, 14 Tex. Civ. App. 336, 37 S. W. 16 (see 93 Tex. 682, no op.).

**Owner Not a Party Not Bound.**—A boundary line fixed by a surveyor employed by various property owners is not binding on such owners, as against an adjoining owner, who was not a party to the surveying, and who never acquiesced in the line as fixed by the surveyor. *Kampmann v. Henitz* (Civ. App.), 24 S. W. 329.

A boundary line between the east and west halves of a survey was improperly located by mistake by a surveyor employed by the owner of one-half, who had previously sold a parcel thereof to a vendee who was not present at and did not assent to such survey. Held, that the location of the land of such vendee must be determined by the facts and conditions existing at the time of the conveyance and the vendor and his heirs were not concluded as to such vendee by their agreement with other parties as to the boundary, not mutually binding upon them and such vendee. *Donaldson v. Rall*, 14 Tex. Civ. App. 336, 37 S. W. 16 (see 93 Tex. 682, no op.).

**Owner Not Bound by Agreement of Tenant.**—A tenant or subtenant has no authority as such to bind the owner of the land by an agreement as to boundaries with an adjoining owner. *Hunter v. Malone*, 49 Tex. Civ. App. 116, 108 S. W. 709.

**Owner Having No Knowledge of Agreed Line Not Bound.**—Defendant's remote grantor agreed with certain heirs owning land south of his that his south line was a line running east from a bois d'arc stake, excluding the tract in controversy, but the subsequent con-

veyances bounded the land as adjoining the heir's land and including the disputed tract. Held, that, neither defendant nor his immediate grantor having known of the agreed line, he is not bound thereby, the stake being insufficient to give notice thereof, and no possession of the land cut off by the agreed line having been taken by the heirs, nor anything done to put purchasers upon notice of the agreement. *Taylor v. Blackwell* (Civ. App.), 105 S. W. 214.

**Married Woman.**—A married woman participating in and agreeing upon a division line is, as to her separate property, bound by such act fixing a division line. *Lecomte v. Toudouze*, 82 Tex. 208, 17 S. W. 1047.

**Subsequent Purchasers without Notice.**—Where adjoining proprietors not being able to find the true division line between them, agree verbally upon a certain line, it seems that subsequent purchasers without notice would be bound by such agreement. *Houston v. Sneed*, 15 Tex. 307, 308. And see *Mitchell v. Nix*, 1 Posey 126; *Johnson v. Hollamon*, 2 Posey 294, 295.

#### e. Evidence as to Agreement.

**Approval of Line Run by Selected Surveyor Sufficient.**—Where the evidence showed that the plaintiff, owner of the north half of a survey, and a former owner of the south half, had engaged a surveyor to run the line between their respective tracts and that the line was approved by both, this is sufficient to establish the boundary line by agreement of the parties. *Carley v. Parton*, 75 Tex. 98, 100, 12 S. W. 950; *Lecomte v. Toudouze*, 82 Tex. 208, 213, 17 S. W. 1047.

Where the evidence shows that the parties made an agreement to settle the disputed boundary line, that they selected a surveyor, that the survey was fairly made by him, and acquiesced in and acted upon by the parties, these are sufficient facts to

sustain a verdict in favor of the agreed boundary line. *Coleman v. Smith*, 53 Tex. 254, 266.

**Merely Pointing Out Line Insufficient.**—In trespass to try title involving disputed boundaries, testimony by a tenant of one of the tracts that the owner of the other had pointed out the boundary line, but not showing that they had an agreement that it should be placed at that point, was insufficient to establish a boundary by agreement or create estoppel. *Hunter v. Malone*, 49 Tex. Civ. App. 116, 108 S. W. 709.

**Revoked Agreement Insufficient.**—Where there is no evidence that adjoining landowners ever agreed upon a boundary line further than that an agreement to exchange lands on each side of a certain line was once made but never carried out and subsequently revoked, it is not error to refuse a charge that the parties have established a boundary line by agreement. *Evans v. Foster*, 79 Tex. 48, 51, 52, 15 S. W. 170.

#### f. Effect of Agreement.

**Agreed Line Becomes Division Line of Parties.**—If the boundary line between two tracts of land is drawn at the wrong place, and the respective owners expressly agree that it shall be the line between them, or accept it and acquiesce in it as the boundary line for a long period of time, it becomes their established division line. *Harrell v. Houston*, 66 Tex. 278, 17 S. W. 731. And see *Webb v. Walters*, 39 Tex. Civ. App. 623, 87 S. W. 1051.

A line actually run and marked for the dividing line of the surveys must govern in a question of boundary between the plaintiff and defendant, where it was marked and established as the divisional line by agreement of the parties. *Dalby v. Booth*, 16 Tex. 563, 566.

It having been found that the western boundary line of the westernmost lot of eight contiguous city lots

was nine inches from the true line, the owners of the lots, in order to save the trouble of moving their buildings, entered into a written agreement to consider the actual boundaries of the lots as the true ones. Held, that this was a sufficient agreement to determine the boundaries of the lots. *Bonner v. Dale*, 62 Tex. 300, 303.

**Determines Extent of Ownership.**—Where adjoining landowners agree that a certain hedge is the boundary line, such agreement settles all questions between them as to the extent of their ownership. *Brown v. Johnson* (Civ. App.), 73 S. W. 49 (see 97 Tex. 627, no op.)

**Immaterial That Line Was Not Run When Agreement Made.**—Where the owners of adjoining tracts made an agreement as to the location of a division line in 1847, but, if no line had ever been run out or marked until 1881, the plaintiffs would still be entitled to recover, if, upon an extension of the division lines, according to the calls in the deeds between the original owners, the true location of the one in controversy should be found where the plaintiffs claim it to be. *Davis v. Mitchell*, 65 Tex. 623, 625.

**Unsigned Modified Agreement Leaves Original Agreement in Full Force.**—Where a disputed boundary line between lands of the plaintiff and defendant was fixed by agreement of the parties and survey thereunder, and later, defendant being dissatisfied with the result of the survey, a modified agreement was drawn up which defendant refused to sign, this left the original agreement in full force and effect. *Masterson v. Bokel*, 32 Tex. Civ. App. 509, 75 S. W. 42.

**Effect Can Not Be Avoided by Plea of Innocent Purchaser.**—An agreement, on trial of a boundary case, admitting title in the respective parties to the land called for in their deeds

"except in so far as the same may be defeated by the agreed boundary line" or by limitation, would seem to preclude one of them from avoiding the effect of the agreed boundary by the plea of innocent purchaser. *Sloan v. King*, 33 Tex. Civ. App. 537, 77 S. W. 48.

**Agreement to Run Line According to Deed of No Effect.**—Where the courses of a deed are clearly stated, any finding of arbitrators under an agreement that they shall run the lines "according to the deed" is of no effect, as the deed is decisive. *Coughran v. Alderete* (Civ. App.), 26 S. W. 109.

**Can Not Affect Public Domain.**—Agreements as to the location of a division line between owners of surveys considered as adjacent, can not in any way affect the public domain. *Ratliff v. Burleson*, 7 Tex. Civ. App. 621, 25 S. W. 983, 26 S. W. 1003 (see 93 Tex. 694, no op.).

#### g. Conclusiveness of Agreed Line.

**Agreed Line Not to Be Disturbed Except for Clear Proof.**—Where the parties have agreed upon and marked a boundary line, and the possession is in accordance with it for such a length of time as may give title by disseizin, the line can not be disturbed, although found to be erroneously established, unless there be clear proof that the possession was not adverse. *George v. Thomas*, 16 Tex. 74, 89. And see *Eberling v. Weyel*, 2 Posey 501, 507.

**Agreement Made in Ignorance May Be Canceled.**—A landowner whose land was claimed adversely, agreed to the appointment of parties to survey and settle the location of a line, under the belief that the controversy only involved the true location of that line, which was a common line between old surveys which had been patented. The adverse claimant had procured a patent to a narrow strip of land which he supposed to be between the old surveys which called for each other, and

the agreement for parties to settle the boundary was made by plaintiff in ignorance of the character of defendant's claim, and also in ignorance of the fact that the field notes of his own survey were not correct in his patent. Held, that plaintiff was entitled to a decree canceling the agreement. *Morrill v. Bartlett*, 58 Tex. 644.

## 2. By Recognition, Acquiescence and Estoppel.

### a. Recognition and Acquiescence.

#### (1) In General.

**Settlement of Disputed Boundaries Thereby Encouraged by Courts.**—Disputed boundary lines may be settled by parol agreement or by long acquiescence of the parties concerned; and the courts will not disturb such settlements, but will encourage them as a means of suppressing vexatious litigation, and of banishing from peaceful communities a fruitful source of discord. Such settlements are obligatory upon the heirs of the parties concerned, although they were minors at the time and the fact that contiguous proprietors derive their titles from the same source imparts additional force to the doctrine that their dividing line may be established by parol agreement between them, or by their acquiescence in it, whether it was the true line or not. *McArthur v. Henry*, 35 Tex. 801, 802; *Eberling v. Weyel*, 2 Posey 501, 507.

**Receivable in Evidence.**—The acquiescence of the proprietors of adjoining lands in a particular line is not unfrequently referred to and received as evidence to determine their boundaries. *Bolton v. Lann*, 16 Tex. 96; *Meriwether v. Asbeck* (Civ. App.), 25 S. W. 1100; *Provident Nat. Bank v. Webb* (Civ. App.), 95 S. W. 716 (see 101 Tex. 653, no op.).

#### (2) Weight to Which Acquiescence Entitled.

**Strong Presumption That Line Acquiesced in Is True Line.**—On the

question of the true locality of a common boundary, the fact that a particular line has been acquiesced in or recognized by the adjoining proprietors as their common boundary line is evidence entitled to great weight, and affords a strong presumption that the line so acquiesced in or recognized is the true line. *Floyd v. Rice*, 28 Tex. 341; *Lagow v. Glover*, 77 Tex. 448, 451, 14 S. W. 141; *Mullaly v. Noyes* (Civ. App.), 26 S. W. 145, 146, affirmed in 93 Tex. 715, no op.

**Presumption Strengthened by Lapse of Time.**—If the true boundary line be doubted or controverted, 'acquiescence of the parties in or their recognition of a particular line is evidence which should have great weight in determining their boundary, affording as it does a strong presumption that the line so recognized is the correct line, which presumption is strengthened by the lapse of time. *Floyd v. Rice*, 28 Tex. 341, 344. *Lagow v. Glover*, 77 Tex. 448, 451, 14 S. W. 141.

**No Fixed Lapse of Time Renders Presumption Conclusive.**—The presumption in favor of the line acquiesced in or recognized by adjoining proprietors as their common boundary line is strengthened by the lapse of time; but no statute of limitations or rule of law is known by which any definite time is fixed as the period at which such a presumption becomes conclusive. Other considerations beside the mere lapse of time are involved in determining how conclusive, in any particular case, the presumption in favor of a recognized boundary line is to be regarded. Each case must furnish its own rule, to be deduced by the court and jury from its own facts, circumstances and surroundings. *Floyd v. Rice*, 28 Tex. 341; *Koenigheim v. Sherwood*, 79 Tex. 508, 513, 16 S. W. 23.

Where a particular line has been acquiesced in or recognized by adjoining owners as their common boundary, it affords strong presumption that

such line is the true dividing line; and though this presumption is strengthened by lapse of time, no period has been fixed that would render it conclusive. Lapse of time, as evidence tending to establish acquiescence in a designated boundary, would depend for its force as evidence upon the degree of information possessed as to his rights by the party sought to be affected thereby. *Medlin v. Wilkins*, 60 Tex. 409.

**Statute of Limitations Not Applicable to Question of Boundary.**—While proof of lapse of time in connection with possession to a boundary and acquiescence therein is admissible to prove boundary, still there is no fixed period of limitation that would do so, as the laws of limitation are not applicable to a question of boundary. *Taylor v. Brown*, 8 Tex. Civ. App. 261, 266, 27 S. W. 911.

**Effect of Acquiescence—Question for Jury.**—Acquiescence of a party in the boundary line claimed by the adverse party under circumstances not amounting to an estoppel is a mere fact to be considered by the jury in determining the question of boundary. The court therefore properly refused a charge asked by defendant calling attention of the jury to the evidence of possession, and instructing "that long acquiescence by adjacent owners of a common boundary line affords a presumption that said line so acquiesced in is the true boundary line." *Schunior v. Russell*, 83 Tex. 83, 84, 18 S. W. 484; *Atascosa County v. Alderman* (Civ. App.), 91 S. W. 846 (see 101 Tex. 628, no op.); *Vogt v. Geger* (Civ. App.), 48 S. W. 1100.

While acquiescence in a line by the parties interested is entitled to great weight in ascertaining the locality of the line its effect is for the jury, and the court can not as matter of law instruct that acquiescence for any period will operate as an estoppel. *Bohny v. Petty*, 81 Tex. 524, 17 S. W. 80.

**To Be Conclusive Must Amount to Estoppel or Agreement.**—It is well settled that general reputation and long acquiescence, while strongly tending to show the true location of a disputed line, will not control, if it is otherwise shown to have been actually located elsewhere, unless the acquiescence amounts either to an estoppel or an agreement as to boundary. *Bohny v. Petty*, 81 Tex. 524, 17 S. W. 80; *Schunior v. Russell*, 83 Tex. 83, 18 S. W. 484; *Wiley v. Lindley* (Civ. App.), 56 S. W. 1001, 1002; *Camp v. League* (Civ. App.), 92 S. W. 1062, 1066 (see 101 Tex. 631, no op.). And see *Vogt v. Geyer* (Civ. App.), 48 S. W. 1100.

### (3) When Line Established Thereby.

**Acquiescence in Lines Actually Established.**—If the original co-owners of a tract of land, having a controversy as to the location of a division line between their respective portions, not only divided the land between them, but also actually ran out and marked the division lines, about the year 1847, and they and their privies have since acquiesced in and acted upon such delineation, until the defendant, in 1881, set up a new line, the plaintiff, claiming by the old line, is entitled to recover. *Davis v. Mitchell*, 65 Tex. 623, 625; *Smith v. Russell*, 37 Tex. 247, 248; *Wardlow v. Harmon* (Civ. App.), 45 S. W. 828, 829.

If the original owners did not extend their lines upon the ground, but some one claiming under one of them had the lines run out and marked, and this designation was accepted and acquiesced in for a number of years by the successive owners of the two parts, the boundary would be just as well established as if the lines were run by the original owners. *Davis v. Mitchell*, 65 Tex. 623, 625.

A marked divisional line, found upon the ground in 1838, recognized as the divisional line by the original

claimants of the adjacent tracts, and afterwards, for a series of years, by those claiming under them, though it may vary ten degrees, in a part of its length, from the course called for in the deed, could not be regarded as having been established in error, in a suit begun in 1862, and could not at that late day be corrected. *Browning v. Atkinson*, 46 Tex. 605, 606.

A recital in a party wall contract that the wall was built on the line between the lots, coupled with evidence showing knowledge of defendant's grantor of the actual location of the wall, and his acquiescence in the possession of the strip in controversy for 16 years by plaintiff's grantor, was sufficient to sustain a conclusion that the prior owners of the two lots agreed, at the time the wall was built, that the division line should be established as the center of the party wall, as indicated in the agreement. *Roberts v. Fellman Dry Goods Co.*, 42 Tex. Civ. App. 590, 92 S. W. 1060.

**Occupation in Ignorance of Established Line Does Not Destroy Effect of Acquiescence.**—Plaintiffs and defendant were adjoining landowners, the division line between the tracts having been recognized and acquiesced in for a period of 25 years. It was shown that by a correct survey that the line should have been further to the west. Held, that to plaintiff's claim of land according to the long established boundary line, defendant could not avail himself of the defense that he had for a long time occupied a few yards of land west of the recognized boundary, such occupancy being without any intention to encroach upon the land in dispute, but in ignorance of the exact location of the established boundary line. *Blassingame v. Davis*, 68 Tex. 595, 5 S. W. 402.

**Line Acquiesced in for Many Years.**—A division line which has been recognized and acquiesced in for 25 years, will not be disturbed, though

shown to be erroneous through a mistake of the surveyor in locating it. *Blassingame v. Davis*, 68 Tex. 595, 5 S. W. 402; *Sullivan v. Michael*, 39 Tex. Civ. App. 564, 87 S. W. 1061.

A boundary line fixed in 1857 by the court, and accepted by the adjoining owners for 20 years, will not be changed to conform with a survey made in 1877 by one of the owners, who thereafter claimed to the new line, and built a fence along that line the following year, and occupied the strip between the old line and the new for 15 years. *Stark v. Homuth* (Civ. App.), 45 S. W. 761 (see 93 Tex. 650, no op.).

#### **Recognizing Boundary Line in Deed.**

—A tract of land was held by a husband and wife as community property, and after the husband's death it was tacitly agreed that the north half was that of the husband's heirs and the south half that of the widow's. The heirs made a conveyance to the plaintiff and other mense conveyances, describing the southern boundary "to the south by the one-half of the Johnson survey and lines." The evidence showed that the widow supposed that the center line was the true one. Held, these facts were a sufficient recognition and acquiescence in the division line as to preclude a remote vendee of the widow from asserting that the boundary is farther north. *Carley v. Parton*, 75 Tex. 98, 101, 12 S. W. 950.

**Old Resurvey and Maps Showing Acquiescence.**—The resurvey and map of an old grant remaining in the office for over thirty years before the location on which the patent issued, showed an acquiescence in their correctness by the owner of the grant and his vendees. *Timon v. Whitehead*, 58 Tex. 290.

**When Injury Would Result from Nonenforcement.**—An agreement as to a boundary line may be implied from the acts and long acquiescence of parties in regard to the same which

should be enforced when a failure to enforce it would result in injury to subsequent purchasers, who have bought, relying upon acts open to their observation, and indicating the true boundary as recognized by those from whom they purchase and contiguous owners; and as between original owners who have acquiesced in a common boundary, whereby one of them had been induced to make permanent and valuable improvements, which he would not otherwise have made on land afterwards in controversy, the same should be enforced. *Hefner v. Downing*, 57 Tex. 576, 580.

#### **(4) Who Are Bound.**

##### **Party Not Acquiescing Not Bound.**

—Acquiescence by some of the plaintiffs will not bind the others when there is no evidence to show that they had any knowledge of an established line or that they had acquiesced in any such line. *Lagow v. Glover*, 77 Tex. 448, 451, 14 S. W. 141.

**Infant.**—An infant, acquiescing in the settlement of boundaries, after coming of age, will be bound by it. If he does not dissent when he comes of age, but acquiesces, he is forever bound. *George v. Thomas*, 16 Tex. 74, 89.

##### **Married Woman and Assigns.**

Where a married woman and her minor daughter acquiesced in a boundary line as run for many years, recognizing it as the boundary in several deeds between themselves and to third parties, neither they, nor parties claiming under them, can, after such recognition and acquiescence, establish another boundary as being the correct one. Public policy forbids such pretensions so adverse to private rights and the public tranquility. *George v. Thomas*, 16 Tex. 74, 91.

##### **Married Woman Assenting to Line Established by Husband.**

—If it were necessary to the just decision of the case, it might very well be held that the husband is competent to represent



his wife in the matter of running a boundary line. If done fairly and honestly, and acquiesced in by her, it ought to be as binding upon her as upon others. *George v. Thomas*, 16 Tex. 74, 89.

**b. Estoppel.**

See, generally, the title **ESTOPPEL**.

**(1) Conditions Essential to Estoppel.**

**There Must Be Representations.—**

An intervenor, not showing that he acted upon any statement or representation of the plaintiff as to the boundaries, does not establish an estoppel. *Koenigheim v. Sherwood*, 79 Tex. 508, 16 S. W. 23.

If plaintiff and defendant's grantor in locating a boundary fence acted under a mistake that the line thereof was the boundary line, neither would be estopped from showing that it was not in fact the real boundary line or from showing where such line really is, and plaintiff not having represented, nor induced defendant to believe, when defendant purchased, that the fence was on the line, defendant is in no better position than his grantor, and plaintiff was not estopped to show that the fence was located by mistake and was not on the line. *Weston v. Meeker* (Civ. App.), 109 S. W. 461.

Plaintiff and his family had a homestead in one-half of a city lot, but a narrow strip thereof was inclosed with the other half of the lot by a fence. Defendant purchased the adjoining lot without any inquiry as to the true boundary, and subsequently erected improvements which encroached upon the strip belonging to plaintiff. Plaintiff did not object to the erection of the improvements on his land, nor did he make any misrepresentations inducing their erection thereon; but his wife, upon learning that defendant was occupying the strip, objected thereto. Held, that plaintiff was not estopped from asserting the true boundary between his homestead and defendant's lot. *Werkheiser v. Foard* (Civ. App.), 108 S. W. 983.

Where there was no evidence that representations had been made by the owner of land to purchasers of adjoining land in regard to his boundaries, it was not error to refuse to charge that an owner is bound by lines fixed by him, and recognized as his boundaries, and is estopped from denying them as against purchasers of adjoining land to whom he pointed them out as his boundaries at the time of their purchase. *Stanus v. Smith*, 8 Tex. Civ. App. 685, 30 S. W. 262.

**Representations Must Be Acted upon.—**

Where, in trespass to try title, a strip between adjoining landowners was in question, and defendant claimed that, when he bought, a certain line was pointed out to him by the grantor, which included the land in question, as the boundary line, the fact that the other party to the action afterwards admitted such line to be the true boundary did not estop him to deny its location, defendant not having bought on his representation. *Davidson v. Pickard* (Civ. App.), 37 S. W. 374. And see *Koenigheim v. Sherwood*, 79 Tex. 508, 16 S. W. 23.

**Party Asserting Estoppel Must Be Misled.—**

Plaintiff owned the south half of a fractional lot of one hundred feet width. In enclosing it by mistake he placed his fence seven feet south of his north line. The owner of the north half joined fences with the plaintiff, thus enclosing the seven feet with his north half. The defendant, before his purchase, knew of the excess and made other improvements upon the land in dispute. The plaintiff did not know his fence had not been placed upon his north line until a short time before he instituted suit. Held, that such testimony did not require a charge upon the facts as constituting an estoppel. The charge properly recognized the principle that if defendant or his grantor was misled by the acts of the plaintiff, or by the position of the fence at the time of his purchase, the plaintiff would be

estopped to claim the land in dispute. *Bohny v. Petty*, 81 Tex. 524, 17 S. W. 80.

To establish a boundary by agreement or create an estoppel, somebody must have been misled to their injury, and mere acquiescence in a boundary, where no one has been induced to change his situation, for a period short of the longest period of limitation, would not be sufficient. *Hunter v. Malone*, 49 Tex. Civ. App. 116, 108 S. W. 709.

**Party Asserting Estoppel Must Be Injured.**—N., owning surveys 5 and 6, sold to L. survey 5, which lay east of survey 6, pointing out as the dividing line a line east of the true line, on which N. had built a fence, supposing such line to be the true line. Thereafter L., acting for N., showed survey 6 to defendant, pointing out the supposed dividing line. N., then made a contract to sell defendant 160 acres out of survey 6. Subsequently N. gave defendant a special warranty deed for 160 acres lying immediately west of said fence. Between the making of the contract and the giving of the deed, N. and L. had learned the true dividing line, and L., having taken possession and cultivated up to that line, had deeded survey 5 to plaintiff, to whom he had pointed out the true line, and who had no notice of the contract between N. and defendant, which had not been filed. Held, that, in the absence of evidence that defendant would be injured by taking the 160 acres west of the true dividing line, plaintiff was not estopped from claiming the land up to that line by reason of the fact that his grantor pointed out to defendant the fence as the dividing line. *Hollingsworth v. Fowlkes*, 6 Tex. Civ. App. 64, 22 S. W. 1110, 24 S. W. 708.

## (2) From What Estoppel Results.

**Recognized Line—Third Persons Acquiring Rights with Reference Thereto.**—If a line be recognized and

acquiesced in by owners of adjacent lands, persons acquiring rights with knowledge of such recognition or acquiescence will be entitled to protection, for under such circumstances the owner, as to such person, ought not to be heard to say that the recognized line was not the true line. *Lagow v. Glover*, 77 Tex. 448, 451, 14 S. W. 141.

**Brief Acquiescence by Parties in Line.**—The fact that adjoining landowners acted on a boundary line for six years, and until plaintiff discovered a shortage in his acreage, when he contended that the line was established by mistake, did not constitute an estoppel against plaintiff's obtaining a determination of the true boundary, but his acquiescence was a fact proper to be submitted to the jury. *Wiley v. Lindley* (Civ. App.), 56 S. W. 1001.

**Long Acquiescence in Line as Run.**—In a suit involving the boundary line between two adjoining landowners, where the evidence showed that they had acquiesced in the line run by a surveyor as their boundary, from 1838 to 1860, and that the defendant, who then sought to have the line established farther west in accordance with later and more accurate surveys, had always understood that the original line was the true boundary, the defendant was estopped to assert that the boundary line was farther west and a verdict in favor of the defendant was plainly contrary to the evidence. *Porter v. Miller*, 76 Tex. 593, 595, 13 S. W. 555, 14 S. W. 334.

In 1858 parties owning land in contiguous surveys took possession of their respective tracts, leaving a lane one hundred yards wide between their fences, the boundary, as claimed by one of the parties, being a line running through this lane and terminating opposite a spring called for in the field notes. The lane was afterwards, by mutual consent, reduced in width to forty feet, by both parties moving

their fences towards the center of it, the line from opposite the spring still running through it. In 1874 a surveyor ran a division line for the claimants, when one of them, whose fence was found to be over the line thus established, withdrew his fence to the line then run, where it remained until 1880, when suit was brought by the other party against the vendee of him who had moved his fence to establish that line. Held, the facts sufficiently established an acquiescence in the boundary line fixed in 1874 to estop the plaintiff from disavowing and holding up to a different line. *Davis v. Smith*, 61 Tex. 18.

**Deed Made with Reference to Line.**

—Where a dividing line is established between tracts of land owned by a county, before purchases are made of land on each side of it, and the deeds under which parties claim have been made, and are known by the parties to have been made with reference to that line, they, and all the persons claiming through them, are bound by it. *Briscoe v. Puckett* (Sup.), 12 S. W. 978.

**Party Not Estopped to Assert That Description of Line in Deed Is Erroneous.**

—In trespass to try title, where the dispute is as to boundaries, and defendant's deed calls for the land adjoining that of plaintiff, but describes the disputed line as running 38 varas north of the boundary as claimed by defendant, such deed does not estop defendant from showing that the latter description was a mistake. *Meriwether v. Asbeck* (Civ. App.), 25 S. W. 1100.

**Marking Boundaries and Recording Evidence Thereof.**

—Where a landowner marks his boundaries and records the evidence thereof, he is estopped from averring as against a subsequent locator that other and different lines than those marked and recorded enclosed the land. *Timon v. Whitehead*, 58 Tex. 290.

**Negligence in Marking Boundaries.**

—And if a party establishes and marks a boundary to his land without the exercise of proper care in determining the true line, his negligence has the same effect as to third parties misled by it as if he had acted knowingly. *Hefner v. Downing*, 57 Tex. 576.

**Inducing Third Party to Act with Reference to Marked Boundary.**

—Although the owner of land may have been misled by the false misrepresentations of the owner of the adjoining tract to mark a division line between them differing from the true line, he will be bound by that line as to a third party who has been induced by his having marked and acquiesced in it to believe it to be the true line, and to purchase and make valuable improvements relying on it, but a third party would not be protected who had notice that the line was not recognized by the owner of the contiguous tract. *Hefner v. Downing*, 57 Tex. 576.

If the holder of an older grant had, by monuments or other notorious designation, established his boundary line in such a manner as to induce the public to believe it to be his true boundary, and subsequent locators had made their locations in the belief that it was his true boundary line, then the older grant could not be extended for quantity beyond that line. Thus where such holder set up and claimed a certain line as the eastern boundary of his grants, though his boundary on that side was not defined by calls either for monuments or for courses and distances, and his grant called for seven and a half leagues, held, that by his claim of such boundary line in the present suit, he will be estopped, as against subsequent locators, from asserting title to any land east of such line, even though the quantum of his grant be not contained within the area circumscribed by such line. *Welder v. Hunt*, 34 Tex. 44, 45.

**Estoppel of Purchaser by Reliance upon Marked Boundary.**—Plaintiff's father, who conveyed the land to him as a gift, while owner caused the boundary line to be established and permanently marked, and defendant, while the line was so recognized, bought the adjoining tract, relying on such boundary, and made improvements, and occupied the land for many years without adverse claim by plaintiff. Held, that the latter was estopped to deny that such line was the true boundary. *Anderson v. Jackson* (Sup.), 13 S. W. 30.

Adjacent landowners agreed upon a division line upon which they built a fence. The plaintiff, subsequently purchasing from one of the parties, is estopped from attacking said agreement. *Eddie v. Tinnin*, 7 Tex. Civ. App. 371, 26 S. W. 732.

The purchasers of city property bounded by streets were concluded by the previous acts of their vendor in exchanging with the city a strip upon one side of the block for a similar strip of the street on the opposite side, widening one street and narrowing the other, where they bought with knowledge and after the new boundaries had been marked by enclosures. *Scott v. Marlin*, 25 Tex. Civ. App. 353, 60 S. W. 969, affirmed in 94 Tex. 701, no op.

**Vendor Misrepresenting Boundaries.**—In trespass to try title, where M., the common grantor of plaintiff and defendant, owned a certain tract of land adjoining land belonging to G., and defendant, knowing the boundary line of G.'s tract, purchased a tract from M. under M.'s representation that the tract extended to G.'s boundary line, if defendant would not have bought the land from M. but for the misrepresentations, then M. and plaintiff, who claimed under a deed of gift subsequent to defendant's deed, would be estopped from denying that the boundary line of G.'s tract was the

true boundary line of the land conveyed to defendant, and defendant should recover. *Mars v. Morris*, 48 Tex. Civ. App. 216, 106 S. W. 430, 431.

**Pointing Out Boundary and Action Thereon by Other Party.**—W. made a deed to A. of part of a block, describing it as "beginning at its N. E. corner, thence south 82 feet." It was understood that A. desired to buy enough off the north end of the block for a residence, and W. and A. had gone on the land, and, by an erroneous measurement, had fixed the N. E. corner 18 feet further south than it really was. From there they measured 82 feet south. Had they measured from the true N. E. corner, enough land would not have been given A. to build on, because of a gully at the north end. After the lines were thus run, A. built a fence along the south line so fixed, and a house close to it. Held, that A. got title to all land north of the fence, either on the theory of an agreed boundary or by estoppel, he having acted on the boundary pointed out. *Parrish v. Williams* (Civ. App.), 79 S. W. 1097; *Pardue v. James*, 74 Tex. 299, 305, 12 S. W. 1.

In an action involving the true location of a boundary line between plaintiff's and defendants' lots, it appeared that before the conveyance to defendants the lots were surveyed, and it was found that plaintiff's building stood 20 inches beyond the surveyed line, and upon the other lot; that plaintiff refused to buy this narrow strip, but tore down his building, and he and defendants' grantor built a fence on the surveyed line; that after defendants purchased they told plaintiff they were going to build, and wanted the matter of boundary line thoroughly understood, and would like to build where it would be no inconvenience to plaintiff; that they then spoke of the surveyed line as the dividing line, and plaintiff suggested that defendants build on a place partly included in the

disputed strip, which they did. Held, that plaintiff was precluded from denying that the surveyed line was correct. *Garza v. Brown* (Sup.), 11 S. W. 920.

**Disclaiming Ownership.**—Where the purchaser of the two quarter-sections fenced one of his lines in accordance with the corners established by a resurvey, and declared that he did not claim the land between such fenced line and the line of the adjacent survey, he will be estopped thereby as against another purchaser who, relying on such acts and statements, purchases from the common grantor such land lying next to the adjacent survey. *Holland v. Thompson*, 12 Tex. Civ. App. 471, 35 S. W. 19.

**Representations of Agent.**—A landowner who authorizes another to survey his lands, establish boundaries, and sell the lands is bound by the latter's representations as to the boundaries of the lands. *New York, etc., Land Co. v. Gardner* (Civ. App.), 25 S. W. 737.

**No Estoppel in Absence of Assent to Line.**—Where, in an action for the recovery of land, there is no evidence that plaintiff, by act or word, assented to the location of the boundary line claimed and used by the defendant, he is not estopped, unless by the statute of limitations, from asserting his claim. *Horst v. Herring* (Sup.), 8 S. W. 306.

**No Estoppel from Line Established in Prior Suit.**—Upon an issue of boundary it was shown that plaintiff, several years before, recovered in a suit the land that he claimed to be in the survey here in controversy, and had a writ of possession executed, and appointed an experienced surveyor who received possession from the sheriff, and that the line selected by him was the same as here contended for by defendant. Held, that such facts did not constitute an estoppel. *Hornberger v. Giddings*, 31 Tex. Civ. App. 283, 71 S. W. 989.

**No Estoppel from Recognized Boundary of Land Not in Dispute.**—

That a party holds a tract of land not in controversy under a deed calling for the San Antonio road as a boundary at a known locality, does not estop him from showing another locality for the road in determining the boundary of the lands in litigation. *Griffith v. Rife*, 72 Tex. 185, 12 S. W. 168.

**No Estoppel from Adoption of Divisional Line Wrongfully Established.**

—If one whose community interest in land inherited from a deceased father, has been in part illegally bartered away by the mother, who also owned a half interest, shall, upon reaching his majority, sell by metes and bounds less than his half interest, and adopt a divisional line formerly established as a partition by the mother, dividing the land in half, he thereby ratifies the partition line, but his sale of the exact quantity that would have been left him had the sale by his mother been valid, will not estop him from asserting right to the residue to which he was of right entitled. *Stone v. Ellis*, 69 Tex. 325, 7 S. W. 349.

**No Estoppel from Agreement with Other Adjoining Owner.**—

Where a dispute arises as to the eastern boundary of a certain survey, an agreement by the owner with a neighbor owning part of the land east, bringing the line westward, does not estop such owner to assert, as against one claiming other land east, that the line as originally claimed by such owner is the true boundary. *Langermann v. Nichols* (Civ. App.), 32 S. W. 124.

**No Estoppel from Pointing Out Line to Tenant of Adjoining Tract.**—

If the owner of land pointed out the boundary line to a tenant occupying the adjoining tract, and such tenant placed a fence on the line designated, the owner was not estopped, independently of adverse holding or limitations, from claiming to the true line. *Hunter v. Malone*, 49 Tex. Civ. App. 116, 108 S. W. 709.

**No Estoppel from Surveyor's Establishment of New Line Contrary to Instructions.**—The former owner of a tract of land, under whom plaintiff claims, employed a surveyor to resurvey his land and to remark his lines which had been destroyed by time and fire; the surveyor established two new corners which cut down the area of the original survey. By his own testimony the surveyor admits that he disregarded the instructions he received and that he had no authority to establish new boundary lines. Therefore, the plaintiff is not estopped to assert his true line as against the defendant, who holds under a patent subsequent to the plaintiff's grant, and especially where the plaintiff, the next year after the above survey was made, employed a surveyor to sectionize his land and instructed him to disregard that line, and the land was so sectionized before the defendant's claim had any existence. The plaintiff did nothing to mislead the defendant and hence the doctrine of estoppel in pais can not apply. *Love v. Barber*, 17 Tex. 312.

**No Estoppel from Building Fence on Line Claimed by Other Party.**—In a suit involving land boundaries, the fact that plaintiff put a fence on the line which defendant claimed was the true boundary, does not estop the plaintiff from showing that the line was in a different place. *Pierce v. Schram* (Civ. App.), 53 S. W. 716.

**No Estoppel from Acts of Unauthorized Agent.**—Where in a boundary suit plaintiff offered to prove that prior to the sale to him A represented the vendors of defendants, and acting as their agent and attorney at law, had negotiated a sale of 320 acres of land to defendants, and at the same time two or three other tracts to plaintiff, and that it coming to the attention of witness N, he approached A and conversed with him about the matter and showed him that he was not entitled

to the land claimed; whereupon A discontinued his attempt to sell, and disclaimed any intention to go outside of a 320 acre tract, which said N recognized as the Delespine claim, and so notified the defendants and others. No such agency on the part of A is shown as that his statements would bind the defendants; and furthermore, if the question of agency were not involved, the proposed testimony does not show sufficient facts to constitute an estoppel. *Dwyre v. Speer*, 8 Tex. Civ. App. 88, 92, 27 S. W. 585.

**Failure to Reserve Claim Defeats Adverse Possession.**—Defendant may not claim adverse possession of a narrow strip of land along the boundary line between his land and plaintiff's, and inclosed by defendant, where, prior to the 10 years' bar, they employed a surveyor to run the boundary line, and defendant did not then reserve his claim to hold to plaintiff's fence, including such strip. *McDonald v. McCrabb*, 47 Tex. Civ. App. 259, 105 S. W. 238. See, generally, the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

### 3. Private Survey.

**Boundaries Fixed by Resurvey.**—If the boundaries of a survey can be ascertained and established by a resurvey, following the calls in the title and map forming a part of it, and the ancient landmarks made for its identity by the original surveyor; or if its locality can be proved by witnesses, who, from their personal knowledge, or information derived from general reputation, or from its having been pointed out to them by the surveyor by whom it was run, or by others who were present at the time or cognizant of the facts, it will fix or mark its position, although there may be a discrepancy between its position thus ascertained and that given by the calls, or the plot of the grant. *Welder v. Carroll*, 29 Tex. 317, 318.

**Private Survey Correcting Erroneous Calls Controls.**—Where, in a private survey of land described in a deed, the surveyor abandons a call for the beginning corner, which was clearly erroneous, and adopts a new beginning corner, whereby the boundaries are made to comply substantially with the other calls of the deed, in determining what land was conveyed by the deed the boundaries as fixed by the survey will control. *Blackburn v. Norman* (Civ. App.), 30 S. W. 718.

**Owner Estopped to Deny Correctness of Survey.**—Where a landowner surveys a boundary line for his land, which is publicly marked, and sells land with reference thereto, he is estopped from denying the correctness of its location as against one locating land with reference thereto. *New York, etc., Land Co. v. Gardner* (Civ. App.), 25 S. W. 737.

**Purchaser Not Bound by Survey.**—Where the purchaser of a tract of land bounded by one of the lines of an original survey caused the same to be surveyed at the time of his purchase, he is not bound by the later survey, and the original boundary line can be located on the ground. *Wiley v. Lindley* (Civ. App.), 56 S. W. 1001.

**Private Survey Does Not Affect True Boundaries.**—Where a deed conveys a certain tract of land known as "Subdivision 3," and the parties to the deed have a survey made, which locates the north boundary some distance south of the true line, the strip between the two lines remains the property of the grantor. *Reed v. Phillips* (Civ. App.), 33 S. W. 986.

### C. ESTABLISHMENT BY JUDICIAL PROCEEDING.

#### 1. Boundary Suit.

##### a. What Constitutes.

**Comprehensive Definition.**—Broadly stated, every action for the recovery of land and in which a question of the true location of any line of a survey

may become involved, is a boundary case. The words admit of that construction. On the other hand, a narrow limitation of the scope of the terms would restrict their meaning to cases brought by one owner of a tract of land against the owner of a contiguous survey to determine one or more of the boundary lines between them. *Cox v. Finks*, 91 Tex. 318, 320.

**Criterion: Case Must Be Founded Solely on Boundary Dispute.**—Whether a suit is or is not one of boundary merely, depends upon the answer to the question: If there had been no question of boundary, would there have been any case? If so, it is not a boundary case. If not, it is a case of boundary pure and simple. In other words, the whole litigation must grow out of a question of boundary. There may be a question of boundary as to two grants, one owned by one party to the suit and the other claimed by both. A suit by one to try the title to the survey in controversy may involve a question as to the boundary between that and the other. This would not be a boundary case within the meaning of the statute. So, on the other hand, a question as to the location of a boundary line may be the ground of the litigation, and yet questions of title may become involved. This may be true in every action to settle a controversy as to the dividing line between two adjacent surveys. The defendant may, if he sees proper to do so, put the plaintiff upon proof of his title—may assail the validity of that title and defeat the action, should the plaintiff fail to make it good. *Cox v. Finks*, 91 Tex. 318, 320; *Davis v. McCabe* (Civ. App.), 46 S. W. 837 (see 93 Tex. 658, no op.).

Where the right of parties to an action involving the title to land depends solely on location, which must be determined by the boundaries of different tracts of land, then we have what the law designates as a "case of

boundary." *Schley v. Blum*, 85 Tex. 551, 553, 22 S. W. 667; *Steward v. Coleman County*, 95 Tex. 445, 67 S. W. 1016, affirming 65 S. W. 383; *Burnett v. Powell*, 6 Tex. Civ. App. 39, 25 S. W. 1030 (see 86 Tex. 382); *Wright v. Bell*, 94 Tex. 577, 63 S. W. 623 (see 59 S. W. 615, 60 S. W. 873, 63 S. W. 159).

Thus, the plaintiffs acting upon the assumption that there was unappropriated public domain between a certain large survey, and the surveys north of it, undertook to appropriate the whole of such tract by virtue of what is known as a Confederate Veteran Certificate, and also in part by a purchase under what is known as the Scrap Act. They brought suit, and the defendants, disclaiming as to all except a portion of the land sued for, demanded a severance of the case. The land claimed by them was that portion which was covered both by the location of the certificate and the alleged purchase. They claimed that there was no vacancy and that the land in controversy was within the limits of the Nancy Burwell survey. Whether there was a vacancy or not, depended upon the true location of the north boundary line of the Burwell survey. But for the question as to that line, the controversy could not have arisen—there would have been no case. Every issue in the case and in the whole case involves the determination of that question of boundary, and the case therefore is one of boundary. *Cox v. Finks*, 91 Tex. 318, 321.

**Agreement of Parties May Make a Boundary Suit.**—Although an action be nominally brought as an action of trespass to try title, yet where by agreement of the parties the only matter in issue is the true position of a boundary line, and all the evidence relates to that one issue, the case becomes a boundary suit. *Reed v. Cavett*, 1 Tex. Civ. App. 154, 156, 20 S. W. 837.

Pending suit of trespass to try title the parties made the following agree-

ment: "It is agreed between us that the plaintiff owns the Willis West survey and 200 acres out of the north part of block 4, Gray league, and the defendants the remainder of block 4 south of plaintiff's 200 acres. For the purpose of showing the true locality of the land either party may offer in evidence their deeds, or such deed as they may see proper, and any other fact explanatory bearing upon the true locality of such land." Held, the court properly limited the issue to the locality of the boundary line. *White v. McFarlin*, 77 Tex. 596, 14 S. W. 200.

**Where Only Application of Field Notes Involved.**—Where the construction of an instrument only involves the application of field notes to land, the case is one of boundary. *Hanrick v. Wheeler* (Civ. App.), 49 S. W. 414 (see 93 Tex. 685, no op.).

**Party Pleading Established Boundary Line and Disclaiming Land on Opponent's Side.**—In trespass to try title, where defendant pleads not guilty, and specially pleads the establishment of a division line, and disclaims all on plaintiff's side, the action, in effect, becomes one to establish a boundary, and plaintiff is not required to prove a superior title to the lands on his side of the alleged boundary. *Wardlow v. Harmon* (Civ. App.), 45 S. W. 828.

#### b. Who May Bring and How Brought.

**Owner May Bring Suit When Adjoining Owner Prevents Line Being Run.**—Where part of a tract of land has been sold by description, and the owner of one part refuses to permit the owner of the other to run the line where the latter claims it should be run, the latter may bring suit to have the line judicially ascertained and determined; but if it appear that the division line has been previously ascertained and marked by the parties or their privies, the suit can not be maintained. *George v. Thomas*, 16 Tex. 74.

**Need Not Be Brought Avowedly to Settle Boundary Line.**—It is not neces-



sary, in order to make a boundary suit, that the action should be brought avowedly to settle the true location of the dividing line between two contiguous surveys. *Cox v. Finks*, 91 Tex. 318, 320; *Schley v. Blum*, 85 Tex. 551, 22 S. W. 667.

**Disputed Boundaries May Be Determined in Trespass to Try Title.**—A dispute as to the boundaries may be determined in an action of trespass to try title, but only where facts are alleged sufficient to support that action. *Nye v. Hawkins*, 65 Tex. 600; *Weaver v. Vandervanter*, 84 Tex. 691, 19 S. W. 889. See, generally, the title TRESPASS TO TRY TITLE AND EJECTMENT.

**May Be Brought against All Adjoining Owners.**—The boundaries of plaintiff's survey may be settled in one suit, brought for that purpose against the respective owners of the adjoining tracts between which said survey lies. *Muncy v. Mattfield* (Civ. App.), 40 S. W. 345.

**c. Nature.**

**Boundary Suit an Action for Specific Performance.**—When a suit is purely one of boundary, it is in the nature of an action for specific performance of the implied contract between the owners to establish their boundary line. *George v. Thomas*, 16 Tex. 74, 86; *Lyon v. Waggoner*, 37 Tex. Civ. App. 205, 83 S. W. 46, 47, affirmed in 101 Tex. 665, no op. See, generally, the title SPECIFIC PERFORMANCE.

**d. Finality.**

**No Second Suit Allowed When Parties and Subject Matter the Same.**—No second suit to settle boundaries was allowed by the law of this state, by and between the same parties, and in relation to the same subject matter prior to adoption of the Revised Statutes. And when the suits were, in their real nature, suits to settle disputed boundaries, it was immaterial that nominally and in form they were brought as actions of trespass to try

title; and the defense of *res adjudicata* was available against the second suit in like manner as though the suits were, in form as well as in fact, equitable proceedings for the settlement of the disputed boundary. *Bird v. Montgomery*, 34 Tex. 713, 714. And see *Bird v. Pace*, 26 Tex. 487.

Where, in an action nominally to try title to land, but really to determine the true locality of a divisional line between the litigants, the title of each party is admitted by the other, the final judgment is conclusive, and no right to a second action existed under the law in force before the adoption of the Revised Statutes. *Spence v. McGowan*, 53 Tex. 30, 34; *Corporation of San Patricio v. Mathis*, 58 Tex. 242; *Barbee v. Stinnett*, 60 Tex. 167.

**Second Action Allowed under Revised Statutes Only When First Begun before Their Adoption.**—And the Revised Statutes provide that such second suits may be brought only in cases where the first action was begun before their adoption, viz, September 1, 1879. The question must therefore soon cease to be of any practical importance. *Corporation of San Patricio v. Mathis*, 58 Tex. 242, 243.

**Judgment Not Conclusive Where No Real Issue of Boundary.**—Although there may be no ambiguity or inconsistency apparent in the description of land in a muniment of title, it may be shown upon the ground itself, that certain land is not embraced within such description; and the rule applies to a judgment for land in trespass to try title where, on the trial, there was no real issue of boundary. *Wood v. Cahill*, 21 Tex. Civ. App. 38, 50 S. W. 1071 (see 93 Tex. 744, no op.).

**Judgment Not Conclusive When Not Apparent upon Which of Several Grounds Based.**—A judgment in a former suit establishing the meanders of a creek as the line of the land here as also there in controversy, is not *res adjudicata* as to the location of such

line where, in the former action, the party so claiming the creek as the line, also claimed by limitation, and it does not appear on which ground the jury found in his favor. *Griffin v. Barbee*, 29 Tex. Civ. App. 325, 68 S. W. 698. See, generally, the title RES ADJUDICATA.

**Judgment Not Conclusive in Case of Retraxit.**—In an action of trespass to try title against several defendants, the question involved was the location of a boundary line. One of the defendants owned 134 acres of the tract sued for as described in the petition. On the trial it was made known to the court by both parties that the question of boundary alone was in issue. The defendant did not exhibit his title to that portion of the land sued for owned by him. The judgment was for the plaintiff, that he recover the land. Held, that parol testimony was competent to prove the retraxit; and upon it appearing that boundary alone was put in issue, the rights of the defendant to his land included in the plaintiff's petition were not concluded. *Freeman v. McAninch*, 6 Tex. Civ. App. 644, 24 S. W. 922, reversed in 87 Tex. 132. See, generally, the title RETRAXIT.

## 2. Jurisdiction.

### a. Court of Law.

**Ambiguities Removed in Trespass to Try Title—Equitable Action Not Necessary.**—An equitable action is not necessary in order to remove an ambiguity or uncertainty in the calls of a deed or patent. It may be done in the ordinary action or trespass to try title. *Williamson v. Simpson*, 16 Tex. 433, 442; *Berry v. Wright*, 14 Tex. 270, 273; *Loving v. Corcoran*, 26 Tex. 92, 93; *Urquhart v. Burleson*, 6 Tex. 502, 513; *Hughes v. Sandal*, 25 Tex. 162, 164; *Sloan v. King*, 33 Tex. Civ. App. 537, 543, 77 S. W. 48; *Green v. Burns*, 9 Tex. Civ. App. 660, 29 S. W. 545, 548.

### b. Court of Equity.

**Grants No Relief unless Boundaries**

### Can Not Be Found without Its Aid.

One of the settled rules of equity, in cases of confusion of boundary, is, that a court of equity will not undertake to grant relief, unless it be shown that, without the assistance of the court, the boundaries can not be found. And when a plaintiff is able to aver the true locality of a boundary line and that the natural objects, called for in a deed to fix its true locality, still exist, and does so aver, he then shows a case, in which, within the meaning of the law, no confusion of boundary can exist. *Nye v. Hawkins*, 65 Tex. 600, 603.

### Must Be Equitable Ground in Addition to Confusion of Boundaries.

It is true that courts of equity from early times, under certain circumstances, have exercised jurisdiction to establish disputed boundaries, but no case is found in which this power was exercised on the sole ground that a boundary was in controversy. The general rule now adopted is, not to entertain jurisdiction in cases of confusion of boundaries, upon the ground that the boundaries are in controversy, but to require that there should be some equity superinduced by the act of the parties, such as some particular circumstances of fraud, or some confusion as where one person had ploughed too near another, or some gross negligence, omission or misconduct on the part of the person whose special duty it is to preserve or perpetuate the boundaries. *Nye v. Hawkins*, 65 Tex. 600, 603; *Lutcher v. Norsworthy* (Civ. App.), 27 S. W. 630.

### Possession by Adverse Party Not Necessary.

—A rule in equity is, that, in order to obtain relief from a court of equity, the plaintiff must show a clear title to some land in the possession of the defendant. This rule, perhaps, might be extended so as to embrace cases in which, without possession, there is an adverse claim arising from a disputed boundary, if the other

facts were such as to justify the interposition of a court of equity. *Nye v. Hawkins*, 65 Tex. 600, 604.

**No Jurisdiction When Complete Relief Available in Trespass to Try Title.**

—The facts which would authorize a proceeding in equity to settle a disputed boundary, under the settled rules governing courts of equity in England and America, would in this State authorize the statutory action of trespass to try title, in which the question of true boundary may be as definitely settled as in any other form of procedure. When, by such an action, complete relief can be given, a court of equity would refuse to act. *Nye v. Hawkins*, 65 Tex. 600, 604. And see *Lutcher v. Norsworthy* (Civ. App.), 27 S. W. 630.

**No Relief Where All Parties Equally Informed.**—Where the means of information are equally open to both parties; and where each is presumed to exercise his own skill, diligence and judgment, in regard to all extrinsic circumstances, equity will not relieve. In like manner, where the fact is equally unknown to both parties; or where the fact is doubtful from its own nature; if the parties have acted with entire good faith, as it can not be doubted they did in this instance, a court of equity will not interpose to afford relief on the ground of a mistake of fact. In this case the means of information were alike accessible to all the parties. The necessity of resorting to those means, if they intended their rights in the partition to be governed by the position of Cole's corner, was apparent when they failed to find it. That was the time to have ascertained or established its true position. Having disregarded it then, and gone on to make partition upon other and different data, it was afterwards too late to complain of the mistake. *Hoxey v. Clay*, 20 Tex. 582, 586.

**c. Of Particular Courts.**

**District Court.**—The district court

of one county has jurisdiction to determine a question of boundary of lands in another, where neither party objects. *Thompson v. Alford*, 20 Tex. 491.

**Courts of Civil Appeals—Jurisdiction Final.**—The jurisdiction of the court of civil appeals over questions of boundary is final, and a writ of error was improvidently granted and will be dismissed, where, had there been no question of boundary, there would have been no case. *Wright v. Bell*, 94 Tex. 577, 63 S. W. 623 (see 59 S. W. 615, 60 S. W. 873, 63 S. W. 159); *Davis v. McCabe* (Civ. App.), 46 S. W. 837 (see 93 Tex. 658, no op.).

**Findings Not Reviewable by Supreme Court.**—Findings by the court of civil appeals as to locality of lines of surveys, and whether surveys are adjoining or are detached, are findings of fact. Such decision can not be revised in the supreme court. *Gep. Laws 1892*, p. 26. *Schley v. Blum*, 85 Tex. 551, 22 S. W. 667; *Meade v. Warring*, 90 Tex. 121, 37 S. W. 598.

**Supreme Court—No Jurisdiction by Writ of Error.**—Where the issue in a suit of trespass to try title is one of boundary, the supreme court has no jurisdiction to grant a writ of error, although the judgment of another court, pleaded as an adjudication settling the boundary, may be involved in determining such issue. *New York, etc., Land. Co. v. Votaw*, 91 Tex. 282, 42 S. W. 969; *Wright v. Bell*, 94 Tex. 577, 63 S. W. 623 (see 59 S. W. 615, 60 S. W. 873, 63 S. W. 159); *Burnett v. Powell*, 6 Tex. Civ. App. 39, 25 S. W. 1030 (see 86 Tex. 382); *Smithers v. Smith*, 98 Tex. 83, 81 S. W. 283. See two preceding paragraphs. And see, generally, the title APPEAL AND ERROR, vol. 1, p. 389. See also post, "Appeal and Review," II, C, 10.

**3. Pleading.**

See, generally, the title PLEADING.

**a. Petition.**

**Petition in Ordinary Form of Trespass to Try Title May Be Used.**—It is a common practice in this state, in determining the question of the boundary lines between adjoining surveys, to present the issue in a petition addressed to the court in the ordinary form of trespass to try title; and a petition is as a pleading sufficient to put in issue the titles of the parties, although the issue of boundary may be the only question sought to be determined, and is in fact the only issue submitted and tried before the court. The petition so framed will embrace the issue of title, and may embrace the question of boundary, and either or both may be tried and adjudicated under such a petition. A petition so drafted in the ordinary form of trespass to try title practically presents two issues and distinct questions—that is, title and boundary—as much so as if the pleading had been so formed as to present these questions in separate counts. The practice in this respect is clearly permissible, and it can not be seriously questioned. *Freeman v. McAninch*, 6 Tex. Civ. App. 644, 646, 24 S. W. 922, reversed, on other grounds, in 87 Tex. 132.

**Lands Claimed Should Be Clearly Described.**—In suits growing out of conflicting boundary lines, the pleadings should clearly describe the lands claimed. *Converse v. Langshaw*, 81 Tex. 275, 16 S. W. 1031.

**Description in Title Papers Should Be Supplemented.**—In every controversy about a boundary, instead of confining the description of the land to such only as may be found in the title papers, an additional and accurate description of the premises should be given in the pleadings in connection with the description contained in the title papers, both of which may be alleged to include the same land. *Roche v. Lovell*, 74 Tex. 191, 11 S. W. 1079; *Stephens v. Motl*, 81 Tex. 115, 121, 16 S. W. 731.

**Boundaries Should Be Described by Unambiguous Calls.**—In a suit to establish boundary lines, the petition should describe the boundaries as claimed by unambiguous calls. *Richardson v. Powell*, 83 Tex. 588, 589, 19 S. W. 262.

**Petition Should Describe Land by Metes and Bounds.**—In boundary suits, the petition should set out the land in dispute by metes and bounds, as otherwise the verdict should describe the land found by the jury. *Edwards v. Smith*, 71 Tex. 156, 9 S. W. 77.

**Proper to Allege Correct Call Where Correction of Field Notes Sought.**—Where the English field notes were the original and preserved along with the Spanish copy of them as an archive, and the title itself not containing the field notes but referring in that respect to the report of the surveyor, it was proper to treat them (the English field notes) as part of the title, and not as extraneous evidence changing or contradicting it, and the calls being inconsistent, it was proper in a suit involving the locality of the grant to allege in the petition and describe the correct call, and to introduce evidence to sustain the pleading. *Irvin v. Bevil*, 80 Tex. 332, 16 S. W. 21.

**Not Necessary to Plead Specially Location Tending to Show Another.**—In trespass to try title, where the description of the lot in controversy is dependent on the location of another lot, the actual location of the other lot may be shown without specially pleading it, where the purpose was to show the true location of the lot in controversy. *McKeon v. Roan* (Civ. App.), 106 S. W. 404.

**Prior General Judgment Does Not Render Petition Demurrable.**—A petition which contains all the essential allegations of an action of trespass to try title, and which also alleges that in a former action by the present defend-

ant against the present plaintiff, to recover the same land, judgment was rendered generally for the present plaintiff, and that in such former action there was a dispute between the parties as to the boundary between their lands, is not demurrable as being an attempt to establish a boundary that has already been established, since the former judgment simply decided that the plaintiff therein had not shown himself entitled to the land. *Wallis v. Wofford* (Civ. App.), 26 S. W. 739.

**Petition Averring No Actual Survey Not Demurrable.**—When the question is one of boundary, in an action of trespass to try title, and the locality of the survey under which the defendant claims is not questioned, or his right thereto denied, provided it be not in conflict with the land claimed by plaintiff, an averment that no actual survey of the land on which the patent under which defendant claims issued, is not subject to demurrer. It is but the averment of a fact proper to be proved in determining the actual locality of the land located and patented, by reference to its calls, and the value of such calls would be largely influenced by ascertaining whether a survey had really been made on the ground. *Boon v. Hunter*, 62 Tex. 582.

**Misdescription to Be Demurrable Must Be Manifest.**—The petition described the land in controversy as eighty-five acres, more or less, out of a certain survey, situated at a certain distance from the town of C., and being a farm belonging to C. up to the time of her death, and known as the C. place. Held: A description of land could not be attacked on demurrer unless it was manifest that the terms of the petition did not distinguish the land from all other tracts. If a well-defined tract of land was known as the C. place, and no difficulty was encountered on the trial in determining the precise limits of the land in con-

troversy, the description on the face of the petition was not insufficient. *Crabtree v. Whiteselle*, 65 Tex. 111, 115.

**Demurrer Does Not Reach Omission of Call.**—In setting out the English field notes of a rectangular grant, alleged for the purpose of correcting an imperfect and erroneous description in the Spanish field notes forming part of the title, there was an evident omission of one of the calls. This defect was not reached by a general demurrer. *Irvin v. Bevil*, 80 Tex. 332, 16 S. W. 21. See, generally, the title DEMURRERS.

**Mere Clerical Error Immaterial.**—The variance between the petition in a boundary suit, describing a survey related to the one involved as No. 446, and proof that it was No. 436, was immaterial, where it appeared that the number stated in the petition was a clerical error. *Battles v. Barnett* (Civ. App.), 100 S. W. 817.

#### b. Plea.

**Plea Should Show Location of Boundary.**—In trespass to try title, in which the question was whether the strip in dispute was on plaintiff's or defendant's side of the dividing line, defendant filed a special plea that, at the time of purchase claimed in the petition, M., the grantor, took defendant on the ground, and pointed out the corner of the lot purchased from him; that A., from whom plaintiff purchased the lot owned by him, was then the owner of the adjoining lot, and was present when such corner was so pointed out; that afterwards defendant and A. agreed on the boundary line, and, in pursuance of such agreement, defendant fenced said land, and has ever since held and cultivated it; and that plaintiff purchased the land now occupied by him with the understanding that said agreed boundary was the line between A.'s and defendant's lots. Held, that the plea was insufficient, in that it failed to show where the bound-

ary was located. *Davidson v. Pickard* (Civ. App.), 37 S. W. 374.

**Estoppel May Be Shown under Not Guilty.**—The defense of estoppel in trespass to try title, where the issue is one of boundary, may be proved under plea of not guilty. *Eddie v. Tinnin*, 7 Tex. Civ. App. 371, 26 S. W. 732.

**Not Guilty Puts in Issue All Boundaries Set Out in Petition.**—Where defendants, disclaimed any title to any part of plaintiffs' surveys lying east or south of surveys 32, 45, and 46, which they claimed, and pleaded not guilty as to any land described in the petition included within the boundaries of such surveys, and it was admitted that plaintiffs and defendants had title to the respective surveys of land described in the petition and answer, except in so far as they were in conflict on the east lines of the surveys described in the answer, the question being the correct location of the east boundary line of a certain block 9, it was not error to fix the east boundary line of survey No. 31, which was immediately north of 32 and formed a part of the east line of block 9 and a part of the west line of plaintiffs' survey, on the ground that no part of the boundaries of survey 31 was in issue. *Jacoby v. Norton*, 40 Tex. Civ. App. 313, 90 S. W. 524.

**Not Guilty Puts Plaintiff to Proof of Title before Raising Boundary Issue.**—In an action of trespass to try title, with plea of not guilty, plaintiff must show title before he can raise questions as to boundaries. *Greenlee v. Taylor*, 79 Tex. 149, 14 S. W. 1056. And see *Lewis v. Brown*, 39 Tex. Civ. App. 139, 87 S. W. 704, 706, affirmed in 101 Tex. 646, no op. See, generally, the title TRESPASS TO TRY TITLE AND EJECTMENT.

#### 4. Evidence.

##### a. Presumptions and Burden of Proof. (1) Presumptions.

**Presumed That Surveyor Made Survey and Marked the Boundaries.**—It is

the duty of the surveyor to run round the land located and intended to be embraced by the survey and patent, and see that such objects are designated on it as will clearly point out and identify the locality and boundaries of the tract, and to extend a correct description of these objects (natural and artificial, with courses and distances) into the field notes of the survey, in order that they may be inserted in the patent, which will afford the owner, as well as other persons, the means of identifying the land that was in fact located and surveyed for the owner; and until the reverse is proved, it will be presumed that the land was thus surveyed and boundaries plainly marked and defined. *Stafford v. King*, 30 Tex. 257, 271; *Phillips v. Ayres*, 45 Tex. 601, 605.

In absence of proof that a survey sought to be identified had not been actually surveyed on the ground, the presumption should obtain that it had been so surveyed, and its calls for course and distance finally resorted to, other modes failing. *Kuechler v. Wilson*, 82 Tex. 638, 18 S. W. 317; *Gerald v. Freeman*, 68 Tex. 201, 4 S. W. 256; *Robertson v. Mooney*, 1 Tex. Civ. App. 379, 381, 21 S. W. 143; *Maddox Bros. v. Ferner*, 79 Tex. 279, 15 S. W. 237; *Smith v. Boone*, 84 Tex. 526, 19 S. W. 702; *Morgan v. Mowles* (Civ. App.), 61 S. W. 155, 156.

**Presumption of Actual Survey Not Destroyed by Mere Opinion of Surveyor.**—Where there is no evidence as to how a survey was made, the presumption of law is that it was actually made on the ground, as the law requires, and this presumption can not be silenced by the mere opinion of a surveyor, who testifies that it was not so made. *Arkansas Pass, etc., Co. v. Flippen* (Civ. App.), 29 S. W. 813.

**Presumption of Actual Survey Not Conclusive.**—The presumption is that the original survey of a league was

actually made on the ground, but the fact that the surveyor did not go on the ground and measure and mark the lines and corners may be shown. *Wilkins v. Clawson*, 50 Tex. Civ. App. 82, 110 S. W. 103.

**Lines Called for Presumed to Have Been Surveyed.**—In the absence of evidence on the subject, the presumption must be indulged that the surveyors actually surveyed all of the lines called for. *Maddox Bros. v. Fenner*, 79 Tex. 279, 291, 15 S. W. 237; *Groesbeck v. Harris*, 82 Tex. 411, 415, 19 S. W. 850; *Maddox v. Fenner* (Sup.), 13 S. W. 153; *Montague County v. Clay County Land, etc., Co.*, 80 Tex. 392, 15 S. W. 902; *Cochran v. Kapner*, 46 Tex. Civ. App. 342, 103 S. W. 469 (see 102 Tex. 580, no op.); *Coleman County v. Stewart* (Civ. App.), 65 S. W. 383, affirmed in 95 Tex. 445; *Waggoner v. Daniels*, 4 Tex. Civ. App. 354, 23 S. W. 738; *Waggoner v. Daniels*, 18 Tex. Civ. App. 235, 44 S. W. 946; *Angle v. Young* (Civ. App.), 25 S. W. 798.

The court will not presume that a surveyor did not actually run the lines of his surveys, in the absence of testimony. *Castleman v. Pouton*, 51 Tex. 84; *Webb v. Brown*, 2 Posey 36.

**No Presumption That Surveyor Intended to Make Lines Conflict.**—It will not be presumed in the absence of evidence that a surveyor was ignorant of lines called for which can be identified. Nor will it be presumed that the surveyor intended to make his lines conflict with each other. *Montague County v. Clay County Land, etc., Co.*, 80 Tex. 392, 15 S. W. 902; *Weston v. Meeker* (Civ. App.), 109 S. W. 461.

**Discrepancies in Marks Raise No Presumption That Original Surveyor Did Not Run Line.**—Where marks on a line of a survey were not quite so old as those on the surrounding older surveys, but there was evidence that the marks were not so old as those on other lines of the same survey, no

presumption exists that such line was not run by the original surveyor of the tract, but by the patentee thereof, after the original survey. *Morgan v. Mowles* (Civ. App.), 61 S. W. 155.

**Corners Presumed to Have Been Marked.**—In the absence of proof to the contrary, it must be presumed that surveyors in making a survey did their duty and marked the corners thereof with some object of reasonable permanence. *Thatcher v. Matthews*, 101 Tex. 122, 105 S. W. 317.

**Artificial Objects Not Found Presumed to Have Been Destroyed.**—If objects of a perishable nature, called for in the patent, be not found, the presumption will be indulged that they are destroyed or defaced; but if it be established, by undoubted evidence, that the land was not in fact surveyed, yet, as the omission was the fault of the government officer and not the owner, it would seem extremely unjust to deprive him of the land, by holding the patent to be void, if the land can, by any reasonable evidence, be identified. *Stafford v. King*, 30 Tex. 257, 271; *Phillip v. Ayres*, 45 Tex. 601, 605.

Where bearing trees called for in a survey have disappeared, it will be presumed that the trees had been at the distances called for in the survey. *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.), 96 S. W. 64 (see 101 Tex. 645, no op.).

**Adjoining Surveys Presumed to Be Made According to Field Notes.**—Where adjoining surveys are made by the same surveyor about the same time and call for each other, the presumption is that they were made by the surveyor as described in the field notes of the surveys. *Worthington v. Baughman*, 84 Tex. 480, 19 S. W. 770. And see *Freeman v. Mahoney*, 57 Tex. 621, 622.

**Such Presumption Not Affected by Excess.**—Three surveys were made in 1848 on land believed to be vacant,

and patents issued thereon. The field notes of each survey called for the northern line of an older survey of a two-league grant as its southern boundary. The northern line of the older grant could not be identified by a marked line or by established corners at either end thereof, though in the grant its northeast corner was described with marked bearing trees, which after the lapse of years could not be found. The distance from the southern line, identified on the ground, to the northern line of the two-league grant was five thousand varas, as called for in the grant; but measuring from its southern line to the southern marked line of the three surveys made in 1848, the distance was about five thousand two hundred and forty varas. The supposed excess of two hundred and forty varas was located on and a patent issued. In trespass to try title between those claiming under the two-league grant and the patentee of the supposed vacant strip, held, the northeast corner of the two-league grant being described therein, and being called for as a corner of one of the surveys made in 1848, by the surveyor who surveyed those surveys, and who also called in his field notes for the north line of the old grant as the south line of the three surveys, the presumption must prevail that the surveyor in 1848 saw the corner for which he called, and that his lines run were consistent with its location on the ground, and such presumption is not affected by the fact that the old corner, as called for by the surveyor of the three junior surveys, would be two hundred and forty varas beyond the distance reached in a line calling to run five thousand varas. *Freeman v. Mahoney*, 57 Tex. 621. And see *Marshall v. Crawford*, 2 Posey 477, 479.

**No Presumption of Vacancy between Surveys Called for as Adjoiners.**—Where the survey of the N.

tract called for the south line and southwest corner of section 18, a claim, in trespass to try title, of possession of land between section 18 and the N. tract was without merit, since, in the absence of an actual survey and markings, it can not be presumed that there was a vacancy between such tracts. *Galloway v. State Nat. Bank* (Civ. App.), 56 S. W. 236, affirmed in 93 Tex. 661, no op. And see *Freeman v. Mahoney*, 57 Tex. 621, 622; *Marshall v. Crawford*, 2 Posey 477, 479.

**Presumed That Survey Was Made for Grantee of Certificate.**—It will be presumed, in the absence of evidence to the contrary, that a survey properly certified by the officer authorized to make it, and which is stated in his recorded field notes as having been made by virtue of a certificate, the grantee of which is mentioned, was made for the grantee of the certificate. *Snider v. International, etc., R. Co.*, 52 Tex. 306.

**No Presumption That Order of Survey Authorizes Surveyor to Report Other than True Boundaries.**—In an action to establish the boundaries of a survey after the original markings have disappeared, if the order directing the survey is not in the record, it will not be presumed that the surveyor was authorized to report the boundaries fixed by a particular survey, and not the true boundaries. *Stanus v. Smith*, 8 Tex. Civ. App. 685, 30 S. W. 262.

**No Presumption as to Precedence of Conflicting Surveys.**—A survey upon which the patent issued called for the north boundary line of a patented survey, made three weeks before by a surveyor who surveyed both, as its south boundary. This line could not be identified by natural or artificial objects either at its terminations or along its course. The locality of the northern boundary of the junior survey and of the south boundary of



the older survey, which lay south of the former, were identified by established corners. Running each survey from its established corners, according to course and distance, a common boundary was not reached, but a space two hundred and eighty varas wide intervened. In a suit by the owner of the land covered by the junior survey against the owner of the older survey, who was in possession of the disputed strip, held. If the manifest mistake made in the calls was a mistake in distance, there is no rule of law which, in the absence of evidence, would raise a presumption against or in favor of either survey. *Duff v. Moore*, 68 Tex. 270, 4 S. W. 530.

### (2) Burden of Proof.

**Plaintiff Must Show Exact Location of Disputed Line.**—In order to enable the court to render a judgment fixing the line in dispute and settling the question of boundary, it devolves upon the plaintiff, not merely to show in general terms that the defendant had enclosed more land than he was entitled to, but to furnish testimony by which the court can ascertain and define exactly where the line should be run. *Jones v. Andrews*, 72 Tex. 5, 9 S. W. 170; *Reed v. Cavett*, 1 Tex. Civ. App. 154, 20 S. W. 837; *Rosson v. Miller*, 15 Tex. Civ. App. 603, 604, 40 S. W. 861.

**Plaintiff Must Show Location of Object Fixing Boundary.**—Where the plaintiff bought only a portion of the Duke grant, and the proper determination of the boundary dispute depended upon fixing the true locality of the mesquite tree, called for in the grant, the defendant being in possession, the burden of establishing that fact rested upon the plaintiff. *Hawkins v. Nye*, 59 Tex. 97, 101.

**Plaintiff Must Show Character of Stream Claimed as Boundary.**—Where plaintiff's land was described as lying

west of the east branch of the Colorado river, and defendant's adjoining land was bounded on the west by the east branch of such river, the burden was on plaintiffs, claiming the land in controversy, to show that a stream between such land and land owned by defendant was the east branch of the river, and not a mere slough as defendant contended. *Selkirk v. Watkins* (Civ. App.), 105 S. W. 1161.

**Plaintiff Must Always Show That His Lines Include Land in Controversy.**—Where the litigation was as to the locality of a line of a survey and defendants insisted that the lines of the grant sued upon did not include the land claimed by defendants, it was error to charge the jury that it devolved upon the defendants to prove that the lines of plaintiff's grant did not include the land in controversy. The burden is upon the plaintiff and never changes. *Scott v. Pettigrew*, 72 Tex. 321, 322, 12 S. W. 161; *Adams v. Crenshaw*, 74 Tex. 111, 116, 11 S. W. 1082; *Clawson v. Williams*, 27 Tex. Civ. App. 130, 66 S. W. 702, affirmed (see 95 Tex. 690 no op.); *Morrow v. Fleming*, 29 Tex. Civ. App. 547, 69 S. W. 244.

The burden of proof is on the plaintiff to show that the patent under which he claims embraces the land claimed and occupied by defendant; failing in this, the defendant is entitled to judgment. *Duff v. Moore*, 68 Tex. 270, 4 S. W. 530. And see *Hallsell v. McCutchen* (Civ. App.), 64 S. W. 72; *Weston v. Meeker* (Civ. App.), 109 S. W. 461.

**Plaintiff Claiming More Land Must Show Intention of Grantor to Convey It.**—The burden of proof is on the plaintiff and those claiming under him to establish that the grantor intended to convey more than the land contained in the two quarter sections, as defined and marked on the ground by the resurvey. *Holland v. Thompson*, 12 Tex. Civ. App. 471, 35 S. W. 19.

**Party Claiming No Actual Survey Was Made Must Prove It.**—In a case where adjoining surveys are made by the same surveyor and about the same time, the burden of proof is upon the party claiming that they were not surveyed upon the ground as officially certified by the surveyor. *Worthington v. Baughman*, 84 Tex. 480, 19 S. W. 770.

A party who asserts that a survey was not actually made, has the burden of proving it, and proof that there was no evidence except the certificate attached to the plat of a survey, that the surveyor went on the ground and established the lines called for, does not discharge the burden to show that the survey represented by the plat was not actually made by the surveyor on the ground. *Cochran v. Kapner*, 46 Tex. Civ. App. 342, 103 S. W. 469 (see 102 Tex. 580, no op.).

**Claimant under Junior Location Has Burden of Proof as to Conflicts.**—Where a suit for land between claimants of different locations turns upon the question of boundary, plaintiff, holding under a junior location, has the burden of showing that defendant's locations conflict with his own, though his is patented and defendant's are not. *Childress County Land, etc., Co. v. Baker*, 23 Tex. Civ. App. 451, 56 S. W. 756, affirmed in 94 Tex. 699, no op.; *Clark v. Hills*, 67 Tex. 141, 2 S. W. 356; *Scott v. Pettigrew*, 72 Tex. 321, 12 S. W. 161; *McKinney v. Baldwin*, 14 Tex. Civ. App. 12, 36 S. W. 346; *Rosson v. Miller*, 15 Tex. Civ. App. 603, 40 S. W. 861.

One claiming under a junior location has the burden of showing that the land included within it does not conflict with a previous location under a prior patent. *Allen v. Worsham* (Civ. App.), 49 S. W. 525.

**Claimant Impeaching Senior Survey Has Burden of Proof.**—Where bearing trees, called for in a survey, had disappeared, one claiming under a junior

survey, seeking to change the construction of the senior survey with respect to the call for distances to the trees, must affirmatively show that the trees were not at the place fixed by the distances called for. *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.), 96 S. W. 64 (see 101 Tex. 645, no op.).

**Party Claiming under Survey Must Establish Corners.**—It is the duty of the party claiming under an uncertain survey, to show and establish his corners. *Schaeffer v. Berry*, 62 Tex. 705.

**Party Alleging Superiority of Marked Line Must Show Establishment Prior to Issuance of Grant.**—The law does not require the distance named in the field notes of a grant to be greatly extended to reach a line, merely because it is found on the ground with marks corresponding in age with the date of the grant. He who claims the right to so extend the distance, and give superior dignity to the marked line, must show that the line was the one marked on the ground by the surveyor preparatory to the issuance of the grant. *Fagan v. Stoner*, 67 Tex. 286, 3 S. W. 44.

**Party Alleging Vacancy between Surveys Called for as Adjoiners Has Burden of Proof.**—The burden of proof is on one claiming a strip of land between two surveys calling for each other to show that there is a vacancy, and the mere fact that there is a slight excess in area in one or more of the surveys than called for is not sufficient to show a vacancy. *Moore v. Stewart* (Sup.), 7 S. W. 771; *Freeman v. Mahoney*, 57 Tex. 621, 626.

#### b. Admissibility.

##### (1) In General.

**Rules Liberal in Boundary Cases.**—In determining the boundaries of lands surveyed long ago, the signs of which have been destroyed, and the location of which is not within the knowledge of living men, many facts tending to solve the question as to

their true location are permitted to go to the jury, which would be excluded in other cases. *Linney v. Wood*, 66 Tex. 22, 23, 17 S. W. 244.

**Any Legal Evidence Admissible to Show Where Lines Established.**—

The survey actually made is in legal contemplation the true survey, and it is always competent to show by any legal evidence where the lines were in fact run upon the ground." *Johnson v. Archibald*, 78 Tex. 96, 102, 14 S. W. 266.

**Deed May Be Shown Inaccurate and Land Identified by Other Evidence.**—

A boundary corner or line may be shown to be inaccurately described in the conveyance, and the land intended to be described therein identified by further evidence than the description given in the instrument. *Hughes v. Sandal*, 25 Tex. 162. And see *McKeon v. Roan* (Civ. App.), 106 S. W. 404.

**Evidence Must Be Relevant.**—Where the issue related to the boundary of two grants from the government, and the proof was clear that the line claimed by the defendant was the true boundary, it was held that evidence offered by the plaintiff, to the effect that the original grantee from whom defendant purchased had, about the time of his sale to defendant, pointed out to defendant, as the true boundary, the line claimed by the plaintiff, was properly excluded as irrelevant. *Bartlett v. Hubert*, 21 Tex. 8.

Where, under the Mexican law, field notes of surveys made under the Mexican government in Texas could be obtained by surveyors only from the general land office, testimony of witnesses that such was the fact was irrelevant and properly excluded. *Clawson v. Wilkins* (Civ. App.), 93 S. W. 1086. See, generally, the title EVIDENCE.

**(2) Best Evidence Rule.**

**Abstract of Title Only Secondary Evidence.**—Where an abstract of title

of patented and located lands of 1877 was not designed by statute authorizing its compilation, as evidence of the boundaries or location of land in suits between individuals, it was secondary evidence, and it was not error to refuse its being read in evidence, the facts or data in the land office on which the volume was based with reference to a particular survey being the best evidence. *Clawson v. Wilkins* (Civ. App.), 93 S. W. 1086.

**Records Must Be Accounted for before Testimony as to Contents Admitted.**—It was not competent for the county surveyor to testify that the records of his office recognized a corner as claimed by defendant as the corner of a certain county, the records not being produced or accounted for. *Matthews v. Thatcher*, 33 Tex. Civ. App. 133, 76 S. W. 61. See, generally, the title BEST AND SECONDARY EVIDENCE, vol. 2, p. 796.

**(3) Extrinsic Evidence.**

**(a) In General.**

There is no doubt of the rule that where the calls of the grant can be established by the aid of extrinsic evidence, such evidence is admissible, and that it may be admitted for the correction of the mistakes of a surveyor. *Williamson v. Simpson*, 16 Tex. 433, 435. And see *White v. Smith* (Civ. App.), 67 S. W. 1028.

However full and precise may be the description of a survey in a deed or field notes, yet to identify it on the ground, resort must be had to personal knowledge or other extrinsic information or evidence. If, by this knowledge, information or evidence, when applied to the description contained in the deed or field notes themselves, the land can be reasonably found and identified on the ground, this description should not be held void for ambiguity. *Hughes v. Sandal*, 25 Tex. 162; *Booth v. Upshur*, 26 Tex. 64; *Norris v. Hunt*, 51 Tex. 609; *Douthitt v. Robinson*, 55 Tex. 69, 74;

*Von Rosenberg v. Haynes*, 85 Tex. 357, 380, 20 S. W. 143.

**(b) Prerequisites to Admissibility.**

**Discrepancy in Calls Must First Be Proved.**—Where several descriptive objects are specified in a grant or survey, and an effort is made to identify the land by following the calls, and some one of the objects varies from the description of it in the grant or survey, proof of such discrepancy must first be made before other evidence in explanation of it can be admitted. *Booth v. Upshur*, 26 Tex. 64; *Stroud v. Springfield*, 28 Tex. 649, 674.

**Not Admissible if Land Can Be Identified from Construction of Whole Deed.**—In order to reconcile any seeming conflict in the description of land as contained in a deed, it is proper to construe the whole deed, and if, from the entire instrument, the land can be identified with certainty, no extraneous evidence is admissible, in the absence of fraud or mistake, to vary or change the location of the land as fixed by the field notes in the deed. *Chew v. Zweib*, 29 Tex. Civ. App. 311, 69 S. W. 207. And see *Johnson v. Archibald*, 78 Tex. 96, 102, 14 S. W. 266, 267; *Sloan v. King*, 33 Tex. Civ. App. 537, 542, 77 S. W. 48.

**Admissible When Description Ambiguous.**—If, when the calls are applied to the land, they disclose a latent ambiguity—that is to say, if they conflict with each other—then extrinsic evidence may be resorted to in order to determine the conflict and to show the land actually intended to be embraced by the calls of the survey. *Johnson v. Archibald*, 78 Tex. 96, 14 S. W. 266, 267; *Sloan v. King*, 33 Tex. Civ. App. 537, 542, 77 S. W. 48.

Where the field notes of a survey are inconsistent, the true description of the survey may be shown by the evidence of the surveyor who made it. *Schley v. Blum* (Civ. App.), 22 S. W. 264 (see 85 Tex. 551).

Where the original field notes of a survey only described an area of 5,000 varas square, having its south line along the north line of another survey, which line is 7,575 varas in length, and gives no data by which any corner of the survey can be definitely located, there is such an ambiguity in the description as to render extrinsic evidence admissible to locate the survey. *Wilkins v. Clawson*, 37 Tex. Civ. App. 162, 83 S. W. 732.

Where a deed called for a certain street as one of the boundaries of the land granted, and also referred to the amended map of the town in which the land was situated, which map did not show a street at such place, there was such an ambiguity as authorized the admission of testimony of the grantee as to his understanding derived from the grantor's agent at the time of the sale as to the existence of the street in question. *St. Louis, etc., Ry. Co. v. Payne*, 47 Tex. Civ. App. 194, 104 S. W. 1077, affirmed in 102 Tex. 591, no op.

A conflict between a call of a deed for distance and a call for a railroad right of way, may be explained so as to show the real intention of the parties, and the deed may be enforced accordingly. *Couch v. Texas Pac. R. Co.*, 99 Tex. 464, 90 S. W. 860, reversing 87 S. W. 847, on other grounds.

**(c) Under Hearsay Rule.**

See, generally, the title **HEARSAY EVIDENCE**.

**aa. In General.**

On questions of boundary the courts have, under certain restrictions, freely admitted hearsay evidence to establish old surveys and boundary lines. *George v. Thomas*, 16 Tex. 74, 92.

Hearsay evidence is admissible to prove ancient boundaries, but it should be closely scrutinized, and not admitted if it be vague and uncertain.

*Welder v. Carroll*, 29 Tex. 317, 319. And see *McKeon v. Roan* (Civ. App.), 106 S. W. 404.

**bb. Res Gestæ.**

See, generally, the title RES GESTÆ.

**Declarations of Surveyor Made While Making Survey Admissible as Part of Res Gestæ.**—The declarations of a surveyor as to distances measured by him in making a survey are admissible as a part of the *res gestæ* for what they might be worth, even though his statements of identification of corners and lines are inadmissible because he is not shown to have such knowledge of the facts as the law requires to entitle them to any standing as evidence. *Russell v. Hunnicutt*, 70 Tex. 657, 661, 8 S. W. 500.

The declarations of a public surveyor, while making a survey, as to what he is doing and for whom, are part of the *res gestæ*, and admissible in evidence as such. *George v. Thomas*, 16 Tex. 74, 75.

**cc. General Reputation.**

**Admissibility Well Established.**—It is a well-established rule of law that boundary lines may be proved by the common understanding and report of a community. *Welder v. Hunt*, 34 Tex. 44, 48; *Stroud v. Springfield*, 28 Tex. 649, 669.

The common understanding of the surrounding community may be proved as to the identity of monuments and lines, and the declarations of deceased witnesses may be proved, to fix the location of corners and lines. *Smith v. Russell*, 37 Tex. 247, 255; *Reeves v. Roberts*, 62 Tex. 550, 553.

General reputation in regard to the boundary lines of an ancient survey, formed long before the suit in which it is offered in evidence was begun, and which boundary was of sufficient interest to have been the subject of note and comment in the neighbor-

hood, is admissible in evidence. *Clark v. Hills*, 67 Tex. 141, 142, 2 S. W. 356; *Goodson v. Fitzgerald*, 40 Tex. Civ. App. 619, 90 S. W. 898.

**As Reliable as Other Species of Evidence.**—In the absence of direct and positive testimony which, when boundaries are ancient, can not usually be had to establish them, common reputation is perhaps as little liable to error as any other species of evidence that can be resorted to for the purpose, and, indeed, is frequently the only resort. *Stroud v. Springfield*, 28 Tex. 649, 669.

**Admissibility as Well-Established as Declarations of Deceased Persons.**—

The rule that old boundaries may be proved by the common reputation and understanding of the neighborhood, where the land lies, would seem better established, and to stand in principle on higher ground than the one which admits the declarations of deceased persons of competent knowledge and having no interests omits, as evidence. *Stroud v. Springfield*, 28 Tex. 649, 669. See post, "Declarations of Deceased Persons," II, C, 4, b, (3), (c), dd, (bb).

**Admissible Only to Show Locality of Boundary.**—

The admissibility, as well as the value and weight, of general reputation must, from its nature, depend very much upon the circumstances of the case in which it is offered. It can not, of course, be received as to title. It is admissible only as to the locus in quo of the boundary, a fact of which the community or neighborhood around it is supposed to be peculiarly well informed. *Stroud v. Springfield*, 28 Tex. 649, 670.

**Boundary Must Be Ancient.**—The boundary must be an ancient one. *Stroud v. Springfield*, 28 Tex. 649, 670.

**Reputation Must Be General.**—The supposed locality of the boundary must be of sufficient interest and note in the neighborhood or community to have been the subject of observation

and conversation among the people. The reputation or understanding must be general and concurrent. *Stroud v. Springfield*, 28 Tex. 649, 670.

**Must Be Ante Litem Motam.**—The reputation or understanding must have been formed and in existence before the controversy commenced in which it is used as evidence. Men are not presumed to be indifferent in regard to matters in actual controversy, for when the contest has begun, people generally take one side or the other, and if they are disposed to speak the truth, facts are or may be seen by them through a false medium. *Greenl. Ev.*, § 131, note. For this reason, it is necessary that proof of common reputation must have reference to a time ante litem motam. *Stroud v. Springfield*, 28 Tex. 649, 670.

In a suit respecting boundaries, a witness was asked, "whether or not the location of the Powell league, as represented on the map, had been uniformly and generally respected and accredited as the true location by the community around it?" The question was objected to, and the objection was sustained. Held, that the ruling was correct, because the question as propounded was not limited to a period anterior to the commencement of the suit, and also because it seems to be directed more towards proving the correctness of the map than the locality of the boundaries of the survey on the ground. *Stroud v. Springfield*, 28 Tex. 649.

**Basis for Admissibility—Extreme Probability of Its Truth.**—The admission of evidence of common reputation as to old boundaries, which frequently can not possibly be proved by direct and positive testimony, is based on the extreme probability of the truth of a fact received, assented to, and acted on as true by the common consent of a community having peculiar means for correct information, and no interest to warp their judg-

ment in forming a conclusion. *Stroud v. Springfield*, 28 Tex. 649, 669.

**Local Public Interest May Be Shown to Establish Basis for Admission.**—Common repute as to the location of a line or corner of an old survey is admissible in aid of the search for its original corners; and that one of the corners was referred to in subsequent adjoining surveys, and that its east line and the corner were made a county boundary by legislative act, is admissible on the issue of local public interest in the location of the corner, so as to form a basis for the admission of evidence of general reputation. *Matthews v. Thatcher*, 33 Tex. Civ. App. 133, 76 S. W. 61; *Linney v. Wood*, 66 Tex. 22, 17 S. W. 244; *Alexander v. Gilliam*, 39 Tex. 227, 228; *Freeman v. Mahoney*, 57 Tex. 621.

**Witness May Testify to Locality of Boundaries from Reputation.**—It was competent for witnesses to testify to locality of boundary lines or corners from reputation, and from declarations by their ancestors, witnesses' knowledge extending over thirty years. *Von Rosenberg v. Haynes*, 85 Tex. 357, 359, 20 S. W. 143.

**Witness Need Not Be Present When Monument Established.**—A witness could testify that in 1852 an old stake was pointed out to him as the corner, and at that time and ever since, the point was generally reputed to be the true corner, such testimony not being inadmissible as hearsay because the witness was not present when the stake was driven. *Matthews v. Thatcher*, 33 Tex. Civ. App. 133, 76 S. W. 61.

#### dd. Declarations and Admissions.

See, generally, the title DECLARATIONS AND ADMISSIONS.

#### (aa) General Principles.

**Acts and Admissions Adverse to Party's Interest Admissible.**—Ordinarily, in ascertaining the boundary line of a survey, evidence of the acts and admissions of previous owners

while in possession, and of the present owners, although not in possession, adverse to their interests, is admissible. *Reed v. Phillips* (Civ. App.), 33 S. W. 986, 987; *Bollinger v. McMinn*, 47 Tex. Civ. App. 89, 104 S. W. 1079.

It was competent to prove that the corner in dispute had been recognized or pointed out by the adverse party as the true corner. *Smith v. Russell*, 37 Tex. 247, 248; *Russell v. Hunnicutt*, 70 Tex. 657, 8 S. W. 500; *Matthews v. Thatcher*, 33 Tex. Civ. App. 133, 76 S. W. 61.

**Declarations and Admissions of Owner Admissible against Vendee.**—The declarations and admissions of the owner of a tract of land with regard to its boundaries are admissible in evidence against his vendee. *Bird v. Pace*, 26 Tex. 487, 488; *Windus v. James* (Sup.), 19 S. W. 873; *Warner v. Sapp* (Civ. App.), 97 S. W. 125.

**Declarations Made by Party before Interest Acquired Inadmissible.**—The declarations of a party as to the location of the boundary line are not admissible against him, when they were made before he acquired any interest in the subject matter. *Bell v. Preston*, 19 Tex. Civ. App. 375, 47 S. W. 375, 753; *Reed v. Phillips* (Civ. App.), 33 S. W. 986.

**Declarations after Suit by Disinterested Party Inadmissible.**—Declarations after suit, and by a party never having been interested in the lands, are not competent testimony to prove the location of division lines. *Hurt v. Evans*, 49 Tex. 311.

**Declarations of Agent Admissible against Principal.**—Declarations respecting a disputed boundary, made by a foreman of plaintiff's vendor to a surveyor engaged in running it, while the foreman was present in the vendor's behalf, are admissible against plaintiff. *Vogt v. Geyer* (Civ. App.), 48 S. W. 1100.

**Failure of Disinterested Adjoining Owner to Assert Claim Inadmissible.**

—For the purpose of establishing a boundary conceded to be a straight line, it is incompetent to prove that an adjoining landowner, claiming under the same grant, does not claim beyond the line in controversy, where none of the parties claim through him, and he is not interested in the suit. *Bailey v. Baker* (Civ. App.), 42 S. W. 124.

**Declarations of Disabled Witness of Survey Admissible.**—A, who was present and assisting in making a survey, pointed out to several witnesses a corner as made by him or in his presence in 1832, when the original survey was made. On the trial, January, 1888, the witnesses were allowed to testify to the declarations of A, and to his pointing out the corner as that of the original survey and made in 1832. It was shown that A's physical condition prevented his testifying either by deposition or orally. Held, that the testimony to his declarations was competent and was properly admitted. *Griffith v. Sauls*, 77 Tex. 630, 14 S. W. 230.

(bb) **Declarations of Deceased Persons.**

aaa. **In General.**

**Admissible When Declarant Had No Interest.**—The declarations of deceased parties who were disinterested, and in position to know the true location of the lines of a survey made upon the ground and in view of the objects identified by them, are admissible, to establish boundary. *Tucker v. Smith*, 68 Tex. 473, 3 S. W. 671; *Lewis v. San Antonio*, 7 Tex. 288, 301.

In a controversy respecting boundaries, declarations of disinterested parties, since deceased, who were in a position to know the line, are competent evidence. *Evans v. Hurt*, 34 Tex. 111.

bbb. **Admissible to Prove Private Boundaries.**

At common law the declarations of deceased persons, except when a part

of the original *res gestæ*, were not admissible to prove private boundaries, but were restricted to cases of a general or public nature. The American rule, however, which prevails in Texas, admits the declarations in case of private boundaries. *Stroud v. Springfield*, 28 Tex. 649, 667.

On questions of boundaries, it seems that declarations of deceased persons who were in a situation to possess information on the subject, and who were not interested, are admissible in evidence, even when the declarations were not part of the original *res gestæ*. At common law such evidence was only admissible in cases involving questions of a general or public nature, but was not allowed for the purpose of establishing the boundaries of private estates. The tendency of American decisions has been to disregard this distinction, and to admit such evidence on questions of private as well as public boundaries. This tendency is the result of the necessity of resorting to this character of evidence, occasioned by the constant destruction of landmarks in this country, in consequence of the perishable nature of their materials and of the settlement and improvement of the lands, by reason of which it is indispensable in many cases that hearsay or reputation should be received to establish old boundaries. *Stroud v. Springfield*, 28 Tex. 649, 650. ccc. **Whose Declarations Admissible.**

**Owner Who Has Parted with Title.**—One who has been the owner of a survey is presumed to know his own boundaries and his declarations as to boundaries made after he has parted with his title and when he has no interest in favor of either party, are admissible after his death; and so would the declarations of one in possession, while pointing out the boundary to which he claimed. See, also, *Hurt v. Evans*, 49 Tex. 311, 316. *Russell v. Hunnicutt*, 70 Tex. 657, 660, 8 S. W. 500.

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**Owner in Possession at Time Declaration Made.**—The declarations of a deceased owner of a tract of land as to corners of the tract of which he was in possession at the time they were made, are admissible in a contest as to the location of such corners and lines. *Hurt v. Evans*, 49 Tex. 311; *Evans v. Hurt*, 34 Tex. 111.

A survey was made in 1847. In 1848 an adjoining survey was made calling for the northeast corner, west line, and southwest corner of the older survey. The older survey calls for its northwest corner "a post from which an elm marked X bears east 20 varas." A dispute arose about the identity of the elm called for, there being two trees answering the call. In 1857 owners of both surveys made declarations as to one of the trees being that called for. In 1887, in a trial involving the west line of the first survey, it being shown that both the parties making the declarations in 1857 were dead, held, that the said declarations were competent evidence and were properly admitted. *Whitman v. Haywood*, 77 Tex. 537, 14 S. W. 166.

**Owner Making Declaration against Interest.**—Where the deceased owner of two tracts of land would have owned any intervening land at the time of a declaration by her that the tracts adjoining, the declaration was against interest, and is admissible on a dispute as to the boundary between her grantees. *Coughran v. Alderete* (Civ. App.), 26 S. W. 109.

**Owner Who Was an Original Surveyor.**—In a dispute as to the boundary line between adjoining proprietors, testimony that a former owner of the elder survey, who was one of the original surveyors of the tract and helped to locate the corners, and who has since died, pointed out to witness a certain place as a corner, is admissible. *Beal v. Asberry* (Sup.), 20 S. W. 115.

**Deceased Grantee.**—The declarations of a deceased grantee of a tract of land



as to the boundaries of subdivisions of the tract sold by him, in regard to which he is not interested, are competent. *Hurt v. Evans*, 49 Tex. 311; *Warner v. Sapp* (Civ. App.), 97 S. W. 125.

The declaration of the grantee of a survey as to his boundary line, made at a time when he was living on the survey, and in connection with an offer to give another a few acres of land, at a time when there was nothing making it to his interest to misrepresent the facts, was admissible after his death, against the state or a grantee under the state, to show the boundary of the survey. *Goodson v. Fitzgerald*, 40 Tex. Civ. App. 619, 90 S. W. 898.

**Surveyor Making Original Survey.**—When it is shown that a surveyor made an original survey, or was present when it was made, or that he was in such a position as to know the truth of his declarations, they are admissible when he has died before the trial. *Russell v. Hunnicutt*, 70 Tex. 657, 660, 8 S. W. 500; *Simpson v. De Ramirez*, 50 Tex. Civ. App. 25, 110 S. W. 149; *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.), 96 S. W. 64 (see 101 Tex. 645, no op.).

Declarations of deceased surveyor as to the locality of a survey made by him, are admissible after his death. But they could not rank higher than his written version of the matter made at the time. *Avers v. Harris*, 77 Tex. 108, 13 S. W. 768; *Davis v. Smith*, 61 Tex. 18, 23.

The declarations of a deceased surveyor made by him in connection with his acts and means of knowledge, reaching back for a period of thirty-six years prior to the trial, are admissible for the purpose of establishing an ancient boundary. *Stroud v. Springfield*, 28 Tex. 649, 661; *Reeves v. Roberts*, 62 Tex. 550, 552.

**Declarations of Surveyor Must Be Made in Discharge of Duty.**—The declarations of a surveyor, since deceased, relative to the lines and location of a

tract of land, are not competent evidence when not made when he was pointing out or marking the boundaries, or discharging some duty in relation thereto. *Clay County Land, etc., Co. v. Montague County*, 8 Tex. Civ. App. 575, 28 S. W. 704. And see *Angle v. Young* (Civ. App.), 25 S. W. 798.

**Surveyor Must Know His Declarations Are True.**—What a surveyor said was a boundary, without proof that he knew the fact, would be too vague and uncertain. *Welder v. Carroll*, 29 Tex. 317, 335; *Russell v. Hunnicutt*, 70 Tex. 657, 660, 8 S. W. 500. And see *Hill v. Smith*, 6 Tex. Civ. App. 312, 25 S. W. 1079.

A witness testified that a deputy surveyor had pointed out a corner in dispute, and it was proposed to prove by a witness that the bearing trees so pointed out corresponded with the calls in the field notes of the survey. He was unable to state the facts. It did not appear that the surveyor pointing out the corner was in a position to know the locality of the corner in dispute. Held, the testimony to the declarations of the surveyor and the opinion of the witness touching the identity of the corner were properly excluded. *Titterington v. Crawford*, 78 Tex. 567, 14 S. W. 692.

**Other Surveys by Same Surveyor Admissible as His Declarations.**—Where a survey made by a deceased surveyor calls for the east line of another survey as one of the boundaries of the tract surveyed, other surveys made by the same surveyor at about the same time, and locating such east line, are admissible as his declarations to show where such line is located, whether such other surveys are legal or not. *Cottingham v. Seward* (Civ. App.), 25 S. W. 797.

Patent and field notes of another survey made by such deceased surveyor, and tending to show that a line called for in the survey in controversy, and also in the one offered in evi-

dence, was a marked boundary, recognized by him, was properly admitted as a declaration by such surveyor. *Daniels v. Fitzhugh*, 13 Tex. Civ. App. 300, 35 S. W. 38.

The declaration of a surveyor, since deceased, may be expressed in field notes of a junior survey. *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.), 96 S. W. 64 (see 101 Tex. 645, no op.).

**Deed Written by Surveyor Admissible as His Declaration.**—Upon a question of boundary a deed shown to be in the handwriting of a deceased surveyor, who had located one of the surveys in controversy, was properly admitted as a declaration by such deceased as to the location of a corner, the bearing trees of which were therein described. *Daniels v. Fitzhugh*, 13 Tex. Civ. App. 300, 35 S. W. 38.

**Copy of Affidavit Not Properly Authenticated Inadmissible as Declaration of Surveyor.**—A certified copy, from the general land office, of an affidavit of a deceased surveyor, there on file, as to the connection of lines of certain surveys made by him, upon the ground, was not properly authenticated, not being an archive of the land office, and was not admissible in evidence as a declaration of such deceased surveyor. *Daniels v. Fitzhugh*, 13 Tex. Civ. App. 300, 35 S. W. 38.

**Chain Carrier Assisting in Original Survey.**—The declarations of a chain carrier, who assisted in making the original survey, or of the surveyor who located the land, deceased at the time of trial, would be admissible. *Russell v. Hunnicutt*, 70 Tex. 657, 660, 3 S. W. 500.

**Declaration of One Having No Knowledge of Boundaries Inadmissible.**—Declarations of one since dead, who was not the owner of the land nor shown to be in a position to know the corner of the survey, that a certain tree was one of its marked corners, not admissible. *Matthews*

*v. Thatcher*, 33 Tex. Civ. App. 133, 76 S. W. 61.

#### ddd. How Given in Evidence.

**May Be Proved by Any Competent Witness.**—After the death of a surveyor, his declarations respecting a line officially run by him upon the ground may be given in evidence by any competent witness. *Welder v. Hunt*, 34 Tex. 44, 45.

**By Proving Testimony of Deceased Witness.**—Touching the locality of an ancient boundary line, the testimony of a deceased witness at a former trial may be proved, although such testimony gave the declarations of a party then dead, made many years before, when the line, then ancient, was pointed out to the witness. *Medlin v. Wilkens*, 1 Tex. Civ. App. 465, 20 S. W. 1026. See, generally, the title WITNESSES.

#### (d) Parol Evidence.

See, generally, the title PAROL EVIDENCE.

#### aa. When Admissible.

##### (aa) To Locate and Identify Boundaries.

**Location of Boundaries May Be Shown by Parol Evidence.**—Parol evidence is admissible to show the true location of boundaries. Indeed, it is difficult to conceive of a case where the question is one of boundary, how it could be decided without resort to parol evidence. Localities must always be determined by parol evidence, from the necessity of the case. *Mason v. Russell*, 1 Tex. 721, 730. And see *McKeon v. Roan* (Civ. App.), 106 S. W. 404; *Martin v. Mitchell*, 32 Tex. Civ. App. 385, 74 S. W. 565 (see 97 Tex. 640, no op.).

The testimony of the surveyor who made the survey is admissible to prove error in the establishment of the initial point, and to explain how such error originated; and also to show its true position as ascertained by him since the running of the survey. *Booth*

*v. Upshur*, 26 Tex. 64; *Stroud v. Springfield*, 28 Tex. 649, 674.

A boundary line of a tract of three hundred acres bought by defendants was in dispute. Defendants claimed an actual survey made by agent of the vendor, with corners marked with oak posts. They also took possession in 1875 up to the line indicated by the oak posts and held the land adversely since. Suit was filed against them September 1, 1888. By survey by course and distance the land in dispute, twenty-two acres, was outside of their purchase. Held, the survey upon which defendants bought having been made by the agent of their vendor, the parol testimony to its locality was competent. *Bruce v. Washington*, 80 Tex. 368, 15 S. W. 1104.

Parol evidence as to the locality of natural objects referred to in the bond or deed, and called for in the description of the land conveyed; the acts of the purchaser indicating his understanding as to what land was embraced in the calls; and the conversations of the vendor and vendee as to the understanding of the boundaries as described, are competent testimony for the purpose of identifying the tract described in the conveyance. *Hughes v. Sandal*, 25 Tex. 162.

**May Explain Field Notes to Show Correct Location.**—On an issue as to the location of a boundary line between two surveys, it was permissible for a surveyor to testify that he was present at the making of the field notes of the later survey, and that they were made, not on the ground, but at the office of the surveyor, and that it was intended to include the land between the older survey and another, this evidence serving merely to explain the field notes as returned. *McCreary v. Douglass*, 5 Tex. Civ. App. 492, 24 S. W. 367.

Parol evidence, that in making the survey on the ground the northeast

corner was the beginning point, is not contradictory of the field notes, which, in describing it, commence at another corner, and is clearly admissible. *Lumpkin v. Draper* (Sup.), 18 S. W. 1058.

Parol testimony of a surveyor is admissible to show that the change of a figure in the field notes of a survey described in a deed would embrace the land involved in the suit. *Coffey v. Hendricks*, 66 Tex. 676, 2 S. W. 47.

**Monuments May Be Identified by Parol Evidence.**—Monuments and lines marked upon the ground may be identified by parol evidence. *Smith v. Russell*, 37 Tex. 247, 255.

On an issue in a boundary line dispute as to whether a stream in controversy was the east branch of the Colorado River as claimed by plaintiffs, or a slough as defendant contended, evidence of witnesses who had been acquainted with the land and condition of the stream for many years, for the purpose of locating the east branch of the river, was not objectionable as an attempt to vary the field notes of the survey of the original grant to defendant, which merely called for the east branch of the river as its western boundary. *Selkirk v. Watkins* (Civ. App.), 105 S. W. 1161.

**(bb) When Description Inconsistent, Uncertain, and Ambiguous.**

**Parol Evidence Admissible to Explain Inconsistent Calls.**—If the calls of a grant are inconsistent, then certain rules of construction and even parol evidence may be resorted to in order to resolve the doubt and to establish the line which was actually run by the surveyor. It is but a case of a latent ambiguity in a written instrument. *Thompson v. Langdon*, 87 Tex. 254, 258, 28 S. W. 931. And see *Martin v. Mitchell*, 32 Tex. Civ. App. 385, 74 S. W. 565 (see 97 Tex. 640. no op.).

When a corner is found upon the ground having bearings as called for

in the patent, and this is shown to have been actually made by the surveyor at a place different from the adjoining line or corner called for, an inconsistency is disclosed which may be explained by parol evidence. *Converse v. Langshaw*, 81 Tex. 275, 16 S. W. 1031.

Parol evidence is admissible in aid of a call found in the field notes, when the purpose is by such evidence to remove an ambiguity and to determine which of two or more conflicting calls shall prevail. *Booth v. Upshur*, 26 Tex. 64, 71; *Duren v. Presberry*, 25 Tex. 512, 517; *Sloan v. King*, 33 Tex. Civ. App. 537, 541, 77 S. W. 48; *Minor v. Kirkland* (Civ. App.), 20 S. W. 932.

**Parol Evidence Admissible to Explain Latent Ambiguity in Calls.**—The testimony showed that both channels of a stream at one time had been known as Rocky Creek. The deed from plaintiff through which defendant derains title calls for Rocky Creek as the north boundary of the tract sold. This presents a deed unambiguous on its face, but which when applied to the ground becomes uncertain as to which channel was meant. It is clearly a case of latent ambiguity. Testimony was properly admitted to explain, and it showed conclusively that at plaintiff's sale of the land south of the creek the south channel was pointed out as the Rocky Creek, the north boundary of the land sold. The actual intention of the parties must govern. *Bassett v. Martin*, 83 Tex. 339, 18 S. W. 587; *Warner v. Sapp* (Civ. App.), 97 S. W. 125.

**Line Uncertain in Deed May Be Established by Parol Evidence.**—A deed is not necessarily void for uncertainty in the description of the premises conveyed, provided the description is capable of being made certain; and when a line is left uncertain, parol evidence is admissible to establish the line contemplated by the parties. *Lohff v. Germer*, 37 Tex. 578; *Logan v. Pierce*, 2 Posey 286, 288.

**Mistake of Surveyor May Be Shown by Parol Evidence.**—Parol testimony is admissible both at law and in equity to show a mistake of the surveyor in making up his field notes and to show how the survey was in fact made. *Urquhart v. Burleson*, 6 Tex. 502, 512.

It is competent for a witness who saw an original survey made, on an issue involving the location of a line on the ground, to testify to what the surveyor did in running out the survey, though it may result in showing that in running the lines he reversed the course called for in his field notes. It is immaterial when the course is the same called for, whether it was run from one end of the line or from the other end, and reversed, when for the purpose of identifying the line, it is sought to trace the footsteps of the surveyor. *Smith v. Leach*, 70 Tex. 493, 7 S. W. 767.

**Parol Evidence Admissible to Show Relative Importance of Conflicting Grants.**—Upon an issue of inadequacy of price for which land was sold, it is admissible to prove, by parol evidence, that the land conflicted, or was supposed to be in conflict, with an elder grant, and also to show the supposed merits of the conflicting titles, as affecting the value of the land in general esteem, or with those who might wish to purchase. Though the existence and extent of the conflict of two grants can only be definitely determined, in many instances, by a survey, there is no reason why it may not be proved by any one who can testify to the fact. *Norvell v. Phillips*, 46 Tex. 161.

**(cc) When Adverse Party Fails to Comply with Notice to Produce Deed.**

It is not error to admit parol evidence of the boundaries of a tract of land, which boundaries are described in a deed in the possession of the adverse party, who has been notified to produce the original. *Trotti v. Hobby*, 42 Tex. 349.

**bb. When Inadmissible.**

**Parol Evidence Not Admissible to Vary Nonconflicting Calls.**—If the calls in a grant when applied to the land correspond with each other, parol evidence is not admissible to vary them, by showing that in point of fact they are not the calls of the survey as actually made. *Johnson v. Archibald*, 78 Tex. 96, 102, 14 S. W. 266, 267; *Barnett v. Mahon* (Civ. App.), 31 S. W. 329, 331.

If there be no conflict in the calls found in the field notes of a survey, there is no room for construction, and the calls must speak for themselves. To permit the introduction of parol evidence to vary the calls would be to violate the familiar rule, that extraneous evidence is not permissible to vary a written instrument. *Thompson v. Langdon*, 87 Tex. 258, 28 S. W. 931, reversing 28 S. W. 931.

Where the calls in a deed are clear and explicit, and the monuments can be found by the ordinary rules of interpretation, parol proof can not be allowed to vary the legal import of the words and to change the natural position of the lines called for. *Muller v. Landa*, 31 Tex. 265. And see *Hartz v. Owen* (Civ. App.), 27 S. W. 42.

**Not Admissible to Establish a Survey Repugnant to Calls for Established Monuments.**—Where the grant calls for certain known and established natural or artificial monuments and boundaries, these may not be controlled by parol proof of a survey entirely inconsistent and repugnant to all the calls of the grant. *Anderson v. Stamps*, 19 Tex. 460, 465. *Fenley v. Flowers*, 5 Tex. Civ. App. 191, 194, 23 S. W. 749; *Hartz v. Owen* (Civ. App.), 27 S. W. 42, 43; *Reast v. Donald*, 84 Tex. 648, 19 S. W. 795; *Coleman County v. Stewart* (Civ. App.), 65 S. W. 383, affirmed in 95 Tex. 445; *Sloan v. King*, 33 Tex. Civ. App. 537, 541, 77 S. W. 48.

**Not Admissible to Control Calls by Showing a Different Survey Was Made.**—When the field notes in a survey call for the corners and lines of surrounding surveys and contain no inconsistent calls, it is not admissible to show by parol evidence that a different survey was in fact made for the purpose of controlling the calls in the grant. *Anderson v. Stamps*, 19 Tex. 460; *Converse v. Langshaw*, 81 Tex. 275, 16 S. W. 1031; *Hartz v. Owen* (Civ. App.), 27 S. W. 42, 43; *Reast v. Donald*, 84 Tex. 648, 19 S. W. 795; *Coleman County v. Stewart* (Civ. App.), 65 S. W. 383, affirmed in 95 Tex. 445; *Sloan v. King*, 33 Tex. Civ. App. 537, 541, 77 S. W. 48.

Where the field notes of a junior survey, as given in the patent of the land, are clear and unambiguous, do not call for any marked line, and the boundaries thereby designated are not in conflict with any portion of an older adjoining survey, parol evidence is not admissible to show that a different survey of the junior location was in fact made which conflicted with the other tract. *Giddings v. Winfree*, 32 Tex. Civ. App. 99, 73 S. W. 1066 (see 97 Tex. 652, no op.).

**Unambiguous Calls Not Controlled by Parol Evidence of Objects Not Called for.**—Where the calls in a deed are unambiguous, and are not alleged or shown to have been made by mistake, they can not be controlled by parol evidence of the existence of objects not called for in the deed discovered by the surveyor in running the lines for partition. *Brodhent v. Carper* (Civ. App.), 100 S. W. 183, 185, affirmed in 102 Tex. 578, no op.

**Inadmissible to Correct a Call Except in Case of Mistake.**—Parol evidence is inadmissible to correct a call in a deed, except in actions to correct mistakes, where the purpose is not merely to aid a call found in the field notes. *Hamilton v. Blackburn*, 43 Tex. Civ. App. 153, 95 S. W. 1094; *Anders-*

*son v. Stamps*, 19 Tex. 460, 464; *Reast v. Donald*, 84 Tex. 648, 19 S. W. 795; *Coleman County v. Stewart* (Civ. App.), 65 S. W. 383, affirmed in 95 Tex. 445; *Sloan v. King*, 33 Tex. Civ. App. 537, 541, 77 S. W. 48.

**Inadmissible to Contradict Field Notes.**—Where the decree in partition contained no description of the land allotted to the different parties, but only confirmed the report of the commissioners, who based the division on the surveyor's plat and field notes returned with their report, parol evidence was not admissible, in a subsequent action to establish the boundary line between two parcels of the land so partitioned, to contradict such plat and field notes. *Barnett v. Mahon* (Civ. App.), 31 S. W. 329.

**Surveyor May Not Testify What He Intended Survey to Include.**—It is not admissible, for the purpose of determining which of two conflicting calls in a survey should prevail, for the surveyor who made it to testify what he intended to include. *Blackwell v. Coleman County*, 94 Tex. 216, 59 S. W. 530.

**(e) Deeds and Grants.**

See, generally, the title DOCUMENTARY EVIDENCE.

**Ancient Deed Admissible Though Neither Party Claims Thereunder.**—

In an action involving disputed boundaries, an ancient deed, under which neither party claims, is admissible in evidence for the purpose of establishing a corner not immediately in dispute between the parties, but from which the disputed boundaries may be located, although the grantor in such deed is living when it is offered in evidence. *Pierce v. Schram* (Civ. App.), 53 S. W. 716.

**Deed under Which Party Holds Admissible.**—Where the boundary between two adjoining lots is involved, a deed under which a party holds one of the lots is admissible in evidence. *Windus v. James* (Sup.), 19 S. W. 873.

**Deed of Adjoining Land Admissible to Identify Boundary.**—In trespass to try title, where a boundary was in dispute, evidence of a deed of adjoining land was admissible in connection with other testimony showing that the land deeded was fenced, for the purpose of showing the identity and significance of fence rows found near the boundary in question. *Camp v. League* (Civ. App.), 92 S. W. 1062 (see 101 Tex. 631, no op.).

**(f) Certificates, Records, Judgments and Decrees.**

See, generally, the title DOCUMENTARY EVIDENCE.

**Certificate of Land Commissioner.**—In a suit to establish a boundary, a certificate of the commissioner of the land office, the essential portions of which were pertinent, was admissible in evidence, though a portion thereof was but the opinion of the commissioner. *Petrucio v. Gross* (Civ. App.), 47 S. W. 43.

**Certificate of Comptroller.**—The certificate of the comptroller from the records of his office are admissible in evidence, where the area of adjoining lots may become material to aid in determining the division line between them. *Edwards v. Smith*, 71 Tex. 156, 9 S. W. 77.

**Minutes of Commissioner's Court.**—

Where plaintiff made no objection to a surveyor's testifying that he laid out a county road purporting to be on the boundary line in dispute, he can not object to the introduction of the minutes of the commissioner's court regarding the road. *Vogt v. Geyer* (Civ. App.), 48 S. W. 1100.

The minutes of the commissioners' court regarding a county road purporting to be laid out on the boundary line in dispute, showing the proceedings for its opening, and designating a part of the center line thereof as the western boundary of plaintiff's land, and showing, also, an order granted to a road overseer for the removal of ob-

structions thereon, may be admitted, in connection with other facts, to show acquiescence in the line. *Vogt v. Geyer* (Civ. App.), 48 S. W. 1100.

But, in trespass to try title, where it was shown that a defendant was in possession of land on both sides of a disputed boundary, the records of the county commissioners' court, showing that a road was laid out where defendants claimed the boundary was located, were inadmissible. *Camp v. League* (Civ. App.), 92 S. W. 1062 (see 101 Tex. 631, no op.).

**Memorandum of Surveyor Preserved as Archive.**—The memorandum made by a colonial surveyor in 1833 at the time he made a survey, and deposited in the land office with the title itself, and there preserved, may be regarded as an archive, and the memorandum having been identified as made by the surveyor, who died before the trial, it was competent to aid in proving the actual footsteps of the surveyor when making the survey. *Ayers v. Harris*, 77 Tex. 108, 13 S. W. 768. And see *Cook v. Dennis*, 61 Tex. 246, 248.

**Ancient Copies of Land Records.**—Ancient copies of land records or archives are competent to show the boundary of a tract of land, if accompanied by long-continued possession. *Downing v. Diaz*, 80 Tex. 436, 453, 16 S. W. 49. See the title ANCIENT DOCUMENTS, vol. 1, p. 253.

**Judgment in Another Case.**—In an action which involved conflicting surveys and the north boundary of a certain section of school land, it was error to admit in evidence a judgment rendered in another case, the parties to which were not the same nor in privity with the parties in the action at bar, which judgment found that a part of the north line of such land was 276 varas north of the line claimed by plaintiffs as the true boundary line, but did not involve the part of said line that affected the land in controversy in the case at bar. *Colonial,*

*etc., Mortg. Co. v. Tubbs* (Civ. App.), 45 S. W. 623.

**Consent Decree.**—When a recital in a consent decree recognizes a designated line as the boundary line between the parties thereto, such decree is admissible in evidence, not as full proof to establish the true boundary when relied on by a stranger to the decree, but as a circumstance tending to establish it, to be weighed with other evidence. *Medlin v. Wilkins*, 60 Tex. 409.

(g) **Surveys, Field Notes and Report of Surveyor.**

aa. **Surveys.**

(aa) **In General.**

**Admissible When Properly Made and Duly Proved.**—Surveys, made by proper officer and duly proved, are admissible in evidence when they relate to and tend to establish the boundaries of the land in controversy. They may be rebutted and their force repelled by other evidence, but it is difficult to perceive any legal ground upon which their admissibility could be contested. *Punderson v. Love*, 3 Tex. 60, 61.

**Entire Survey Admissible.**—One party litigant having read such parts of an original survey as concurred with his patent, it was not error to permit the adverse party to introduce the entire survey for the purpose of contradicting or explaining the patent. *Smith v. Russell*, 37 Tex. 247, 248.

**Earlier Survey to Be Admissible Must Be Basis of Later.**—In an action involving an issue as to the boundary of land, the fact that the surveyor who located the land may have adopted an earlier survey does not render the earlier survey admissible in evidence, unless it is shown that the later survey was based on the earlier, and that the lines of the earlier survey were different from those established on the location of the land by the later survey. *Wyatt v. Duncan* (Civ. App.), 22 S. W. 665.

**Surveys Made at Same Time Considered as One.**—Two surveys made at the same time, by the same surveyor, for the same owners, should be treated as one piece of work in determining the boundaries of the property covered by one of them. *Bell v. Preston*, 19 Tex. Civ. App. 375, 47 S. W. 375, 753.

**(bb) Of Adjoining Tracts.**

**Position of Line of Adjoiner Relevant in Determining Weight of Call.**—If a line of a survey was generally but erroneously supposed to be at a certain place, that fact should be considered in determining what weight ought to be given to the calls for that line in a deed to a neighboring tract; other calls in the deed might be given a controlling influence in determining what lands were conveyed by the deed. *Jones v. Powers*, 65 Tex. 207.

**Calls in Survey Not Controlled by Calls in Other Surveys Not Mentioned in Field Notes.**—Where a survey is located by projection from a certain point, and a boundary thereof does not correspond with the boundary line of adjoining surveys, which are mentioned in the field notes of such survey, in determining whether the calls for distance in such survey or the calls for the latter surveys shall control, the survey must be construed by reference to the calls in the grant, and such calls can not be aided by the lines and calls of other surveys not mentioned in the field notes, and the intention of the surveyor at the time of the location must be ascertained and given effect. *Coleman County v. Stewart* (Civ. App.), 65 S. W. 383, affirmed in 95 Tex. 445.

**Excessive Acreage of Other Surveys Can Not Be Shown.**—Where, in determining the boundaries of an old grant, it must be constructed on its calls for course and distance, it is not competent to show that other old surveys in that vicinity contained excessive acreage. *Matthews v. Thatcher*, 33 Tex. Civ. App. 133, 76 S. W. 61.

**Distance from Known Corner Not Extended by Calls in Adjoining Surveys for Unidentified Objects.**—In an action to determine the boundaries of an old survey, some of whose corners, originally called for as "stake in prairie," can not be identified, evidence showing other adjoining surveys, made subsequently by different surveyors, identifying such corners by artificial objects not called for in the field notes of the older survey, is not admissible to extend the distances in the older survey from its known corners. *Matthews v. Thatcher*, 33 Tex. Civ. App. 133, 76 S. W. 61.

**(cc) Private Survey.**

In an action of trespass to try title where the plaintiff's sole ground of recovery is a presumption of a valid title based on long continuous possession, a private survey proves nothing as to boundaries in the absence of evidence to connect it with the claim of possession. *Dangerfield v. Paschal*, 11 Tex. 579, 583.

**bb. Field Notes.**

**Admissible to Show Location.**—Field notes are admissible in evidence to show the location of disputed lines. *Poor v. Boyce*, 12 Tex. 440, 445.

Where part of the boundaries of an old survey made by a deceased surveyor, who surveyed the tract in suit, were identical with some of the boundaries of that tract, though such old survey had been canceled, the surveyor's field notes showing the boundaries thereof are admissible to show the boundaries as originally established by him. *Stanus v. Smith*, 8 Tex. Civ. App. 685, 30 S. W. 262.

Where the boundary between two leagues of land, owned respectively by plaintiffs and defendants, was in controversy, the field notes and plat of a resurvey of the league owned by defendants, corresponding with the original survey thereof, and made by the same surveyor, under the belief that such land was vacant by reason of



certain acts of the grantee, and for the purpose of locating another tract, in which field notes was a call for the land in controversy as a part of the league belonging to plaintiffs, were properly admitted in evidence. *Petrucio v. Gross* (Civ. App.), 47 S. W. 43.

The issue being the location of the corner from which the original surveyor, C., started, and the call in the original survey being for an old willow tree which had disappeared, and H. having testified that he was with J. when J. made a later survey, and that J. began at an old willow which was generally known as the corner located by C., and that from there they ran the distance called for in the field notes of J., and established a certain corner, such field notes are admissible, in connection with the testimony of H., to establish C.'s starting point. *Stewart v. Crosby* (Civ. App.), 56 S. W. 433, affirmed in 93 Tex. 720, no op.).

**To Identify Object.**—It being in issue whether the east line of a survey was the Guadalupe River or was a slough or old river bed taken by mistake for the river, it was competent to show by the original field notes of the survey from the land office, that although calling for the river, the meanders given did not conform to the bed of the river, but did very nearly follow the course of the slough. *Allen v. Koepsel*, 77 Tex. 505, 14 S. W. 151.

In an action involving the location of the boundary line between the K. survey and another, a surveyor testified for plaintiff that marks on a tree, claimed by defendant to be a bearing tree of the southwest corner of the K. survey, were made by one G., since deceased, when he laid off the H. an adjoining survey in 1858. Held, that, though G. was not the surveyor who originally laid off the K. survey, his field book, containing entries made in 1855, before the H. survey was

made, and showing that the marks were not made on the tree by him, was competent to contradict the testimony as to the bearing tree. *Jackson v. Cable* (Civ. App.), 27 S. W. 201 (see 93 Tex. 711, no op.). And see *Camp v. League* (Civ. App.), 92 S. W. 1062, (see 101 Tex. 631, no op.).

**To Explain Variance in Calls of Survey.**—Where two calls of a survey are necessarily inconsistent, and there is nothing on the ground connecting itself with the original survey to explain the variance, the field notes of the surveyor may be looked to, to throw light on the question. *Giddings v. Thompson* (Civ. App.), 92 S. W. 1043.

Field notes called for "southeast corner of a survey in name of James Russell." No such survey existed, but one in name of Ira Ruble was there instead. Held, admissible to show that the Ruble survey was made for James Russell, and that the survey had been known as the Russell survey. *Buford v. Bostick*, 50 Tex. 371.

**Admissible for Either Party.**—In an action to establish a boundary, the original field notes are admissible in evidence at the instance of either party. *Hamilton v. Saunders* (Civ. App.), 73 S. W. 1069.

**Adverse Party May Show Correspondence of Field Notes with Line Contended for.**—Where, in an action to establish a boundary, plaintiff introduced the original field notes of the survey in evidence, defendant was entitled to show by a surveyor who ran the line defendant contended was the true boundary that such line corresponded with one or more of the calls of such original field notes. *Hamilton v. Saunders* (Civ. App.), 73 S. W. 1069.

**Error in Call Does Not Exclude When Readily Corrected.**—Field notes of a survey should not be excluded from evidence because of error in a call, when such error can be readily

corrected by comparing other calls in said notes with colonial map or plat of survey in evidence. *Pierce v. Schram* (Civ. App.), 53 S. W. 716.

Where English field notes are alleged for the purpose of correcting the Spanish field notes of the same grant and there is an evident omission of one of the calls, this defect, although manifest, is no ground for objection to the field notes in evidence on the ground of variance. *Irvin v. Bevil*, 80 Tex. 332, 16 S. W. 21.

**Not Admissible When Made by One Ignorant of Survey.**—Field notes of a railway survey, made 30 years after the location of the survey in question by a surveyor who had no knowledge of the lines of the survey in question, are inadmissible on the issue of boundary. *Goodson v. Fitzgerald*, 40 Tex. Civ. App. 619, 90 S. W. 898.

**Not Admissible When Inconsistent.**—Where the field notes of a surveyor concerning the location of bearing trees in another survey are inconsistent, they are no evidence of the location of the bearing trees, which had disappeared. *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.), 96 S. W. 64 (see 101 Tex. 645, no op.).

**Certified Copy of Field Notes Admissible.**—A certified copy of field notes, taken and certified by the district surveyor from the records of his office, is competent evidence to prove a survey. *Poor v. Boyce*, 12 Tex. 440.

Where original field notes would have been admissible, but were lost, and a person testified that he correctly copied them, and identified the copy, the copy is admissible; and it is immaterial that, though copied in the district surveyor's office, it might not have been a proper record thereof, being a private survey. *Stewart v. Crosby* (Civ. App.), 56 S. W. 433, affirmed in 93 Tex. 720, no op.).

**Photographic Copies Admissible.**—Photographic copies of an archive,

showing the original English field notes made by the surveyor upon the ground, are competent when it is in issue whether the survey had been actually made of all the lines called for. *Ayers v. Harris*, 77 Tex. 108, 13 S. W. 768.

**Copy Not Made Admissible by Ex Parte Affidavit.**—A copy of the field notes of a survey can not be so authenticated as to make it admissible evidence, by an ex parte affidavit to its correctness, of the person who had been the surveyor by whom the original survey and field notes were made, such person not being the legal custodian of the original from which the copy purports to have been made, nor would such a copy be aided by the testimony of a witness that, to the best of his knowledge and belief, it corresponded with another copy of the field notes which the witness had long previously obtained from the person who made the survey. *Grimes v. Bastrop*, 26 Tex. 310, 311.

**Field Notes Made by Surveyor Since Deceased Admissible as His Declarations.**—Field notes of the original survey by the surveyor who made them, if they are proved to be in his handwriting, he being dead, are admissible as his declarations. *Stroud v. Springfield*, 28 Tex. 649, 665; *Russell v. Hunicutt*, 70 Tex. 657, 660, 8 S. W. 500.

See ante, "Whose Declarations Admissible," II, C, 4, b, (3), (c), dd, (bb), ccc.

**Field Notes of Other Surveys Admissible.**—In cases of disputed boundaries the field notes of adjoining surveys are competent, as also the field notes of the conflicting surveys. *Briggs v. Pierson*, 7 Tex. Civ. App. 638, 26 S. W. 467; *Barrow v. Lyons*, 38 Tex. Civ. App. 585, 86 S. W. 773.

Plaintiff claimed a strip of land between what he contended was the north line of defendant's survey, and the south line of B's survey. Defendant claimed that his north line and

B.'s south line were identical. Held, that the field notes of B.'s survey, calling for defendant's north line as B.'s south line, were admissible as tending to show the true location of the line in dispute. *Moore v. Stewart* (Sup.), 7 S. W. 771.

**Field Notes of Other Surveys Not Admissible to Create Conflict in Calls.**—It is not proper to resort to the calls in the field notes of another survey, although made at the same time and by the same surveyor, to create a conflict in case none arises from the calls of the survey in question when applied to the objects called for as actually found on the ground. *Thompson v. Langdon*, 87 Tex. 254, 259, 28 S. W. 931, reversing 28 S. W. 931; *Upshire County v. Lewright* (Civ. App.), 101 S. W. 1013 (see 102 Tex. 595, no op.); *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.), 96 S. W. 64 (see 101 Tex. 645, no op.).

**Change in Field Notes Not Shown by Custom of Draftsmen.**—On the issue of the boundaries of certain land, evidence that, prior to the incumbency of H. as commissioner of the general land office, it had been the practice of the draftsmen in that office to make changes in field notes returned to the office, in order to make them conform to the maps in the office and the supposed intention of the surveyor, was inadmissible to show an alleged change in the field notes in question. *Clawson v. Wilkins* (Civ. App.), 93 S. W. 1086.

#### cc. Report of Surveyor.

**Competent Evidence in Boundary Cases.**—The report of a surveyor is evidence but certainly not conclusive, as to its coincidence with, and establishment of, the calls in the deed. *Bolton v. Lann*, 16 Tex. 96. And surely it was competent to introduce countervailing evidence upon the trial. *Bass v. Mitchell*, 22 Tex. 285, 294.

Under Rev. St. 1895, art. 5264, making it evidence, unless rejected for

good cause, the report of a surveyor appointed by the court to run a boundary, and who has testified to the survey, is admissible in an action to establish such boundary. *Wardlow v. Harmon* (Civ. App.), 45 S. W. 828.

**Admissibility Depends upon Order Directing Survey.**—A surveyor's report was filed and admitted in evidence over the objections of defendants. The objection to the report was that it relates what the surveyor did in running out and establishing lines of a survey containing the correct quantity of land, instead of showing what evidences or want of evidence he found of the footsteps of the surveyor when he made the survey described in the patent. Whether or not the report ought to have been stricken out depends on the order directing the survey to be made. That order should have directed the surveyor what he was to do, and if his report had then failed to show that he had followed such directions it should not have been received, but where the record does not contain the order of survey, the supreme court will infer that the surveyor did what he was ordered to do. *Randall v. Gill*, 77 Tex. 351, 356, 14 S. W. 134.

**Report Not Based on Actual Observation Inadmissible.**—A surveyor's report based upon a modern survey of an old grant and made up of arguments and conclusions upon such evidence as was accessible to him as to the true location of the lines of the surveys in question, was properly suppressed. His duty is to go upon the land he is required to survey with a copy of the field notes by which he is to be guided, to search for and survey its lines and corners, and to report to the court the result of his work; that is to say, to report such natural and artificial objects as indicate the true location of the lines as he may have found upon the ground, and the correct distance of such. When no such

objects can be found, then he should so report. *Schunior v. Russell*, 83 Tex. 83, 84, 18 S. W. 484.

**Admissibility Not Affected by Incorporation of Improper Matter Not Excepted to.**—Where a survey was ordered in a boundary suit, and the surveyor went on the land with a copy of the field notes by which he was to be guided, searched for and surveyed its lines and corners, and reported such natural and artificial objects as indicated the true location of the lines and the correct distances thereof, and, where no such objects could be found, so reported, the report was sufficient, though it contained statements of what the surveyor found on the ground in reference to the line which plaintiff showed him outside his instructions; no specific objection being made as to such defect. *Broll v. Wishert* (Civ. App.), 79 S. W. 1089.

**Incorporation of Improper Matter Immaterial When Testimony Covers Same Matter.**—Though, in an action to determine a disputed boundary line, the surveyor appointed to locate the line improperly incorporated in his report what one told him as to defendant's former claim respecting the boundary, that was not ground for striking out the entire report, where such claim was shown by other testimony, including defendant's. *McDonald v. McCrabb*, 47 Tex. Civ. App. 259, 105 S. W. 238.

**Erroneous Admission of Objectionable Report Cured by Failure to Object to Testimony About Same Matter.**—In an action to determine a disputed boundary line, the report of a surveyor appointed to locate the line is in effect merely his testimony, and, if it contains objectionable matter and he is allowed without objection to repeat the matter in his oral testimony, the error in admitting the report is cured. *McDonald v. McCrabb*, 47 Tex. Civ. App. 259, 105 S. W. 238.

**Error in Report Affects Weight Not**

**Admissibility.**—In an action to establish a disputed boundary line, objections that the surveyor appointed to locate the line made a mistake in using a point as the basis of his work, and made numerous errors in his report in computing the acreage, go to the weight to be given the report as evidence, and not to its admissibility. *McDonald v. McCrabb*, 47 Tex. Civ. App. 259, 105 S. W. 238.

**Unsworn Report Inadmissible.**—Where the report of a surveyor was not sworn to, and the evidence it contained was immaterial, it was not error to exclude it. *Keyser v. Meusback*, 77 Tex. 64, 68, 13 S. W. 967.

**(h) Maps and Plats.**

**aa. Maps.**

**Maps Admissible to Supplement Survey.**—It is much too strict a rule to hold that, where another survey is called for, the identity of the survey thus called for must be shown by its field notes, of record in the office of the county surveyor, to conform in every particular with the calls in the survey the identity of which is in question. This would be to suppose that surveyors, in writing out their field notes or reports of surveys, are much more careful and accurate than in the very nature of things could be expected of them, and certainly beyond what every day's experience shows they are. In looking for the survey called for, one can not, in all instances, be found corresponding in every particular with the calls. It is not essential to show the existence of a survey in all respects in strict and literal accord with such a one as called for, but merely that the locality of the survey in fact called for, though imperfectly or inaccurately designated, shall be identified and pointed out with reasonable certainty; and to this and not only the record of the supposed survey, but also the official maps and records of adjacent surveys, but also all other pertinent and legitimate evi-

dence conducing to the desired conclusion, may be consulted. *Buford v. Bostick*, 50 Tex. 371, 376.

**Map Called for Admissible to Explain Grant.**—Where a grant called for a map, as part of the description, the map is admissible in evidence to explain and sustain the grant. *Welder v. Carroll*, 29 Tex. 317, 318.

**Original Map Admissible to Explain Plat.**—Where, on an issue as to the location of a boundary line, the deeds of both parties referred to a plat recorded in the county clerk's office, but the plat was of such a nature that the survey as actually made on the ground could not be ascertained therefrom, it was not error for the court to consider evidence, including the original map from which the plat was made, which showed the actual survey as originally made and marked on the ground. *McLane v. Grice* (Civ. App.), 66 S. W. 709.

**Map Admissible to Aid Jury in Rendering Verdict.**—In an action to determine a disputed boundary line, the court properly referred the jury to the map made by the surveyor appointed to locate the line, in directing them how to shape their verdict in identifying the line found by them, where they were left free to find either the line claimed by defendant, that claimed by plaintiff, that found by the surveyor, or any other line they might determine to be the true line. *McDonald v. McCrabb*, 47 Tex. Civ. App. 259, 105 S. W. 238.

**Map Need Not Be Made by Surveyor.**—The fact that surveys appearing on a map were made by H., and the map itself by a third person, does not render the map inadmissible as hearsay or secondary evidence, in a suit to establish boundaries between the surveys. *Fulcher v. White* (Civ. App.), 59 S. W. 628.

**Incompleteness Immaterial When Adverse Party Not Injured.**—A map of the land, made by the county sur-

veyor from records not in issue between the parties, was admissible to show the location of the land as to surrounding tracts, etc. The fact that the map did not contain two small tracts, the deeds to which were not recorded, was not sufficient cause to reject it, unless the opposite party showed that he was injured by the defect. *Haney v. Clark*, 65 Tex. 93, 94.

**Custody of Genuine Map Immaterial.**—A genuine map of lots made by the maker of the original plat, under whose direction the original survey was made, is admissible on the question of boundary of the lots, no matter from whose custody it came. *Ostrom v. Layer* (Civ. App.), 48 S. W. 1095.

**Map May Be Rebutted by Patents.**—Where one party, for the purpose of proving the locality of a survey as claimed by him, was permitted to introduce a sketch from the general land office map, it was not error to allow the adverse party to introduce in rebuttal patents from the general land office, in order to show thereby that the officers of the government regarded the map as incorrect in this particular. *Stroud v. Springfield*, 28 Tex. 649, 651.

**Can Not Be Proved by Certificate.**—A map, not being found in the public office where it belonged, could not be proved by certificate, under the 89th or 91st section of the act to regulate proceedings in the district court. *Pas. Dig.*, arts. 3715, 3717, notes 839, 841. *Welder v. Carroll*, 29 Tex. 317, 318.

**Land Office Map Admissible to Identify Land.**—A map compiled in the land office, and lithographed, printed and published by that office, is an official map, and admissible in evidence for the purpose of identifying the location of surveys. *Barrow v. Gridlev*, 25 Tex. Civ. App. 13, 59 S. W. 602, 613, affirmed in 94 Tex. 689, no op.

**County Map Admissible.**—County

maps required to be kept in the surveyor's office are official documents, to which parties may look, as between themselves and the state, to ascertain where vacant lands exists; and in some cases they afford important evidence of boundary. When the understanding of the officers of the state and the grantee can be clearly gathered as to the true locality of several surveys mentioned in a patent, by looking to their location as delineated on the map of the county, such map will be looked to in ascertaining boundary. *Boon v. Hunter*, 62 Tex. 582.

**Certified Copies Admissible.**—Certified copies of maps in use in the land office, and archives of the office, are competent as evidence showing conflict of surveys placed upon such maps in the land office. *Houston, etc., R. Co. v. Bowie*, 2 Tex. Civ. App. 437, 21 S. W. 304. And see *Gallon v. Van Wormer* (Civ. App.), 21 S. W. 547.

**Compared Copy of Original Map Admissible.**—Where the original map referred to in the grant was traced to the office of the district surveyor, a compared copy, proved by the surveyor, ought to have been submitted to the jury, and it should have been left to them to determine whether it was the same referred to in the grant or not, and if it be the same, it may be consulted to identify the land. *Welder v. Carroll*, 29 Tex. 317, 318. And see *Gallon v. Van Wormer* (Civ. App.), 21 S. W. 547.

**Original Map Need Not Be Produced—Sworn Copy Sufficient.**—Where a map had remained in the district surveyor's office for a term of several years, and had been used by him as an archive, the sworn copy should have been admitted, without the necessity of producing the original. *Welder v. Carroll*, 29 Tex. 317, 318.

#### bb. Plats.

**Certified Plat Evidence of Actual Survey.**—A plat, certified by a surveyor, which shows the courses and

distances of the lines called for, the bearing trees of the several lots, the distance at which the lines cross a certain stream, and the witness trees at the point of crossing, indicates that the surveyor made an actual survey and ran the lines on the ground as indicated by the plat. *Cochran v. Kapner*, 46 Tex. Civ. App. 342, 103 S. W. 469 (see 102 Tex. 580, no op.).

**Not Rendered Inadmissible by Inaccuracies.**—Where the boundaries of a tract of land were in issue, it was not error to admit in evidence a plat of the survey, in connection with the testimony of a witness who had made a survey of the land, though there were some inaccuracies in the plat. *Besson v. Richards*, 24 Tex. Civ. App. 64, 58 S. W. 611.

#### c. Weight and Sufficiency.

**Preponderance of Evidence Sufficient in Boundary Cases.**—It is not proper to give reasonable certainty as the rule of sufficiency of proof in civil cases. Such rule is equivalent to certainty beyond reasonable doubt, and the rule of preponderance of the evidence applies as well to boundary cases as to other civil cases. *Scott v. Pettigrew*, 72 Tex. 321, 322, 12 S. W. 161; *Mock v. Hatcher* (Civ. App.), 43 S. W. 30; *White v. Smith* (Civ. App.), 67 S. W. 1028.

Where, in trespass to try title, the issue is as to the location of a boundary line, and the evidence is conflicting, all that can be required of plaintiff is to show the line, as claimed by him, by a preponderance of the evidence. *Briggs v. Pierson*, 7 Tex. Civ. App. 638, 26 S. W. 467.

#### **Satisfaction of Jury Not Required.**

—Where plaintiff claimed that the position of his sections of land in dispute was not dependent on the true location of an adjacent block of surveys, which was also in dispute, and he to some degree relied upon established and marked lines and corners to show the true location of his land,

it was error, as imposing too great a burden on him, for the court to charge that, "Where the lines of a survey have been actually run upon the ground and the corners established and lines marked, these, if they can be found, constitute the true boundaries of the land, if there are a sufficient number of them shown by the evidence so as to establish to the satisfaction of the jury the true location of the land; these must be respected by the jury and must not be departed from or made to yield to any other less certain matter of description." *Masterson v. Ribble*, 34 Tex. Civ. App. 270, 78 S. W. 358; *Briggs v. Pierson*, 7 Tex. Civ. App. 638, 26 S. W. 467. And see *Jaggers v. Stringer*, 47 Tex. Civ. App. 571, 106 S. W. 151.

**Direct Testimony Superior to Map.**

—There is no rule that requires a court to prefer a map description, though contemporaneously made, to testimony of a more direct character to the existence of a corner from which by measurement the locality may be determined. *Withers v. Connor*, 76 Tex. 185, 186, 13 S. W. 743.

**Testimony of Surveyor Sufficient to Locate Boundaries.**—Where there are two conflicting surveys, and the evidence of a surveyor who ran the lines of both showed with reasonable certainty the true location of the disputed boundary to be as alleged by plaintiff, and there is no evidence to establish a different line, judgment should be for plaintiff. *Houston v. Brown* (Sup.), 8 S. W. 318.

Where there is evidence that a surveyor was mistaken as to where he was when he located a certain survey, it is proper to allow the survey to stand as he testifies he located it, without crediting his testimony as to where he was. *Hume v. Hernstadt* (Sup.), 12 S. W. 285.

**Direct Testimony Corroborated by General Reputation Sufficient.**—Where there is much direct testimony tend-

ing to prove the location of a disputed boundary and much testimony showing that it was the common understanding in the community that a certain tree was the corner, this is sufficient evidence to warrant the court in finding that the tree was in fact the beginning corner. *Harris County Irr. Co. v. Hornberger*, 42 Tex. Civ. App. 450, 94 S. W. 145, 147. See, also, *Camp v. League* (Civ. App.), 92 S. W. 1062, 1065 (see 101 Tex. 631, no op.).

**Declaration of Owner Corroborated by General Reputation Sufficient Evidence of Locality.**—The declaration of a former owner of land as to his boundary line, corroborated by evidence of general reputation during a long period of time, is, in the absence of opposing evidence, sufficient to sustain a finding locating the boundary accordingly. *Goodson v. Fitzgerald*, 40 Tex. Civ. App. 619, 90 S. W. 898.

**Identification of Land by Known Corners of Adjoining Surveys Sufficient.**—Where it is shown that a tract of land sued for forms part of a block of surveys, the outer corners of the surveys in the block being known and identified, and from adjacent surveys the position of the land sued for is thus ascertained and fixed, such evidence of identity of the land sued for is sufficient, though no lines or corners can be found of the survey in controversy. *Jones v. Burgett*, 46 Tex. 284, 285.

**Certified Copies of Land Office Maps Sufficient Evidence of Conflict of Surveys.**—Certified copies of maps in use in the land office not being contradicted or shown to be inaccurate, are sufficient evidence of the conflict of surveys placed upon such maps in the land office. *Houston, etc., v. Bowie*, 2 Tex. Civ. App. 437, 21 S. W. 304.

**Mere Excess Insufficient to Prove Vacancy between Old Surveys Called for as Contiguous.**—He who at this late day when lands have become valu-

able and those who originally surveyed them have passed away, makes a location between grants which surveyors who originally surveyed them, more than thirty years ago, under their official oaths, declared to be contiguous, should come prepared with evidence which will clearly show that such declarations were made through mistake, and such testimony must consist of something more than that one or both of the grants will be slightly in excess of the area called for, to make such declarations good. *Freeman v. Mahoney*, 57 Tex. 621, 626.

**Report of Surveyor Entitled to No More Weight than Testimony of Witness.**—The report of a surveyor appointed by the court in a cause in which the boundary of a survey is in controversy, is entitled to no greater weight than the testimony of a witness cognizant of the facts referred to in the report. *McAninch v. Freeman*, 69 Tex. 445, 4 S. W. 369.

**Declaration of Surveyor Must Be Certain to Have Any Weight.**—A declaration of a surveyor, since deceased, must, to have effect as evidence of a boundary, possess the element of certainty, and a statement of a surveyor declaring that an object was found by him at one place, and also at another place, is without any value as testimony. *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.), 96 S. W. 64 (see 101 Tex. 645, no op.).

**Weight of Recital in Consent Decree Depends upon Knowledge of Parties.**—The effect to be given to a recital in a consent decree recognizing a certain line as the boundary depends upon the degree of knowledge of their respective rights possessed by the parties to the decree at the time of its entry. *Medlin v. Wilkins*, 60 Tex. 409.

**Field Notes Not Referred to Not of Same Weight as if Reference Made.**—Where the description in a grant varied in several particulars from cer-

tain field notes, though in general conforming to them, the court could not charge, as a matter of law, that they were to be taken as of the same importance and force as if they were referred to in the grant. *Taylor v. Brown* (Civ. App.), 39 S. W. 312.

**No Vacancy between Adjoining Surveys Called for Sustains Verdict for Claimant.**—Where defendant claims title through a survey whose calls are the lines of certain older surveys which are supposed to surround it, if no vacancy exists between such surveys, the verdict should be for plaintiff. *Galveston, etc., R. Co. v. Hartz* (Civ. App.), 26 S. W. 782.

**Illustrations—Evidence Sufficient—Locating Line from Marked Objects.**—In a suit concerning the boundary line between lands of H. and A., the surveyor, who had located the line by order of the court, fixed it as claimed by H., by objects on the ground, which were called for in deeds to H. and his vendors. There was evidence that H. acquiesced in such line, and that his vendors had recognized it, and that a tree called for near a stream had been washed away, but another tree, marked and described as the one called for in the deed, stood in the proper position, and was positively identified by the surveyor as the call in the deed. Held, sufficient to establish the boundary line as claimed by H. *Adams v. Halff* (Civ. App.), 24 S. W. 334. And see *Beckham v. Thompson* (Civ. App.), 97 S. W. 131; *Brodhent v. Carper* (Civ. App.), 100 S. W. 183, affirmed in 102 Tex. 578, no op.; *McCulloch v. Patman* (Civ. App.), 69 S. W. 1012.

All parties claimed under a partition decree about 35 years old. A surveyor appointed by the court reported that he had run the north line of the survey from east to west, finding most of the bearing trees described in said decree, and some stakes; that he found the east line of the west



quarter, which had been set off in the partition, plainly marked; that at defendant's request he then ran the north line east from the point which defendant asserted to be the west corner of the league, said point being 520 varas east of the point asserted by plaintiff, and fixed by witness in running the line west, and failed to find any bearing trees, and found a conflict of 520 varas. Two county surveyors testified that they had surveyed the same land, and come to the same conclusion. Held, that the west line was as contended by plaintiff. *Butts v. Caffall* (Civ. App.), 24 S. W. 373. And see *Davidson v. Equitable Securities Co.* (Civ. App.), 96 S. W. 787.

**Showing Location Corresponding with Grant.**—A finding that the land in controversy, consisting of an island, was embraced within the boundaries of a certain grant, by fixing the extreme northern point of the islands comprising such grant at over three leagues from the mouth of the river, was not erroneous, as being in conflict with the terms of the grant, where such grant, which conceded one league of land bounded by the east and west forks of the river, definitely located its extreme southern point at about one-half league from the mouth of the river, and the maps and sketches in evidence showed that the width thereof was much less than the length of a side of a square league. *Petrucio v. Gross* (Civ. App.), 47 S. W. 43. And see *Brodent v. Carper* (Civ. App.), 100 S. W. 183, affirmed in 102 Tex. 578, no op.

**To Show Original Survey Incorrect.**—In a trespass to try title, the evidence showed that the lines of the survey in suit were marked with bearing trees by the surveyor who made the original survey. The original corner of such survey was approximately located, though the bearing tree had disappeared. The original

field notes called for a line to be run from such corner, N., 16 W., 600 varas, and for the north boundary to be run by course and distance from the point so fixed. This would locate the northwest corner of the tract south of a certain creek, whereas the same field notes locate it 1,340 varas north of the creek. A surveyor appointed by the court found that by reversing the calls of the survey, and running a line from the original corner N., 16 W., 1,340 varas, instead of the 600 varas, called for by the field notes, thence west by course and distance as required by the notes, thence S., 16 E., the line crossed the creek just 600 varas from the northwest corner. The field notes call for a stake at the northwest corner, from which a mesquite tree bears N., 31 W., 27 varas. A surveyor who surveyed the tract several years before the suit testified that he found the mesquite tree as shown by the plat. The tree was shown to have been marked at about the proper place for a surveyor's mark. The position of the tree is inconsistent with the statement in the notes that the northwest corner was 1,340 varas north of the creek. Held, that the evidence was sufficient to support a finding that the survey made by order of court shows the true boundaries, and that the original surveyor, by mistake, interchanged the figures 600 and 1,340 in the field notes. *Stanus v. Smith*, 8 Tex. Civ. App. 685, 30 S. W. 262.

**To Change Location of Line.**—The northeast and southeast corners of a survey were well known, and marked on the ground. The calls were for north and south boundaries of 698 varas in length. If the southwest corner, designated as the beginning point, be located according to the call in a certain direction, and at a certain distance from a certain corner of another tract, then the north and south boundaries would be 1,900 varas in

length, and the survey would contain more than twice the amount of land it was intended to appropriate. Neither the western boundary line, nor either of the corners therein, nor trees or rock piles referred to as being at such corners, could be found on the ground, locating the southwest corner according to the calls therefor. If, however, the west boundary be located 698 varas west of the east boundary, the survey would contain all that it was intended to appropriate, and at the corners would be found rock piles and the stool of a tree, which might be those referred to in the description. Moreover, one of the chain bearers testified that in making the survey the lines were run on the ground commencing at the northeast corner, and that they ran north and south boundary lines, about 700 varas in length. Held, that the jury were justified in finding the western boundary of the survey to be 698 varas west of the east line as determined by the corners on the ground. *Lumpkin v. Draper* (Sup.), 18 S. W. 1058.

**Locating Corner Elsewhere than Fixed by Surveyor.**—In an action involving the question of boundary, the jury adopted a survey reported by S., except that they established the southwest corner 106 varas west of where S. located it. There was evidence that S. measured the south line from the bank of a river, that it was about 106 varas from the bank to the top of a bluff where there were cedar trees, that the surveys made prior to the grant called for a cedar tree at such point, and that the river had materially moved its channel eastward. Held, that the verdict, as to such corner, was supported by the evidence. *Taylor v. Brown* (Civ. App.), 39 S. W. 312.

**To Show No Vacancy between Surveys Called for as Contiguous.**—In 1854, patent of survey 23 was issued, its east line forming part of the west

line of survey 22, and its western boundary being the north survey. In 1859, patent of survey 24 was issued, calls therein being made for a mound, the southwest corner of 23, thence east with 23 to a mound, thence south with the west line of 22 to its southwest corner. In the survey of 24, which was made in 1838, the southwest corner of 23 was recognized as the northwest corner of 24, and in the north survey the call is with the west boundary line of 24 to the southwest corner of 23. In a resurvey of 24, in 1848, there was a call for the southwest corner and the south line of 23. In 1849 a survey by one G. showed that 23 and 24 joined each other as shown in previous surveys, and in 1880 the northeast and northwest corners of 24 were identified as the southeast and southwest corners of 23. Held, to support a verdict that there was no vacancy between 23 and 24. *Angle v. Young* (Civ. App.), 25 S. W. 798.

**Evidence Not Sufficient—To Sustain Judgment Disregarding Marked Tree.**

—An original plat called for a tree that was identified by marks made on it by the maker of the original survey, and, starting from the point fixed by the tree, the plat fixed the direction of a line which plaintiff claimed was the boundary in controversy, and on which defendants had erected a stone wall. Defendants' surveyors fixed another line, but they did not deny the existence of the tree nor explain why they disregarded it in making their survey. Held, that a judgment for defendants was not sustained. *Ostrom v. Layer* (Civ. App.), 48 S. W. 1095.

**Judgment without Evidence to Support It.**—In trespass to try title it appeared that the northeast corner of plaintiff's land was the northwest corner of defendant's land, but no natural or artificial object was called for by the field notes. Plaintiff's

northwest corner and defendant's southwest corner were well identified, and, following course and distance from the corners, located the boundary line as claimed by plaintiff. Defendant's land was surveyed in 1838, and the line located where he claimed it, which was recognized until 1860, when a new survey was made, and the line established about 347 feet east of the line as first located. At that time, commencing at the well-established southwest corner of defendant's land, defendant's west line could be traced by marks and trees, as called for in the field notes, to about three-fourths of a mile from the point where the divergence begins. Afterwards another survey was made, beginning at plaintiff's well-established northwest corner, and course and distance were followed for the northeast corner, defendant's northwest corner, and the line was found to be as claimed by plaintiff. Defendant surveyed again in 1887, and located the line as claimed by him. Held, that a judgment for defendant was without evidence to support it. *Porter v. Miller*, 76 Tex. 593, 13 S. W. 555, 14 S. W. 334.

**Insufficient to Show Existence of Monument.**—On an issue as to the location of a boundary, evidence held insufficient to show the existence of a monument called for in a deed under which one of the parties claimed. *Chew v. Zweib* (Civ. App.), 86 S. W. 925.

**Insufficient to Locate Land.**—In trespass to try title, evidence held insufficient to sustain the finding of the jury as to the location of the land in controversy. *Cochran v. Moerer*, 39 Tex. Civ. App. 75, 87 S. W. 160.

##### 5. Witnesses.

See, generally, the titles **EXPERT AND OPINION EVIDENCE; WITNESSES.**

**Boundary Line May Be Proved by Any Competent Witness.**—A survey

is not the only means of proving a boundary line; any witness who knows the fact may be competent to prove the existence of a marked boundary line. *Bolton v. Lann*, 16 Tex. 96; *Bass v. Mitchell*, 22 Tex. 285, 294.

##### **Witness Need Not Be an Expert.**—

A witness need not be an expert, to testify to marks on trees purporting to relate to a survey. *Vogt v. Geyer* (Civ. App.), 48 S. W. 1100.

**Surveyor Competent to Testify as to Identity of Land.**—Where from any reason testimony to the identity of the land in controversy is pertinent, it is competent to have a surveyor make survey of the premises, and to testify to the matter upon the trial. It is not necessary that the pleadings disclose the necessity, or that an order of survey be made. This does not apply when a report of a surveyor is offered in evidence. *Henry v. Whitaker*, 82 Tex. 5, 17 S. W. 509.

**Vendor Not Incompetent Because of Interest.**—A patentee of land who sells the same by general warranty deed containing the same descriptive calls as those given in the patent, is not thereby rendered incompetent, by reason of interest, to testify as a witness with regard to the boundaries of the land, in behalf of parties claiming it under the title so made by him; the controversy being not about the titles of the respective parties litigant, but about the true boundaries of the tract patented to and sold by the witness. *Robertson v. Mosson*, 26 Tex. 248.

**Competency Not Impaired by Liability to Party for Trespass.**—A witness who is liable to one of the parties, as a trespasser upon the land, is competent, because the judgment could not be used for or against him. *Welder v. Carroll*, 29 Tex. 317, 318, 319.

**Witness May Testify of Survey Made by Him.**—In trespass to try title, a question whether the witness

had ever surveyed on the ground the tract described in the petition and an affirmative answer thereto, were admissible as a predicate for the witness' testimony, in which he detailed minutely what he had done and found upon the ground. *Camp v. League* (Civ. App.), 92 S. W. 1062 (see 101 Tex. 631, no op.).

**Witness Making Resurvey May Detail Conditions Disclosed.**—A witness, who had made a resurvey of the land after suit begun, based on corners pointed out by the defendant, could detail the conditions and distances disclosed by his survey, but it was improper for him to state that at least fifty other surveys would be affected by the change proposed by plaintiffs. *Matthews v. Thatcher*, 33 Tex. Civ. App. 133, 76 S. W. 61.

**Witness' Testimony May Be Based upon Map Made by Him.**—Where, in a case involving boundaries, a surveyor was offered as an expert witness, and he explained and illustrated his testimony by reference to a map which he had made, this was not error, and it is no valid objection that it was not an official map or that no one had testified to its correctness. *Griffith v. Rife*, 72 Tex. 185, 187, 12 S. W. 168. And see *Dangerfield v. Paschal*, 11 Tex. 579, 582.

**Testimony Founded on Map Competent Through Field Notes Not in Evidence.**—Where the record shows that the testimony of witnesses with reference to the connection and calls of surveys involved was founded upon a map of Haskell county certified to by the commissioner of the general land office, showing the boundaries and location of both surveys in question, and of the surrounding surveys, and that upon this map the course and distances of the lines of the surveys were entered, it is improper, to exclude their testimony on the ground that the field notes of the surveys were not introduced in evidence.

*Whitman v. Rhomberg* (Civ. App.), 25 S. W. 451, 452.

**Witness May State Relation of Disputed Corner to Others from Observation of Survey.**—A witness pointed out, upon a plot shown him, the northwest corner of the Mitchell survey, and testified with regard to said corner: "I found a corner that appeared to be an original corner, and I found that it corresponded with other corners on the ground that were called for;" objection was made that "it was not proper to bring in a surveyor or anybody else and have him to testify with reference to what he found that was called for unless the papers that show the callings are first put in evidence." This objection to the order of introducing the evidence was properly overruled. The witness described very fully the examination of the lines and corners made by him; he was properly allowed to state the relation borne by the disputed corner to others. *Boydston v. Sumpter*, 78 Tex. 402, 405, 14 S. W. 996.

**Witness May Testify That Only Office Survey Was Made.**—Where the issue involved the location of a boundary line, it was permissible for a witness to testify that he had the junior location made, and that no survey was made on the ground, but the field notes were made out in the surveyor's office, he being present, and that the intention was to include all the land between two older surveys, as this evidence did not tend to contradict, but merely to explain the field notes as returned. *McCreary v. Douglass*, 5 Tex. Civ. App. 492, 24 S. W. 367.

**Witness May Testify as to Source of Knowledge of Line.**—Where a witness testified that a surveyor was with him when he found a certain marked line, but he related no declaration of surveyor, such testimony was admissible as showing how, when, and under what circumstances the wit-

ness gained his knowledge. *Hornberger v. Giddings*, 31 Tex. Civ. App. 283, 71 S. W. 989.

**Surveyor May Testify as to Correspondence of Former Survey with Object Called for.**—In trespass to try title, testimony of a surveyor that meanderings of a stream shown by a former survey would fit only one particular part of the stream, was admissible after he had testified to an actual survey by himself. *Camp v. League* (Civ. App.), 92 S. W. 1062 (see 101 Tex. 631, no op.).

**Surveyor's Report May Be Supplemented by His Testimony.**—Where the record shows that the surveyor whose report was attacked was examined as a witness and stated as such, his work in making the survey, such testimony will be considered as supplementing his report and sustaining it. *Randall v. Gill*, 77 Tex. 351, 14 S. W. 134.

**Surveyor's Opinion as to Identity of Line Competent.**—On the issue of boundary, a surveyor who had surveyed a line, and to whom another had pointed out a cove where he claimed the original grantee said the line ran, was properly permitted to testify that in his opinion the line run out by him and coinciding with plaintiff's contention was the line of the survey as pointed out to him. *Goodson v. Fitzgerald*, 40 Tex. Civ. App. 619, 90 S. W. 898.

**Surveyor May Testify That Deeds Embrace Property in Dispute.**—In trespass to try title, an expert surveyor was properly permitted to testify whether the property described by field notes in the petition was embraced within the metes and bounds given in deeds examined by him. *Camp v. League* (Civ. App.), 92 S. W. 1062 (see 101 Tex. 631, no op.).

**Surveyor May Explain Discrepancy in Position of Objects by Variation of Needle.**—There being calls in the original surveys for unmarked trees,

designated by their species, size, and course and distance from corners, it was proper to permit a surveyor to testify that there were trees of the same species, about the proper course and distance from the corners found by him, and to testify how there might be a slight discrepancy between the bearing of the trees as shown in the original surveys and as he found them on the ground, owing to a variation of the needle, for the burden of proof to show a vacancy between surveys is upon him who asserts the vacancy. *Angle v. Young* (Civ. App.), 35 S. W. 798, 800.

**Opinion of Surveyor That Only Part of Survey Was Actually Run Incompetent.**—In an action to determine the title to land of which the boundaries are in dispute, it is error to permit surveyors to give their opinion to the effect that, when the land was originally surveyed, only one line of the survey was actually run. *Randall v. Gill*, 77 Tex. 351, 14 S. W. 134. See *Reast v. Donald*, 84 Tex. 648, 651, 19 S. W. 795.

**Surveyor's Opinion as to Conflict Incompetent—Facts Must Be Stated.**—On an issue as to whether one survey conflicted with another, it was error to permit a surveyor to testify that there was no conflict; the witness should have been required to state the facts, and leave the question of conflict to be decided by the jury, under appropriate instructions from the court. *Bugbee Land, etc., Co. v. Brents* (Civ. App.), 31 S. W. 695; *Randall v. Gill*, 77 Tex. 351, 14 S. W. 134; *Reast v. Donald*, 84 Tex. 648, 19 S. W. 795; *Keystone Mills Co. v. Peach River Lumber Co.* (Civ. App.), 96 S. W. 64 (see 101 Tex. 645, no op.).

**Opinion of Surveyor That Line Should Be Run Contrary to Call for Natural Object Incompetent.**—Where a deed calls for the meanders of a creek as the line, and the surveyor who originally ran the line and wrote

the deed testified that the creek was the line, it was error to admit the testimony of other surveyors, giving as their opinion that the line should run out by the other calls for its course and distance, rather than by following the creek. *Griffin v. Barbee*, 29 Tex. Civ. App. 325, 68 S. W. 698.

**Opinion That Certain Location Contrary to Field Notes Incompetent.**

—On an issue of the location of a survey whose boundaries depended on the location of other surveys, opinions of surveyors as to how they would locate the latter, and that, if such surveys were located in a certain manner, it would be contrary to the field notes for the same, is inadmissible, since such testimony involves a question of law. *Fulcher v. White* (Civ. App.), 48 S. W. 881.

**Testimony of Surveyor That Survey Corresponds with Field Notes Incompetent When Both in Evidence.**

Testimony of a surveyor that his meanderings of a river correspond with those of certain field notes is inadmissible, where the two sets of meanderings are introduced in evidence, and leave no room for the expression of opinion as to their correspondence, unless some question arises as to the identity or comparative identity of calls, in which event the surveyor may testify as an expert. *Goodson v. Fitzgerald*, 40 Tex. Civ. App. 619, 90 S. W. 898.

**6. Questions of Law and Fact.**

**a. Questions of Law.**

**What Are Boundaries Question of Law.**—As to what are boundaries, is a question of law for the determination of the court. *Farley v. Deslonde*, 58 Tex. 588, 591; *Bolton v. Lann*, 16 Tex. 96, 112; *Farley v. Deslonde*, 69 Tex. 458, 6 S. W. 786.

**Relative Value of Field Notes Put in Evidence Question of Law.**—In an action to recover the value of timber cut on the "A. Burrell league in Hardin County," if to ascertain the

location of the land it was proper to resort to the original field notes as made by the surveyor, and as an addition to them the plaintiffs without objection introduced the county map and some parol evidence to support their allegation as to the locality, the defendant introducing none, it was for the court and not the jury to determine the relative value of the English field notes and the Spanish copy of them. There being no conflict in the evidence the court did not err in refusing to submit the issue as to the locality of the land as if there were conflicting evidence. *Irvin v. Bevil*, 80 Tex. 332, 16 S. W. 21.

**Location of Corner Erroneously Described Mixed Question of Law and Fact.**

—Where a surveyor began at the western boundary of one survey and ran a line west, established a corner, called for a survey not there, the question of the locality of such corner is a mixed question of law and fact, in determining which, both the rules of law and the evidence as to the footsteps of the engineer are to be considered. *Castleman v. Pouton*, 51 Tex. 84, 88; *Booth v. Upshur*, 26 Tex. 64, 71; *Booth v. Strippleman*, 26 Tex. 436, 441; *Burnett v. Burriss*, 39 Tex. 501, 502; *Browning v. Atkinson*, 37 Tex. 633, 659; *Jones v. Burgett*, 46 Tex. 284, 292.

**Boundary Not Determined as Matter of Law by Call for Adjoiner.**

—A call in a deed for the line of an original grant will not be so conclusive as to the land included as to enable the court to determine the boundary as matter of law, where there is evidence tending to show that its location was misunderstood by the parties and a different location of the line regarded by them as the boundary of the land conveyed. *Soape v. Doss*, 18 Tex. Civ. App. 649, 45 S. W. 387.

**b. Questions of Fact.**

**Location of Boundaries Question of Fact.**—As to where the boundaries are

upon the ground, is a question of fact to be determined from the evidence. *Farley v. Deslonde*, 58 Tex. 588, 591; *Farley v. Deslonde*, 69 Tex. 458, 6 S. W. 786; *Bolton v. Lann*, 16 Tex. 96, 112; *Broll v. Wishert* (Civ. App.), 79 S. W. 1089; *Adams v. Crenshaw*, 74 Tex. 111, 11 S. W. 1082; *Roberts v. Helm*, 1 Tex. Civ. App. 100, 102, 20 S. W. 1004.

Where a survey lying between two older surveys calls for lines in each of them, and also for quantity, course and distance, and each survey is delineated not by permanent or well-known monuments, but by calls which may be suppositions, and the area of such survey is not sufficient to compromise all the space between the two other surveys for which it calls, its true locality is to be determined by the jury according to the relative prominence, certainty and notoriety of its several calls. *Booth v. Upshur*, 28 Tex. 64, 73. And see *Stroud v. Springfield*, 28 Tex. 649.

An agreement, in a boundary suit, admitting that the parties had title to their respective lands, as described in their deeds respectively, except in so far as the same might be defeated by an agreed boundary line, etc., did not eliminate the issue of boundary nor preclude the introduction of evidence to identify the actual boundaries called for in their respective deeds, and it was proper to submit this question to the jury. *Sloan v. King*, 33 Tex. Civ. App. 537, 77 S. W. 48.

Where land in controversy lay at the northwest end of the survey between a certain bayou and the west line, and if the southwest corner of the survey should be found to be the north line of land belonging to an adjoining owner, then only a part, if any, of the land sued for could be recovered by plaintiff, defendant was entitled to have such issues submitted to the jury, and it was error for the

court to charge that plaintiff should recover all of the land sued for or none of it. *Clawson v. Wilkins* (Civ. App.), 93 S. W. 1086.

**Beginning Point of Survey Question of Fact.**—Whether a survey began at the point indicated by its field notes as the beginning, or not, is a question of fact for the jury. *Jones v. Andrews*, 62 Tex. 652.

**Whether Lines Actually Run Question for Jury.**—Whether any or all the lines of a survey were actually run upon the ground in making the original survey, is a question of fact which should be submitted to the jury. *Ayers v. Lancaster*, 64 Tex. 305; *Randall v. Gill*, 77 Tex. 351, 354, 14 S. W. 134; *Reast v. Donald*, 84 Tex. 648, 651, 19 S. W. 795.

**Whether Lines Defined Question of Fact.**—Whether the boundary lines of the Uranga grant were so defined as to notify the public of their location was a question of fact the jury was called on to settle. *Weir v. Van Bibber*, 34 Tex. 226, 227, 230.

**Location of Line Question for Jury.**—Where it was in issue whether a river or a slough was the east line of a survey, it was proper to submit to the jury the question as to the locality of the east line as made by the surveyor, that is, whether the slough or the river was the original line as made by the surveyor. *Allen v. Koepsel*, 77 Tex. 505, 14 S. W. 151. And see *Logan v. Meade*, 43 Tex. Civ. App. 477, 98 S. W. 210, 211.

Where, in an action to establish a boundary line, plaintiff contended that the line was 200 varas west of the west line of his land as fixed by a survey made at the time of his purchase, which plaintiff claimed was located by mistake, while defendant claimed that such line was the true location, there was such a conflict of evidence as to the location of the line as to present a question for the jury. *Wiley v. Lindley* (Civ. App.), 56 S. W. 1001.

A tier of three surveys, beginning with the southernmost, had the east and west lines marked, and they were continued to the north line of the third survey. The second survey was based on the north line of the first, and the third on the north line of the second. The surveyor who made the third survey declared that it commenced at the northeast corner of the second, and, running the course and distance called for in the second's north line, called for its northwest corner; and, by comparison of the calls for creeks, it appeared that he was accurate as to distance between creeks and lines. There was an old line where the owner of the second survey claimed his north line to be, supposed to have been run by the surveyor in making the original survey of the third; and defendant, who claimed to have pre-empted a vacant strip between the second and third surveys, had recognized such line as the south boundary of the third survey. The south line of the second survey was not fixed on the ground by marked corners or lines, but the east and west lines called for course and distance from the south line. Held, that the location of the north line of the second survey was a question for the jury, looking at all the facts, and was not to be determined by the call for distance from the south line. *Moore v. Stewart* (Sup.), 7 S. W. 771.

When some and not all of the lines of a survey were run, it becomes necessary for the jury to determine the location of the lines that were not run, as well as those that may be ascertained by following the footsteps of the surveyor. *Upshur County v. Lewright* (Civ. App.), 101 S. W. 1013 (see 102 Tex. 595, no op.).

In an action to determine a disputed boundary line, held, under the evidence, a question for the jury whether the survey made under order of the court retraced the line as originally

run. *McDonald v. McCrabb*, 47 Tex. Civ. App. 259, 105 S. W. 238.

**Length of Line Question for Jury.**

—Upon an issue as to the length of certain 'boundary lines, evidence held to require submission of the question to the jury. *Giddings v. Thompson* (Civ. App.), 92 S. W. 1043.

**Location of Object Question for Jury.**—There being evidence as to the actual location of a mesquite tree, called for in a grant, it was the province of the jury, from all the evidence, to find where it stood; and it was not necessary to find, after a lapse of nearly forty years, all the objects called for in the deed; such objects having been called for to designate at that time where the tree was to be found. *Hawkins v. Nye*, 59 Tex. 97, 98.

**Identification of Object Called for Question for Jury.**—Where a grant called for the falls by a river, and for the corner of another grant, without finding one of which the grant could not be located, but either being found, it could then be identified by the other calls, its identification is a question of fact for the jury. *Frisby v. Withers*, 61 Tex. 134.

**When Calls Inconsistent Locality of Land Question of Fact for Jury.**

—Where discrepancies in calls are shown to exist, a question of fact is fairly raised for the jury to decide, in the light of all the surrounding circumstances adduced in proof, as to which one of the objects expressed in the grant or survey most truly indicates to their minds the locality of the land in question. *Booth v. Upshur*, 26 Tex. 64, 70. See, also, *Stroud v. Springfield*, 28 Tex. 649.

Where the calls for the beginning corner of a survey are inconsistent, and the testimony to the locality of the land sued for and surveys called for in its field notes is conflicting, it is for the jury to determine from the testimony if they can the locality of



the land; it is error for the court to designate one point among several testified to as a point from which the survey should be constructed by its calls. *Jones v. Andrews*, 72 Tex. 5, 9 S. W. 170; *Wilkins v. Clawson*, 37 Tex. Civ. App. 162, 83 S. W. 732, 734.

**Which of Conflicting Calls Governs Question of Fact.**—In a suit to determine a disputed boundary line, whether a call for the corner of a certain survey in the field notes of a survey in question or a call for a certain spring in the field notes of an adjoining survey should control in locating the east line of a block, held, a question of fact for the court sitting without a jury. *Jacoby v. Norton*, 40 Tex. Civ. App. 313, 90 S. W. 524.

Where a survey called for corners of two other tracts as a common point, but those corners did not coincide, and, compared with the amount called for, there would be a deficiency or an excess in the actual survey according to which call was taken as true, though the deficiency would be greater than the excess, the issue as to which call should govern was a question of fact for the jury. *Titterington v. Kirby*, 47 Tex. Civ. App. 596, 106 S. W. 899.

**What Vendor Intended as Boundaries Question for Jury.**—The owner of a survey of land had it resurveyed and divided into numbered quarter sections with corners for each established on the ground, and afterwards sold two of such quarters, designating them by their numbers, but instead of calling for the corners thereof as established by the resurvey, his deed called, as did the field notes of the original survey, for an unmarked line of an adjacent survey, which lay in fact beyond the distance called for. Held, that the question of what land the grantor intended to sell and convey was one of intention to be gathered by the jury from all the facts

and circumstances in evidence. The rules that a call for an unmarked line will control a call for course and distance, and that the presumption is that the surveyor actually ran the lines upon the ground, do not apply, and it was error for the court to so charge. *Holland v. Thompson*, 12 Tex. Civ. App. 471, 35 S. W. 19.

Where one of the lines of an original survey was not actually run out, but it called for course and distance and also for the line of a prior survey on that side, which could be reached only by exceeding the call for distance, and there was evidence that it was intended, in making such survey and location, to cover all the vacant land up to such adjacent prior survey, it should have been left to the jury to determine where the line should extend to, and whether the intention of the locator was in fact to include all of the vacant land there. *Taylor v. Lewis*, 36 Tex. Civ. App. 305, 81 S. W. 534.

## 7. Instructions.

See, generally, the title INSTRUCTIONS.

**Duty of Court to Submit Proper Rules.**—The court should submit to the jury the rules by which they are to be governed in determining the true location of the land. *Williams v. Mayfield*, 57 Tex. 364, 366, 367.

**Whether Usual Tests of Calls Should Be Given Dependent upon Particular Case.**—It is not in all cases proper to give in a charge to the jury the artificial rules so long recognized by the courts as the usual tests of the relative dignity of calls, but the propriety of doing so must depend upon the facts of each particular case. Where these rules have no application to the facts of the case on trial, they are liable to confuse and mislead the jury, and should not be given. *Best v. Splawn* (Civ. App.), 33 S. W. 1005, 1006; *Ayers v. Beaty*, 5 Tex. Civ. App. 491, 24 S. W. 366.

**Proper for Instruction to Set Forth Duty of Surveyor as to Marking Boundary.**—In an action involving boundaries the court charged the jury: "It is a matter of no consequence which corner or line of the survey was first made; but the question is, did the surveyor mark the boundaries or corners defining the land intended to be conveyed, and does the title describe the boundaries and corners in such a manner that they can now be found on the ground and identified as the true boundaries and corners of the land described in the title?" No objection can be conceived to this charge. It simply explains the duty of the surveyor in making his survey, in order to segregate any given piece of land from the public domain, and should he do less, he would fail to accomplish his design and fall short of his duty. *Ayers v. Harris*, 64 Tex. 296, 298.

**Charge Stating Dignity of Calls and Directing Jury to Consider the Evidence Proper.**—A charge in trespass to try title having correctly stated the rule as to the relative dignity of calls in field notes in ascertaining the location of a survey, and expressly directed the jury to consider all the evidence and follow the actual survey as it was made by the surveyor, could not have misled the jury. *Wilkins v. Clawson*, 50 Tex. Civ. App. 82, 110 S. W. 103.

**Not Error to Refuse Additional Instructions When Jury Sufficiently Instructed.**—Where a location was made to take up a vacancy and calling for adjoining surveys, and there was in the general charge of the court a full exposition of the law touching boundaries, it was not error to refuse additional instructions, when to give such repeated charge would give undue prominence to the evidence indicated and thereby might mislead the jury. *Kuechler v. Wilson*, 82 Tex. 638, 18 S. W. 317.

Where on an issue as to the location of a survey, defendant being entitled to recover if the northwest corner was at a certain tree, he could not complain of the refusal of instructions based on the theory that such tree was the northwest corner, where the court charged that, if the tree was the northwest corner, the jury should find for defendant. *White v. Smith* (Civ. App.), 67 S. W. 1028.

**Instruction Should Not Contain Inferences.**—It is not proper for the charge of the court to state inferences and presumptions of fact in reference to the lines and surrounding surveys of the land in controversy, although such presumptions may be stated in the opinion of the supreme court on a former appeal of the case. *Clay County Land, etc., Co. v. Montague County*, 8 Tex. Civ. App. 575, 28 S. W. 704.

**Alternative Instruction Proper.**—In an action involving the location of a line forming the western boundary of plaintiff's and the eastern boundary of defendant's land, it appeared that the west line of plaintiff's tract was described as beginning at the south end of defendant's previously established eastern boundary, and running thence, along the line, a certain distance. The court instructed that the only issue in the case was the true location of the western boundary line of plaintiff's land, but further instructed that, if the southeast corner of defendant's land was located as claimed by plaintiff, the verdict should be for plaintiff, while, if it was located as claimed by defendant, the finding should be for him. Held, that the instruction was not prejudicial to defendant on the ground that, as defendant's survey was the older and plaintiff's survey called for one corner of defendant's survey as its beginning point, the location of plaintiff's survey was immaterial. *Giddings v. Thompson* (Civ. App.), 92 S. W. 1043.

**Charge Should Allow Jury to Follow Footsteps of Surveyors.**—A charge ought to be so framed as to allow the jury to follow, as far as practicable, the footsteps of the surveyor, and to construct lines no farther nor beyond where he had left his footprints; to follow first those lines and to go to those corners which, according to their judgment, the evidence pointed to as being identified and established by the evidence. *Jones v. Andrews*, 62 Tex. 652, 664.

**Instruction Should Not Deprive Jury of Consideration of Entire Testimony.**—The court should not attempt to control the jury in applying the entire testimony to the purpose of identifying the land. *Jones v. Andrews*, 72 Tex. 5, 9 S. W. 170.

**Instruction Exaggerating Importance of Portion of Testimony Erroneous.**—It is error for the court to give an instruction in a boundary line dispute giving undue prominence to some of the evidence tending to prove the location of the survey. *Randall v. Gill*, 77 Tex. 351, 356, 14 S. W. 134; *Adams v. Crenshaw*, 74 Tex. 111, 11 S. W. 1082.

Where there was other evidence besides the testimony of the witness F. tending to establish that a disputed boundary line was where plaintiff claimed it, a charge instructing the jury that the testimony of F., if true, fixes the line as claimed by plaintiff, and if they believed that contention established, they should return their verdict accordingly, was erroneous as singling out certain evidence and making plaintiff's right depend on its truth or falsity, and as being on the weight of evidence. *Farnandes v. Schiermann*, 23 Tex. Civ. App. 343, 55 S. W. 378.

**Instruction Exaggerating Weight of Either Party's Contention Erroneous.**—Where, on an issue in trespass to try title as to the location of a survey, there was evidence to establish the

theory of plaintiffs on which the survey might be located, it was error for the court, instead of instructing that if the jury found from the evidence that the survey could be located as claimed by plaintiffs, and was so located they might find for plaintiffs, to instruct that it might be located by certain courses and distances, in effect in accordance with plaintiffs' theory, as the instruction given was on the weight of the evidence. *Thompson v. Kelly*, 47 Tex. Civ. App. 180, 97 S. W. 326.

**Improper to Give Undue Importance to One Call.**—Defendant requested an instruction, "that one of the questions in the case being the true location of the division line between the 'Perdido' and 'La Blanca' tracts of land, and it appearing that said line's north end is at a corner stone called 'El Coyote,' on the south boundary line of the 'Encantada' grant, therefore said Coyote corner if the same can be located from the evidence would be the starting point from north to south of said division line." This was properly refused. It was calculated to give undue importance to one call in the grant over others of equal dignity. *Schunior v. Russell*, 83 Tex. 83, 84, 18 S. W. 484. And see *Giddings v. Thompson* (Civ. App.), 92 S. W. 1043.

**Instruction Making Course and Distance Exclusive Test of Locality Erroneous.**—The court erred in the charge complained of, in confining the jury, as a matter of law, to course and distances, in the absence of an actual survey, as the exclusive test of the true locality of a survey. *Boon v. Hunter*, 62 Tex. 582, 588; *Roberts v. Helm*, 1 Tex. Civ. App. 100, 102, 20 S. W. 1004.

**Improper to Exaggerate Importance of Acquiescence in Line.**—In an action involving a disputed boundary line, claimed by defendant to be identical with a line shown to have been run

by a surveyor for a county road, an instruction implying that any acquiescence by plaintiff and defendant, or those under whom they claim, however small, in the line run by the surveyor, should defeat recovery, is error. *Vogt v. Geyer* (Civ. App.), 48 S. W. 1100.

**Instruction Should Not Confine Jury to Consideration of Only One Call.**—On a question of boundary between two surveys (plaintiff's land and survey No. 8), the evidence as to the location of the calls in the field notes was conflicting. The jury was instructed that, if they found that survey No. 8 was located on the ground a certain distance "west from the west line of F. county school land, as claimed by plaintiff, to find for plaintiff." Held, that the instruction was error, as it confined the consideration to one connection called for by the field notes, in disregard of evidence of other calls. *King v. Mansfield* (Sup.), 19 S. W. 858.

**Not Proper to Instruct Jury to Consider Only Course and Distance.**—Where a report of survey made under order of court was read in evidence and reported a rock for a corner of the tract as upon the ground and recognized for many years as the corner of the tract in controversy, held, proper to refuse a requested charge confining the jury to course and distance unless there were natural objects called for in the patent still existing, for this charge, if given, would have confined the jury to the consideration of course and distance only in determining the locality of the southeast corner of the survey, unless it appeared from the evidence that there were distinctly marked natural objects called for in the patent yet existing and susceptible of identification by the calls in the patent. This is not the law. In determining the locality of a boundary line the inquiry is, where was it in fact located, and not where it

ought to have been located. *Evans v. Foster*, 79 Tex. 48, 52, 15 S. W. 170.

**Improper to Instruct Jury to Construct Survey with Reference to Quantity Alone.**—When two corners of a survey are found and identified, being the upper and lower corners of the survey bordering on a stream, it is error to charge the jury that they may locate the back line with reference to the area of land which the grant, if properly located, should contain, in disregard of the distances called for in describing the side lines, in the event they could not fix the disputed portions of the lines with reasonable certainty. *Ayers v. Harris*, 64 Tex. 296.

**Instruction Should Not Deprive Jury of Consideration of Field Notes.**—In an action to determine boundary lines between surveys, the court erred in charging the jury that the intention of the surveyor that a line should run the distance called for in his field notes must be determined by evidence outside of the called-for distance in the notes themselves; the jury should be permitted to consider every fact proven in coming to their conclusion as to where the surveyor intended to end the line. *Mock v. Hatcher* (Civ. App.), 43 S. W. 30.

**Improper to Instruct That Distance Superior to Artificial Object.**—Where, in an action involving a disputed boundary line, the true location of the corner was for the jury on conflicting evidence, an instruction that a call for an unmarked prairie line was not such a call for an artificial object as would control a call for course and distance, tended to mislead the jury to believe that a call for distance was of greater weight and prevailed over a call for the corner to be at a certain designated line, and was therefore objectionable as on the weight of the evidence. *Clawson v. Wilkins* (Civ. App.), 93 S. W. 1086.

**Instruction Depriving Jury of Adoption of Most Certain Rule Erroneous.**

—On an issue as to the location of the U. and the T. surveys, it appeared that the former was located west of the latter, but that both were north of the C. survey; that the field notes of the T. survey called for a stake on the north boundary of the C. survey as the southeast corner of the T. survey, and that the notes of the U. survey called for the same bearing trees at its southeast corner that were called for at the southwest corner of the T. survey, and that none of the bearing trees called for could be found on the ground, but that the north line of the C. survey was at that time a well-marked and established line; and the court instructed that, if the surveyor who made the original location of the T. and U. surveys ran on the ground the north line of the T. survey and the west line, and that if the northwest corner of the T. survey was the only corner thereof which could be identified on the ground, the jury should locate such northwest corner and establish the T. survey by running south course and distance for the southwest corner, and east course and distance for the northeast corner, and then establish the southeast corner by running the south course and distance, and the south line east course and distance, called for in the field notes, the intersection of the two lines being the southeast corner of the T. lands, and the instruction, proceeded to give a similar rule for the location of the line of the U. survey. Held, that the instruction was erroneous, as the jury should have been left to apply the rule which indicated with most certainty the location of the land, since, if the surveyor took the north line of the C. survey as a base line and intended to connect his surveys with it, it should not necessarily be prevented merely because he did not run each line back to the base line, and because so to

do would give an excess of area to the U. and T. surveys from the area called for in their patents. *Upshur County v. Lewright* (Civ. App.), 99 S. W. 441, 442.

**Charge Disregarding Marked Line Erroneous.**

—The true locality of the north or back line of a survey fronting on a river was the matter to be ascertained, and it was not shown that the east line had been originally run by the surveyor. The southwest and southeast corners on the river were clearly established. In the field notes of the survey there were several calls for natural objects besides those at the river corners. Held, that it was error to instruct the jury that the true northeast corner, at which the trees called for to identify it could not be found, should be established by measuring (reversing the course) on the east line the distance called for in the field notes, from where that line crossed a stream, to the northeast corner. Especially was this error when it involved a disregard of a marked east line extending beyond the corner, as it would have been thus established by the charge of the court and of other measurements and marked lines. *Ayers v. Lancaster*, 64 Tex. 305.

**Charge Limiting Effect of Established Corner Erroneous.**

—In a survey the southeast and southwest corners were not disputed. The east line was marked for much of its distance and a double hackberry on that line was claimed for the northeast corner. No marked line could be found on the west, though there is testimony that it was run. The north line was in dispute and it was called for at right angles with the east line. The court charged that if the jury found that the two hackberries were marked and established as the northeast corner and that the west line was not run and measured, then the north line and the length of the west line would be controlled and fixed

by said hackberries or northeast corner. Held, such a charge was error, in that it limited the effect of the fact, if found, of the locality of the northeast corner. That corner would control the north line whether the west line was in fact never run, or if run its locality lost. *Scott v. Pettigrew*, 72 Tex. 321, 12 S. W. 161.

**Instruction Directing Jury to Fix Boundaries Regardless of Excess Erroneous.**—Where no older surveys are called for in a grant, and there is nothing indicating an intent to embrace in the grant land not included in the area named, and the footsteps of the surveyor who made the location are found upon a part only of the boundaries of the grant, the jury should not be instructed to fix the unmarked and undefined boundaries regardless of the fact of excess. The fact of excess in area should have been left to the jury to be considered in connection with all other evidence, without suggestion from the court as to what weight it was entitled to in determining so much of the boundaries as were not identified by marks and objects upon the ground. *Scott v. Pettigrew*, 72 Tex. 321, 328, 12 S. W. 161. But see *Ayers v. Harris*, 77 Tex. 108, 116, 13 S. W. 768; *Branch v. Simons* (Civ. App.), 48 S. W. 40 (see 93 Tex. 636, no op.). And see two succeeding paragraphs.

**Instruction That Excess Is Simply a Circumstance to Be Considered Proper.**—Where the location of an unmarked corner of a survey could be determined only by its proximity to a branch called for in the field notes, and the evidence as to the actual distance from the beginning corner at which the branch could be found was conflicting, plaintiff's evidence showing that to reach it required an extension of the south line much beyond its proper length, which would make an excess in the survey, it was not error as on the weight of evidence for the court

to charge that "the fact that the lines and corners of the survey as originally run and noted on the ground include a greater or less quantity of land than is included in the field notes of the patent becomes immaterial further than as a circumstance to be considered;" it is well settled law in this state that the fact that the lines of a survey of a portion of the public domain made by the official surveyor for the purposes of a grant embrace more land than it purports to convey, or that the distances called for may fall short of those of the lines as actually run, neither destroys nor diminishes the grant. Hence, if in a case involving the question of the boundary of a survey, the undisputed evidence should show the true location of certain lines and such lines should include more land than is called for in the survey, it would not be erroneous for the court to charge the jury that the lines as actually run should be taken as the true boundary lines of the survey and that the fact that there was an excess was wholly immaterial. But where the calls can not be reconciled and the evidence is conflicting—the lines as claimed by one party embracing an excess while those claimed by the other embraced none—it is not error to instruct the jury in effect that they may consider the excess as a circumstance to aid them in determining the true boundaries of the grant, but when they have determined the grant the excess becomes wholly immaterial. The propositions that when the boundaries are ascertained the excess is immaterial, and then when the evidence is doubtful as to the lines the excess may be looked to to aid the jury in determining their true location, are both correct as a matter of law, and it is not upon the weight of the evidence to so instruct the jury. *Yocham v. McCurdy*, 95 Tex. 336, 342, 67 S. W. 316, reversing 27 Tex. Civ. App. 183, 65 S. W. 213.

**Prior Holdings as to Instructions Regarding Excess Reconciled.**—The charge in *Yocham v. McCurdy*, supra, is very like that which was held in *Scott v. Pettigrew*, 72 Tex. 321, 328, 12 S. W. 161, to be a charge upon the weight of the evidence and prejudicial to the appellant and was repeated in the same language in *Ayers v. Harris*, 77 Tex. 108, 13 S. W. 768, and held not to be prejudicial to the appellant in the latter case. In each of these cases the question was as to the boundary lines of the Maximo Moreno eleven-league grant; and the testimony upon the question was practically the same. In each, the excess claimed upon the one side and denied upon the other was very large. But in *Scott v. Pettigrew*, the verdict and judgment in the trial court was in favor of the party claiming the excess, while in *Ayers v. Harris*, the party who denied that any excess existed prevailed upon the issue. To reverse the judgment in either case, it was therefore necessary to hold not only that the charge was erroneous, but also that it was prejudicial to the party appealing. The position of the parties being changed upon the appeal, a charge prejudicial to the appellant in the one case was not only not necessarily to the prejudice of the appellant in the other, but was likely to have inured to his benefit. If *Scott* had prevailed in the former case, it may properly have been held that since his adversary claimed there was no excess, the latter could not have complained of the charge, though erroneous. Very clearly it was not prejudicial to the party, who claimed that the survey embraced more land than was called for in the field notes, to charge that the excess was immaterial. Therefore the opinion in the former was not overruled by that in the latter. But the charge in *Scott v. Pettigrew* was not free from objection. In *Ayres v. Harris*, it is spoken of as

"somewhat obscure, if not contradictory." In that case the charge admitted of the construction, and the jury may have understood it to mean, that if they could fix the boundaries of the grant, without regard to the excess, they were not to consider the excess for any purpose—whereas the law is that it is a circumstance to be considered with the other evidence in determining the question of boundary. In the case at bar the instruction in effect merely tells the jury that the excess may be considered in determining the lines of the survey and for that purpose only. The charges are distinguishable and it is not necessary to overrule *Scott v. Pettigrew* in order to sustain the correctness of the instruction. *Yocham v. McCurdy*, 95 Tex. 336, 344, 67 S. W. 316.

**Proper to Instruct Jury to Harmonize Calls.**—When the court has carefully instructed the jury as to the comparative dignity and force of calls in the grant describing a survey, the locality of which is in dispute, it is not error to instruct them that, if they can not identify any designated corner from the evidence, it is their province to fix the lines of the survey in subordination to the general rules which the court has described, in such a way as will most nearly harmonize the calls with known corners and marked lines identified by the evidence. *Ayers v. Harris*, 64 Tex. 296.

**When Discrepancy in Calls Established, Error to Charge That Initial Point Correctly Designated.**—A discrepancy between the calls in a survey being established, and evidence being offered to prove error in the initial point called for, and to show its true position, it is error to exclude such evidence and to instruct the jury that they must presume the initial point to be at the place designated in the survey. *Booth v. Upshur*, 26 Tex. 64; *Stroud v. Springfield*, 28 Tex. 649.

**Improper to Instruct That Surveyor's Report Prima Facie Correct.**—In a suit involving boundaries in which an order of survey had been made and the report of the surveyor submitted in evidence, there being conflicting testimony, it was error, as charging upon the weight of evidence, to instruct the jury that the surveyor's report must be taken as correct and true until it is shown to be erroneous; and that the burden of proof is upon the defendant to show that this report is erroneous. *Kerlicks v. Meyer*, 84 Tex. 158, 19 S. W. 379.

**Can Not Authorize Arbitrary Establishment of Line without Evidence.**—Where the charge of the court authorized the jury, if there was not that amount of evidence which would enable them to say where the true line was, to establish a line without evidence, and to adopt one arbitrarily upon a matter of description in the deed, as to quantity of land intended to be conveyed thereby, when the parties to that deed had not undertaken to make the quantity of land thereby conveyed a matter descriptive of the land conveyed, the charge is erroneous. *Hawkins v. Nye*, 59 Tex. 97, 102.

**Charge Disregarding Evidence Tending to Locate Land Erroneous.**—A charge is erroneous which disregards evidence (acts and declarations of the locating surveyor in making subsequent adjoining surveys) tending to identify the actual location of the line in controversy, upon the ground, without reference to the corner assumed in the charge as controlling. *Davis v. Coleman*, 16 Tex. Civ. App. 310, 40 S. W. 606.

**Improper to Instruct as Matter of Law That Line Terminate at River Encountered.**—If a surveyor in running from a base line a dividing line between lands set aside from the same original survey to joint owners, reaches the river on which the land fronts, he may go around a bend of the river and

continue his dividing line from a point on the continuation of his course so as to give to each tract its proper portion of land. On a question involving the true location of such division line, the surveyor being dead, a charge which as matter of law would require the original line to terminate at the point where the river was first reached from the base line, would be error. *Tucker v. Smith*, 68 Tex. 473, 474, 3 S. W. 671.

**Proper to Refuse Instruction Regarding Line about Which There Is No Dispute.**—Where, in trespass to try title, plaintiff relied on an agreement by defendant's remote grantor as to such grantor's south boundary line, made after a survey, it was proper to refuse an instruction assuming that the surveyor located the north line of land adjacent on the south, where the survey was made without reference to such north line, concerning which there was no dispute. *Taylor v. Blackwell* (Civ. App.), 105 S. W. 214.

**Proper to Instruct Jury to Ascertain at What Variation Line Should Be Run.**—Where, in a boundary suit, it appeared lines were originally run at a variation of 9 degrees and 45 minutes, and it was undisputed that, during the 50 years since then, the variation of the magnetic needle has decreased from 2 to 3 minutes per annum, it was not error to instruct the jury to ascertain at what variation the lines should be run to follow the original survey. *Battles v. Barnett* (Civ. App.), 100 S. W. 817.

**Improper to Instruct That Survey Be Located from Corner, Location of Which Not Fixed.**—A charge in a suit involving a question of boundary, which virtually instructs the jury to determine the location of the survey by running it out from its beginning corner, is error, especially when the evidence identifies some of its lines as being in such locality as, if adhered to, would place the corner designated as the beginning corner in some other



locality. *Jones v. Andrews*, 62 Tex. 652.

On an issue as to the location of land conveyed by courses and distances, it is error to instruct that, if a corner of an adjoining survey was a well marked corner, the jury might adopt it as a beginning corner in locating the land in controversy, where a calculation from the corner of other adjoining surveys would vary such location, and there is testimony that a corner of the land in controversy was established at the place where the calculation from such other adjoining surveys would locate it, though the corner marks testified to as having been placed there are not mentioned in the deed or field notes of the land in controversy. *Davis v. Coleman*, 16 Tex. Civ. App. 310, 40 S. W. 606. And see *Halsell v. McCutchen* (Civ. App.), 64 S. W. 72.

**Improper to Instruct Jury to Find Vacancy When No Evidence Thereof Exists.**—Where, in a suit to establish a boundary, it was material whether the corner of a survey was on the margin of a river or on the second or valley bank, it was error in instructing the jury to assume they might find a vacant strip between the river and the corner, there being no evidence of such a strip. *Stacy v. Greenwade*, 26 Tex. Civ. App. 277, 63 S. W. 1059.

**Instruction Tending to Discredit Surveyor's Testimony Erroneous.**—A charge which declared to the jury that it was a matter of no consequence who made the survey, in a case where the surveyor was himself a witness, was error, inasmuch as it might tend to affect the credit to be given to his evidence. *Ayers v. Lancaster*, 64 Tex. 305.

**Proper to Instruct That Boundaries Be Determined by Deed under Which Party Claims.**—In a controversy involving boundary of a subdivision of a tract of land granted to one H, which the plaintiff had conveyed to

defendant, the defendant set up an agreed line, but also disclaimed as to any part of the H survey except that described in the deed from plaintiff to him, held, that it was not error in the court to charge the jury in effect that the boundary should be determined in accordance with the description of the land as embraced in the deed. *Blackwell v. Hunnicutt*, 69 Tex. 273, 9 S. W. 317.

**Unnecessary to Charge That Contiguous Tract Is Separate or Community Property.**—In an action to settle boundary, a charge as to whether one of the contiguous tracts of land is separate or community property is unnecessary. *Bonner v. Dale*, 62 Tex. 300; *Holloway v. Holloway*, 30 Tex. 164. See *Higgins v. Johnson*, 20 Tex. 389.

**Proper to Explain Decree Introduced in Evidence.**—A decree of partition was introduced in evidence; the plat and field notes made by the commissioners of partition, making part of the decree, were in conflict. It was competent and proper for the court to instruct the jury as to the meaning of the decree, and to instruct that the field notes in the decree were conclusive among the parties, when the decree named the field notes as determining the boundaries. *Hurt v. Evans*, 49 Tex. 311.

**Instruction on Question of Acquiescence Should Define That Term.**—In a boundary case, while a charge to the jury on the question of the acquiescence of the parties in a certain boundary line, which does not define the term "acquiescence," is defective, yet it is no ground for reversal where the other party does not ask for an instruction defining the term. *Lagow v. Glover*, 77 Tex. 448, 452, 14 S. W. 141.

**Instruction Permitting Jury to Determine Effect of Surveyor's Report Properly Refused.**—An instruction in an action to determine a disputed boundary line, leaving to the jury to

determine what parts of the surveyor's report undertook to determine questions of fact or to include evidence, was properly refused. *McDonald v. McCrabb*, 47 Tex. Civ. App. 259, 105 S. W. 238.

**Instruction Conforming to Admissions as to Boundaries Can Not Be Complained of.**—Where, in trespass by a landowner against an adjoining owner, the issue was the location of the boundary, and it was admitted on the trial that defendant owned the land on one side of a certain hedge, and plaintiff on the other, an instruction to such effect could not be complained of. *Brown v. Johnson* (Civ. App.), 73 S. W. 49 (see 97 Tex. 627, no op.).

**Proper to Refuse to Define Terms "By," "Near," etc.**—The court properly refused an instruction "that the word by, or the term passing by, when descriptively used in a grant, does not mean in immediate contact with but means near to the object to which it relates; and you are further instructed that the term near is a relative term meaning, when used in land grants, very unequal and different distances." The words doubtless were well understood by the jury. *Schunior v. Russell*, 83 Tex. 83, 84, 18 S. W. 484.

**Where Evidence Establishes That Corners of Surveys Are Identical Not Error to So Charge.**—The land sought to be recovered by plaintiff was claimed to be situated in the W. league, which lay east of the D. league, and was within or without the W. league according to the location of its south line. The southeast corner of the D. league was in dispute, but there was no question but that it was coincident with the southwest corner of the W. league. The evidence was conflicting as to the location of the south line of the D. league; the line extended east in the location fixed by some of the evidence having the effect to exclude the land in question from the W. league, while a similar extension

from the location fixed by other evidence would include it. Held, that an instruction to the jury that the southeast corner of the D. league was the southwest corner of the W. league was without prejudice. *Smith v. Clay* (Civ. App.), 57 S. W. 74 (see 93 Tex. 720, no op.).

**Proper to Instruct That Survey in Partition Suit Locates Line.**—In trespass to try title by a party claiming under a partition deed, the court properly instructed that, if the jury found the position of the boundary line in dispute was fixed by the survey of the parties to the partition suit in the place contended by plaintiff, then they should find for the plaintiff, but, if they found that it was fixed at the place contended by defendant, then they should find for the defendant, without reference to the lines and corners the parties to the partition deed had in mind when the deed was made. *Brod-bent v. Carper* (Civ. App.), 100 S. W. 183, affirmed in 102 Tex. 578, no op.

**Charge Need Not Refer to Natural Object.**—In an action involving a boundary line, the failure of the court to call attention in its charge to a natural object was not available error, where the charge stated a correct rule, and plaintiffs asked for no special application thereof. *Taylor v. Brown* (Civ. App.), 39 S. W. 312.

**Where No Issue of Boundary, Proper to Refuse Charge upon That Subject.**—In an action to recover for the value of trees cut from land where the issues in the cause did not require the court to charge upon the rules relating to boundaries, there was no error committed by refusing to give the charges requested on that subject. *Irvin v. Bevil*, 80 Tex. 332, 340, 16 S. W. 21.

## 8. Verdict.

See, generally, the title VERDICT.

**Verdict Fixing Boundary Should Definitely Locate Line.**—In a boundary case the verdict and judgment should definitely fix and establish the

location of the line in dispute with reference to some known object then in existence, concerning the identity and locality of which there is no dispute. *Reed v. Cavett*, 1 Tex. Civ. App. 154, 156, 20 S. W. 837; *Merrell v. Kenney* (Civ. App.), 45 S. W. 423; *McCurdy v. Bullock*, 2 Tex. Civ. App. 223, 20 S. W. 1110. And see *Thatcher v. Matthews* (Civ. App.), 105 S. W. 1006.

Where the southwest as well as the northeast line of the conflicting survey was in dispute, a verdict was void for uncertainty which merely fixed the northeast line at a given distance from the southwest line, without locating the latter line. *Farnandes v. Schiermann*, 23 Tex. Civ. App. 343, 55 S. W. 378.

**Should Identify Line.**—In a suit about boundaries, the jury found that the "old league line" was the true line, but did not find which of the three lines in dispute was the "old league line." Held, that the verdict was void for uncertainty. *Jones v. Leath*, 32 Tex. 329.

**Verdict Locating Line with Reference to Established Corner Sufficient.**—A verdict fixing a disputed boundary line, and finding that plaintiffs' "southwest corner is 10,640 varas south, 19 west, from the original northwest corner of the S. survey (an established corner), which is, 19 west, 80 varas from the southwest corner of the S. survey, as now claimed by the defendants; thence south, 71 east, to the F. west line for corner,"—is sufficiently definite. *Cavitt v. Reed* (Civ. App.), 55 S. W. 349.

**Verdict Following Survey Containing Conflicting Calls Insufficient.**—Where, on the issue as to the location of a line of a survey, located after the location of the surrounding surveys, there is a conflict between the calls for directions and distances and the calls for corners by reference to the surrounding surveys, a verdict for defendant, which, in finding the location of the disputed line, merely follows the description in the survey, is

insufficient, as it should have found which of the conflicting calls was correct. *Best v. Splawn* (Civ. App.), 33 S. W. 1005.

**May Be Aided by Pleadings.**—The verdict of the jury in a boundary suit may be aided by the description of the line in the pleadings. *Reed v. Phillips* (Civ. App.), 33 S. W. 986, 987.

**Can Not Be Aided by Evidence.**—Where a jury renders a verdict for land presumably in accordance with a boundary line as contended for by plaintiffs, there being nothing in the pleadings, charge of the court, or verdict defining the line, held, the court in rendering judgment consulted the evidence in ascertaining the line, and the verdict can not be aided in this manner. The pleadings may be referred to for such purposes, but not the evidence. *Burnett v. Harrington*, 58 Tex. 359, 363; *Brient v. Bruce*, 5 Tex. Civ. App. 580, 24 S. W. 35.

#### 9. Judgment and Decree.

See, generally, the title JUDGMENTS AND DECREES.

**Judgment Must Follow Verdict.**—The judgment on a verdict fixing a boundary must depend on and follow the verdict, which can not be added to or varied by a supplemental survey made under order of the court between verdict and judgment. *Dillingham v. Smith*, 30 Tex. Civ. App. 525, 70 S. W. 791.

Since judgments must follow verdicts upon which they are based, a judgment in a boundary suit referring to a tract of land as descriptive of the line in controversy was erroneous, where the verdict made no reference to it. *Battles v. Barnett* (Civ. App.), 100 S. W. 817.

**Judgment Conforming to Original Calls Proper.**—Where to establish the line of a survey at a certain tree, claimed by one party to be an original line tree, would do violence to the course of such line and the width of the survey as originally called for,

but to place it according to the contention of the other party would conform to the original calls, a judgment in favor of the latter was proper. *Richardson v. McCullough* (Civ. App.), 60 S. W. 974.

**Undisputed Field Notes May Be Inserted in Judgment Though Not Contained in Verdict.**—In describing the boundary lines of land in a judgment for its recovery, it is proper to insert undisputed field notes concerning the lines found by the jury, though the notes were not inserted in the verdict. *Coughran v. Alderete* (Civ. App.), 26 S. W. 109.

**Judgment Fixing Line May Give Bearings Though Petition Failed to Call for Them.**—Where a verdict has been rendered in favor of a plaintiff, who claims under a certain survey, a judgment may be rendered giving the calls of said survey with the bearings of a resurvey, and also directing the mode of fixing the locality of the land to correspond with the verdict and plaintiff's claim, though the petition did not call for the bearings. *McFarlin v. Vaughn* (Sup.), 12 S. W. 813; *Jones v. Andrews*, 72 Tex. 5, 9 S. W. 170.

**Judgment for Plaintiff Fixing Line Unwarranted When Verdict Does Not Locate Line.**—In a suit against C. G., and L., owners of different tracts adjoining plaintiff's survey, to determine the boundaries of said survey, the verdict was: "We, the jury, find for defendant C., and establish the lines of the M. (plaintiff's) survey by beginning at" a certain point "as described in paragraph 5 in charge. We \* \* \* find for the defendant G." Held, that as the verdict, aided by said paragraph of charge, did not show the location of the line between plaintiff and defendant M., who set up title to land claimed by the former, a judgment fixing the line of plaintiff's survey as to all the parties was unwarranted. *Muncy v. Mattfield* (Civ. App.), 40 S. W. 345.

**General Judgment against Plaintiff Sufficient without Any Specific Location.**—In an action for the recovery of land, plaintiff's petition fully described the land in defendants' possession, recovery of which was sought, and claimed it as part of a certain survey. The answer also described by metes and bounds the land claimed by defendants, and pointed out an error in the calls of the survey, whereby it was claimed that the land in controversy lay without the survey, and on its western boundary. Held, that a verdict and judgment that plaintiff take nothing, and that defendants be dismissed with their costs, sufficiently determined the rights of the parties without any specific location of the boundary. *Lumpkin v. Draper* (Sup.), 18 S. W. 1058.

**Plaintiff Can Not Complain if Decree against Him Does Locate Boundary.**—The plaintiff alleged in his petition a necessity for a decree fixing the boundary line between him and the defendants and prayed for a decree establishing the line as claimed by him and the defendants likewise prayed that by the decree the line be fixed as claimed by them, held, that upon a finding by the court (a jury being waived) in favor of the defendants, the plaintiff could not complain that it was error for the court to establish the line by its decree, instead of simply rendering a general judgment against the plaintiff. *Bird v. Pace*, 26 Tex. 487, 488.

#### 10. Appeal and Review.

See, generally, the title APPEAL AND ERROR, vol. 1, p. 389. And see, ante, "Of Particular Courts," II, C, 2, c.

**Decree in Former Suit Conclusive.**—The decree in a former suit in regard to a disputed boundary line is conclusive of that question. *Jackel v. Reiman*, 78 Tex. 588, 590, 14 S. W. 1001.

**Former Suit Res Adjudicata Only as to Line Actually Involved.**—A

former suit was shown to have involved and settled between the same parties the locality of a common line for a part only of its length. Such suit was res adjudicata to the extent of the line involved, but not as to the remaining part of such line. *Reast v. Donald*, 84 Tex. 648, 19 S. W. 795.

**When Line Fixed by Erroneous Decree Has Been Adopted as True Line Decree Will Be Affirmed.**—Where a decree of the lower court, in defining the specific boundaries of the land adjudged to the plaintiff, without a commission for partition, may have been erroneous, but as it is in proof that both plaintiff's vendor and defendant, many years ago, agreed to the specific division made by the judgment of the court; and as there is no claim that this particular land is more valuable than any other portion of the two leagues in which appellees claim to have an undivided interest; and as there is no complaint of this portion of the judgment of the lower court, because it will work an injury to any one; and, particularly, as there was no motion for a new trial by the appellant, so that the district court might have had an opportunity for correcting any error in the judgment there rendered, held, that the judgment must be affirmed. *Crayton v. Hamilton*, 37 Tex. 269, 272.

**Verdict Giving Proper Quantity Not to Be Disturbed by Call Creating Excess.**—A verdict fixing a corner by course and distance from another well-known corner 2688 varas distant, which gives the quantity called for to the survey, will not be disturbed by reason of a call in the field notes for a known bearing tree 916 varas distant, the corner in dispute being unmarked and in a prairie and the acreage in the survey being in excess, if the corner be located upon the course and distance from the bearing tree. *Luckett v. Scruggs*, 73 Tex. 519 11 S. W. 529.

**Judgment Locating Survey According to One of Two Methods Submitted by Parties Will Not Be Disturbed.**—Where, by agreement, two methods of locating a survey are presented to the jury, with instructions to find for the plaintiff or defendant, according to the reliability of the method contended for by each, and the verdict is in favor of locating the survey as plaintiff claims, and the court awards judgment thereon, the judgment will not be disturbed, unless defendant's method of locating the survey is certainly the most accurate. *McFarlin v. Vaughn* (Sup.), 12 S. W. 613.

**Verdict Fixing Line as Contended by Party Stands When Evidence Conflicting.**—A verdict on conflicting evidence, finding the line of a survey to be as claimed by one of the parties, will not be disturbed on appeal. *Heaton v. Stewart* (Civ. App.), 33 S. W. 144.

**Verdict Fixing Line Will Not Be Disturbed Where Evidence Sufficient to Support It.**—A verdict finding a certain disputed line to be the boundary of the land in controversy will not be disturbed, on appeal, where the evidence was sufficient to support it. *Branch v. Simons* (Civ. App.), 48 S. W. 40 (see 93 Tex. 636, no op.). And see *Giltner v. Waters*, 2 Posey 513, 515.

Where there was evidence that the witness measured the distance from the line which plaintiff's son pointed out as the true line between the plaintiff and defendant, and that the measurement gave the defendant 21 varas in depth, whereas the judgment and verdict allowed the defendant only twenty varas; held, that as there was evidence in accordance with the verdict, and no evidence that the line from which the witness measured was the true line, it could not be said there was error in refusing a new trial. *McCarthy v. Cabrera*, 17 Tex. 629, 630.

Where an office survey contains calls for the corners of certain other surveys, and a discrepancy appears in the distances, raising a question as to which call should control, the decision of the lower court, if based on the evidence, is decisive. *Day Land, etc., Co. v. New York, etc., Land Co.* (Civ. App.), 25 S. W. 1089 (see 93 Tex. 638, no op.).

Where, in trespass to try title, plaintiff's right to recover depends upon the location of a certain line, and the evidence is conflicting, a finding in his favor, though the burden of proof is upon him, will be affirmed when supported by the testimony of some of the surveyors, especially when the result accords with the conclusion reached by the supreme court in previous cases. *Cable v. Dignowitty* (Sup.), 17 S. W. 33.

In an action to establish the boundary line between two lots, the evidence was conflicting, and the line was differently located by two surveys. Held, that a judgment that the true line was the one marked by a fence, which was supposed to separate the two lots at the time that plaintiff purchased from defendant, should not be reversed for want of evidence to support it. *Brooks v. Allen* (Sup.), 16 S. W. 798; *Schley v. Blum*, 85 Tex. 551, 22 S. W. 667.

**Verdict Fixing Line Not to Be Disturbed Merely Because Evidence Preponderates in Favor of Different Line.**—Where a boundary, as fixed by a jury, is sustained by evidence, the finding will not be disturbed because the evidence preponderates in favor of some other line, unless it is so clear as to make any other view unreasonable. *Taylor v. Brown* (Civ. App.), 39 S. W. 312, 313.

**Where All Facts Before It Appellate Court May Direct Judgment Locating Line.**—Where the special issues submitted by the court to the jury

embrace all the facts necessary for a final disposition of the case without another trial, to put an end to litigation, the judgment below is reversed and the cause is remanded with directions to the district court below to take the steps necessary to have described and defined, on the ground the dividing line that the parties agreed to, and to enter a judgment which will have the effect of establishing that line. *Cooper v. Austin*, 58 Tex. 494, 503.

**Where Verdict Ambiguous Case Must Be Remanded for New Trial.**—Where a verdict attempting to fix the location of a boundary line presents an ambiguity making it impossible to render a judgment which can determine the actual line in accordance with the terms of such verdict, judgment, on reversal, can not be rendered upon it, but the case will be remanded for trial. *Dillingham v. Smith*, 30 Tex. Civ. App. 525, 70 S. W. 791.

**Error as to Limitations Immaterial When Verdict Based upon Agreement of Parties.**—Where, in trespass by a landowner against an adjoining owner, the issue was as to the location of the boundary line, and the jury found that a certain hedge was the agreed boundary, any error committed as to limitations was immaterial; the finding of the jury being based on the agreement, and not on limitations. *Brown v. Johnson* (Civ. App.), 73 S. W. 49 (see 97 Tex. 627, no op.).

**Error for Court to Comment on Weight of Calls.**—Where, in trespass to try title, the issue was the location of certain surveys, and defendants sought to establish that if the surveys were located in accordance with certain calls in the field notes the location would not be as claimed by plaintiffs, it was error for the court to remark, in the presence of the jury, that in his opinion such calls were merely descriptive. *Thompson v. Kelly*, 47 Tex. Civ. App. 180, 97 S. W. 326.

**Party Can Not Complain That Issue of Boundary Was Submitted to Jury.**—Where the only issue raised by the pleadings was one of boundary, plaintiff can not, as appellant, complain that the court submitted only that issue to the jury, nor that it restricted the issue to the back part of such boundary line (of city lots), where the evidence raised an issue only as to such part, and he admits in one of his assignments of error that the only question was as to the locality of the line at the rear end of the lots. *Lang v. Henke*, 22 Tex. Civ. App. 490, 55 S. W. 374 (see 93 Tex. 712, no op.).

**Party Can Not Complain of Judgment Giving Him More Land than Original Agreement.**—Where a survey under a modified agreement gave defendant more land than did the original agreement, defendant could not complain of a judgment in accordance with plaintiff's prayer fixing the boundaries according to such latter survey. *Masterson v. Bokel*, 32 Tex. Civ. App. 509, 75 S. W. 42.

**Erroneous Admission of Field Notes Immaterial Where They Could Not Have Affected Verdict.**—Though it was error in an action involving the position of a survey, to admit in evidence the field notes of the survey as contained in the records in the surveyor's office showing that certain courses and distances had been erased and others inserted, since the field notes of a survey returned to the land office and carried into a patent can not be changed afterwards in the surveyor's office, the error was harmless, where the evidence could not have affected the finding upon which the judgment was based. *Simpson v. De Ramirez*, 50 Tex. Civ. App. 25, 110 S. W. 149.

**Error in Taking Judicial Notice of County Map Immaterial Where Jury Not Influenced Thereby.**—Error in trespass to try title in taking judicial

cognizance of an "official map" of a county was harmless, where it could not have influenced the finding on which the judgment was based. *Simpson v. De Ramirez*, 50 Tex. Civ. App. 25, 110 S. W. 149.

**Error Corrected by Entire Record Immaterial.**—In a boundary suit, where it appeared that the parties had agreed that the only issue was the line, the fact that the judgment awarded to defendant, through inadvertence, the land belonging to plaintiff, as shown by the agreement, is not cause for reversal, the error being corrected by the entire record, and not having been called to the attention of the trial court. *Broll v. Wishert* (Civ. App.), 79 S. W. 1089.

#### D. APPOINTMENT OF EXCESS OR DEFICIENCY.

**Excess Should Be Apportioned Among Surveys Involved.**—On an issue as to the boundary between two surveys, none of whose original corners can be found, where but one corner of an adjacent survey on the north and one corner of a survey on the south are found, and the distance between such corners is in excess of that called for by the field notes, the boundary in question should be determined by apportioning such excess to the two surveys whose corners are found, and measuring the distance called for in the field notes from the line thus ascertained on the north. *Knippa v. Umlang* (Civ. App.), 27 S. W. 915.

Two adjacent tracts were surveyed by locating a corner in each tract a specified distance apart. On a resurvey, it was found that the distance was greater, and the surveyor in making a resurvey disposed of the excess by apportioning it between the sections resurveyed. Held, that the excess was properly disposed of. *Austin v. Esuela Land, etc., Co.* (Civ. App.), 107 S. W. 1138.

**Apportionment Should Be Made in Proportion to Proper Quantity of Respective Surveys.**—Where two surveys were made at the same time, one can not claim priority to the other merely because the final title is anterior in date, nor can the boundary of one be enlarged because the other has been declared invalid. Where the calls of two surveys together exceed the quantity intended to be granted, the land is nevertheless appropriated; and, if the dividing line between them can not be ascertained, they must hold in proportion to the respective quantities to which they are entitled; and, if there be not enough to fill both surveys, they must suffer diminution in the like proportions. *Welder v. Carroll*, 29 Tex. 317, 318, 319; and see *Ware v. McQuinn*, 7 Tex. Civ. App. 107, 26 S. W. 126.

Two deeds executed at the same time, by the same vendor, each calling for the line of the other as a division line, and calling for land within, but on opposite sides of the same survey, will be held to convey the entire tract, whether it be greater or less in quantity than estimated, and any excess must be divided between the two in proportion to the quantity owned by each, irrespective of values, in the absence of facts showing that equity would require the application of a different rule. *Sellers v. Reed*, 46 Tex. 377.

**Deed Indicating How Deficiency Supplied.**—A deed of conveyance to land described it as "beginning at the west corner of the Gonzales survey, thence south, 45 degrees E., to Bridges' corner; thence north, 45 degrees E., to Bridges' corner on Thorn's line; thence north 45 degrees W., to the south boundary line of the Esculan survey; thence south, 45 degrees W., to the beginning, to include 571 acres of land; and if said point will not include sufficient land to make the complement (571 acres), it

is to run north on the said Esculan survey for deficit." The terms of this deed indicate a clear intention of the grantor to convey all his land in the west corner of the Gonzales league, bounded on one side by Bridges' line, and on the other by Thorn's line; it is equally clear that it was intended that this tract, thus bounded, should contain 571 acres, and if not, the deficiency should be supplied by addition from the Esculan league. *Johnson v. Garrett*, 25 Tex. Supp. 13.

**Where Location of Survey Fixed, Rule of Apportionment Not Applicable.**—Two surveys fronting on a stream were made about the same time by the same surveyor. Survey 104 began at the stream at a point well known. The calls were, thence east, thence south 1344 varas; thence west to the stream, thence with stream to beginning. Survey number 105 called to begin at southwest corner of 104; thence east, thence south, thence west to corner on stream. This corner is known. The sum of the east lines is in excess of the distances called: Held, that survey number 1044 is not affected by such excess, for the field notes of survey number 105 call to begin at the southwest corner of number 104, and show that it was the intention of the surveyor to leave no vacant land between the two surveys. *Thompson v. Langdon*, 87 Tex. 254, 259, 28 S. W. 931.

Plaintiff's deed called for a portion of the M. and S. surveys, commencing at a point a certain distance north of the southwest corner of the M. survey; the location of the corner being unknown. The land, as claimed, included part of defendant's land in the S. survey. The S. survey was north of the M. survey; their west boundaries being a straight north and south line, and the east boundary of the Y. survey. None of the corners of the surveys could be found, except the northeast corner of the Y. survey.



which, by the Y. survey field notes, was a certain distance north of the northwest corner of the M. survey and southwest corner of the S. survey. North of the S. survey were the R., B., and W. surveys, in order, all surveyed at the same time as the other surveys. None of the corners of these surveys were known, except the southwest and southeast corners of the W. survey; and from the southwest corner of the W. survey to the northeast corner of the Y. survey the distance was in excess of the amount given by the field notes of the surveys. Held, that the determining point of plaintiff's land was the southwest corner of the M. survey, and hence an instruction that if the jury were unable to determine dividing lines in the system in controversy, and there was any excess, the lines were to be found by apportioning the excess between the surveys according to acreage, was inapplicable to the case, and confusing and misleading to the jury. *Halsell v. McCutchen* (Civ. App.), 64 S. W. 72.

### III. State Boundary.

**Not a Judicial Question.**—It is judicially known that the political department has always claimed Greer County as part of the state, and exercised acts of control over it, and until that department ceases to exercise such control, the courts will treat it as subject to the jurisdiction of the state of Texas. The settlement of the boundary line of Texas is not within the scope of the judicial department. *Harrold v. Arrington*, 64 Tex. 233. And see *Rodriguez v. Hernandez*, 35 Tex. Civ. App. 78, 79, 79 S. W. 343.

So long as the political authorities of the state of Texas claim authority over territory and it is included in her boundaries, it is not in her courts that the right can be questioned. *Day Land, etc., Co. v. State*, 68 Tex. 526, 4 S. W. 865.

#### **Courts Bound by Boundary Established by Political Department.**

Courts must recognize the boundary of the state as fixed by the political department. *Harrold v. Arrington*, 64 Tex. 233, 238.

Courts will treat as subject to their jurisdiction any territory claimed by the political department. *Harrold v. Arrington*, 64 Tex. 233.

#### **State Not Estopped by Unauthorized Acts of Agent.**

Where an agent not authorized to determine boundary lines, but only to subdivide the land, fixes upon wrong boundary lines, the state is not bound thereby, either on the ground of estoppel or acquiescence for the principle of estoppel is not ordinarily applicable to the state. *Saunders v. Hart*, 57 Tex. 8. See, generally, the title **ESTOPPEL**.

#### **Boundary Prescribed by State Conclusive on Citizens.**

Whether or not the claim of the republic of Texas, defining her boundaries, as extending along the coast, three leagues from land, was admitted by other nations to a greater extent than one marine league from the shore, would have depended very much upon her power to have enforced it; but, as between her own citizens, in respect to the right of the soil the boundary prescribed is conclusive. *Galveston v. Menard*, 23 Tex. 349. See, generally, the title **INTERNATIONAL LAW**.

#### **Rio Grande Established as Boundary between Texas and Mexico by Treaty of Guadalupe Hidalgo.**

That part of Texas on the lower Rio Grande, and between it and the Nueces, was, by act of congress of the republic, December 19, 1836, declared a part of Texas. This, however, was under the actual jurisdiction of Tamaulipas, save Corpus Christi and parts along the Nueces, until annexation, December 29, 1845. The article of annexation did not fix the boundaries. April 29, 1846, the legislature of Texas reiterated the claim of Texas to the

Rio Grande as its western boundary. The treaty of Guadalupe Hidalgo, February 2, 1848, between the United States and Mexico, established the Rio Grande as the boundary between the two nations, and the jurisdiction of Texas over this territory was acceded to by the "Compromise Act," on September 9, 1850, by the act of congress. *State v. Saiz*, 47 Tex. 307, 309, 310. And see *Ogden v. Lund*, 11 Tex. 688, 690; *Rodriguez v. Hernandez*, 35 Tex. Civ. App. 78, 79, 79 S. W. 343.

Though Texas claimed jurisdiction extending to the Rio Grande river as early as December 19, 1836, such jurisdiction was never admitted by Mexico until the treaty of Guadalupe Hidalgo in 1848, and until 1848 the state of Chihuahua exercised jurisdiction over the territory of Texas bordering the upper Rio Grande, and embracing the city of El Paso. *Clark v. Hills*, 67 Tex. 141, 2 S. W. 356.

**Jurisdiction of Texas Extends to Center of Red River.**—The state of Texas has jurisdiction to the center of the stream over the waters of Red River, which constitutes its boundary. *Parsons v. Hunt*, 98 Tex. 420, 84 S. W. 644.

Inasmuch as the United States and Spain, by the treaty of 1819, adopted Red River as a conterminous boundary, without designating either of its banks, it must, under the general rule, be held that the channel or middle of the river was the line intended; whence it follows that the jurisdiction of Texas extends to that line at least. *Spears v. State*, 8 Tex. Cr. App. 467.

#### IV. National Boundary.

**Rio Grande Boundary between United States and Mexico.**—It is judicially known that the Rio Grande is the boundary between Mexico and the United States for the latter never claimed beyond it. *Ogden v. Lund*, 11 Tex. 688, 690. And see *Rodriguez v.*

*Hernandez*, 35 Tex. Civ. App. 78, 79, 79 S. W. 343.

The Rio Grande is by the treaties between the United States and Mexico treated as a navigable stream, and it is the agreed international line between the two countries. *Denny v. Cotton*, 3 Tex. Civ. App. 634, 642, 22 S. W. 122, affirmed in 93 Tex. 682, no op. And see ante, "State Boundary," III.

#### V. County Lines.

See, generally, the title COUNTIES.

#### A. GENERAL CONSIDERATIONS.

**Control of Legislature Not Absolute.**—At the time of the passage of the act of March 11, 1875, the control of the legislature over county boundaries was absolute, though such power under the constitution no longer exists. *Trinity County v. Polk County*, 58 Tex. 321.

**County Boundaries Judicially Known.**—The boundaries of counties, as municipal subdivisions, are matters of judicial knowledge. *State v. Jordan*, 12 Tex. 205; *Bryan v. Crump*, 55 Tex. 1, 10. See, generally, the title JUDICIAL NOTICE.

**May Be Proved by General Reputation.**—General reputation is admissible to prove the boundaries of a county. *Nelson v. State*, 1 Tex. Cr. App. 41, 42; *Cox v. State*, 41 Tex. 1. See, generally, the title HEARSAY EVIDENCE.

**Estoppel Not Applicable to County Boundary.**—A county can not be estopped to claim its true boundary line when it acts as a subdivision of the state, and in right of the sovereignty of the state. *Marsalis v. Garrison* (Civ. App.), 27 S. W. 929.

But where land is purchased of a county under a certain representation as to the boundaries of a survey made by it, and with reference thereto, the county is estopped from afterwards claiming title to part of said land on the ground that the survey and bound-

aries were wrong. *Colonial, etc., Mortg. Co. v. Tubbs* (Civ. App.), 45 S. W. 623.

**Boundary Agreement Must Be Made by Commissioners and Be Recorded.**

—No boundary line agreement attempted to be made by a county whereby its title to school land is divested can have any affect, unless it is made by the commissioner's court, and is a matter of record. *Atascosa County v. Alderman* (Civ. App.), 91 S. W. 848 (see 101 Tex. 628, no op.).

**Boundary Agreement Can Not Affect Title to School Lands.**—A county may dispose of the fee in its school lands only by sale, and an attempt on its part to make such disposition by a boundary line agreement is binding neither on it nor on the other party to the agreement. *Atascosa County v. Alderman* (Civ. App.), 91 S. W. 846 (see 101 Tex. 628, no op.).

**Effect of Long Acquiescence in Line.**—A judgment establishing a county line as located by careful surveyors acting under the orders of the county court, and which line has been approved by the commissioner of the general land office, and, with but slight interruptions, recognized by the counties concerned for half a century, will not be disturbed except on clear evidence that it is erroneous. *Lampasas County v. Coryell County*, 27 Tex. Civ. App. 195, 65 S. W. 67.

**Statute of Limitations Not Applicable to County Line.**—The statute of limitations can not be invoked against a county on the question of its boundary line. *Marsalis v. Garrison* (Civ. App.), 27 S. W. 929; *Presido County v. Jeff Davis County* (Civ. App.), 77 S. W. 278 (see 98 Tex. 628, no op.).

**Location in County Not Invalid Because Boundaries Not Surveyed.**—A location and survey in Jack County was not invalid because such county had not then had its boundaries legally surveyed and established nor the surveyor procured copies of previous sur-

veys and maps as required by the Acts of March 20, 1848, and of January 26, 1858. *Houston, etc., Cent. R. Co. v. De Berry*, 34 Tex. Civ. App. 180, 78 S. W. 736, affirmed in 98 Tex. 620, no. op.

**Mistake of Land Commissioner as to Boundaries Does Not Affect Claimant.**

—Where the commissioner of the general land office was mistaken as to the boundaries of a county, the claimant of land, depending on the commissioner's acts, ought not to be held responsible. *Magee v. Chadoin*, 30 Tex. 644.

**B. ESTABLISHMENT OF LINE.**

**Notice of Appointment of Surveyor Necessary.**—Under act May 12, 1846 (*Sayles' Early Laws*, art. 1714), providing that where a county desires to establish a boundary line, notice of the appointment of a surveyor therefor shall be given the other county ten days before the time appointed for running the line, such notice is essential, and must be shown to have been given. *Marsalis v. Garrison* (Civ. App.), 27 S. W. 929.

Where, under the act of May 12, 1846, for establishing county boundary lines, a survey of a county line is made by a surveyor appointed by one county without notice to the other county, his action is unauthorized and not binding on the other county. *Wise County v. Montague County*, 21 Tex. Civ. App. 444, 52 S. W. 615.

**When Line Fixed, County Court Can Not Establish Another Line.**—If a county line has been definitely fixed upon the ground by an actual survey made, reported and approved as required by the statute, a county court has no power to order another survey made and thereby establish another boundary line. *Jones v. Powers*, 65 Tex. 207.

**When Line Not Definitely Marked County Court May Make It Definite.**

—It is only when the county commissioners' court or the commissioner of the general land office decides that

the boundaries of a county are not sufficiently well defined that action to make them definite is authorized. When a county line has been once run, marked upon the ground and established in accordance with law it cannot be said to be indefinite, though it may be incorrect. None of the statutes seem intended to give the commissioners' court power to correct what may have been incorrect in the establishment of a county line upon the ground; they gave them power to make the line definite and provided that a line run and marked as specified should thereafter be the boundary line. This was a prohibition to any further action looking to the establishment of some other line. *Jones v. Powers*, 65 Tex. 207.

**Application of Statute Relating to Marking County Boundaries.**—Act April 22, 1879, § 1, provides that, when it appears to the county court that the boundaries of a county are not sufficiently defined, such court shall appoint a surveyor to ascertain the boundaries and establish the lines and corners. Section 10 provides that before any county in the state, not already organized as a land district under existing laws, shall be recognized as such, the county court shall cause the boundary lines of the county to be surveyed and marked, and the field notes and map duly recorded and returned to the general land office, as provided in the act. Held, that section 1 applies where the boundary lines of counties have never been established under its provisions, though they may have been previously organized as a separate land district; and section 10 requires the boundary lines of all unorganized counties to be well defined before being recognized as a separate land district. *Marsalis v. Creager*, 2 Tex. Civ. App. 368, 21 S. W. 545.

**Lines Established as Law Prescribes Taken as True.**—County lines estab-

lished in manner provided by law must be considered the true ones, whether mathematically correct or not. *Jones v. Powers*, 65 Tex. 207, 213.

Where a boundary line between two counties has been run by the proper officers of each county and has been recognized as the dividing line between the two counties, it must be regarded as the true line so far as it affects the rights of citizens acquired under the acts of officers who believed it to be the true line and acted with reference thereto, although it may turn out that there was an error in the location of the line which was afterwards corrected. *Rogers v. Concho Cattle Co.*, 90 Tex. 555, 39 S. W. 1081.

**Establishment of Line by Land Commissioner Final.**—Laws 21st Leg. (1889) p. 42, § 8, provides that, where the surveyors fail to agree as to the true boundary line between their respective counties, a full statement of the questions at issue between them shall be reported to the commissioner of the general land office, whose duty it shall be to examine the matter and determine the line, and such line "shall thereafter be the true dividing line between said counties." Held that, where the boundary line between counties has once been established pursuant to the sections, the commissioner of the general land office has no power to afterwards re-establish the line. *Kaufman County v. McGaughey*, 3 Tex. Civ. App. 655, 21 S. W. 261.

**District Court May Restrain Commissioner from Re-Establishing Line.**—Under constitution, art. 5, § 8, the district court has jurisdiction of an action to restrain general land office commissioner from re-establishing county boundary. *Kaufman County v. McGaughey*, 3 Tex. Civ. App. 655, 671, 21 S. W. 261.

**Legislature May Ratify Lines Established by Commissioners without Authority.**—Since the legislature could empower the commissioners' courts to

adjust and establish disputed county boundary lines, it could by subsequent curative act, ratify their action in such a matter done without previous authority. *Wright v. Jones*, 14 Tex. Civ. App. 423, 38 S. W. 249, affirmed in 93 Tex. 678, no op.).

**Where Survey under Orders of Court Locates True Line Immaterial That Orders Irregular.**—Where the evidence in an action in the district court to establish the boundary line between two counties shows the true line to be as located by a former survey made under the orders of the county court, it is immaterial whether such orders were regular and valid or not. *Lampasas County v. Coryell County*, 27 Tex. Civ. App. 195, 65 S. W. 67.

#### C. BOUNDARY SUITS BY COUNTIES.

**County May Not Bring Suit to Establish Boundary When Statute Provides Other Method.**—A suit by one county against another to establish the true boundary line between them, and to enjoin from the exercise of jurisdiction, can not be maintained. The issue in such a cause presents a political question, and not one for judicial inquiry. The statutes in force, *Reversed Statutes*, 668-691, having defined the boundaries of the counties, the statutory mode of ascertaining the locality of the dividing lines on the ground must be pursued. *Guadalupe County v. Wilson County*, 58 Tex. 228.

**Under Amendment Allowing Suits by County, Preliminary Steps Required by Original Statute Must Be Taken.**

—The amendment made by the act of April, 1885, to § 8, of the article of a former act which provided for the settlement of disputed county boundaries (*Rev. Stat.*, appendix, p. 27) does not authorize a county to institute suit in the district court until it has taken the preliminary steps after the amendment went into effect that were required by

the original statute. *Rockwall County v. Kaufman County*, 69 Tex. 172, 6 S. W. 431.

**Amendment Not Retrospective in Operation.**—Act April, 1885, conferring on the district courts jurisdiction of actions between two counties to determine disputed boundary lines, concerning which their respective surveyors can not agree, is not retrospective; and an action for this purpose can not be maintained where the survey was made before the enactment of the law. *Rockwell County v. Kaufman County*, 69 Tex. 172, 6 S. W. 431.

**District Court Has Jurisdiction of Suit.**—Under the act of 1897, adding article 808a to the *Revised Statutes*, the district court has jurisdiction of a suit to establish the boundary line between two counties, whether such line has been theretofore established or not, and although the counties may have appointed surveyors to establish such line and their duties be still uncompleted. *Lampasas County v. Coryell County*, 27 Tex. Civ. App. 195, 65 S. W. 67; *Presidio County v. Jeff Davis County* (Civ. App.), 77 S. W. 278 (see 98 Tex. 628, no op.).

The jurisdiction conferred upon the district courts by the Act of 1897 (*Sayles' Civ. Statutes*, art. 808a), of suits of establish boundary lines between counties, is warranted by the constitutional provision (art. 5, § 8, as amended in 1891) conferring upon these courts "such other jurisdiction, original and appellate, as may be provided by law." *Wise County v. Montague County*, 21 Tex. Civ. App. 444, 52 S. W. 615.

**County Court Not Deprived of Jurisdiction by Statute Conferring Jurisdiction on Commissioner's Court.**—The act of April 22, 1879, giving to the county court jurisdiction to determine county boundary lines, was not repealed by § 20 of the final title of the *Revised Statutes* of 1879 nor by articles 686 et seq. of such *Revised Stat-*

utes, giving such jurisdiction to the commissioner's court; and hence a disagreement between the surveyors appointed by the commissioner's court in 1881 to locate a county line did not confer authority upon the commissioner of the general land office to order the survey and determination of such disputed line. *Kaufman County v. McGaughey*, 11 Tex. Civ. App. 551, 33 S. W. 1020, affirmed in 93 Tex. 688, no op.

**Jurisdiction of Commissioner's Court Limited—Regularity of Proceedings Must Be Proved.**—In proceedings to establish a disputed county line, the jurisdiction of the commissioner's court is a limited one, and there is no presumption of the validity of the proceedings such as will throw on the county not taking part therein the burden of showing that they were irregular, but the burden is on the other to show that they were regular. *Wise County v. Montague County*, 21 Tex. Civ. App. 444, 52 S. W. 615. See, generally, the titles COURTS; JURISDICTION.

#### D. BOUNDARIES OF PARTICULAR COUNTIES.

**Young, Cooke and Archer Counties.**—In creating the county of Young, the legislature intended to establish its boundaries without reference to the then existing boundaries of Cooke, and it can not be judicially ascertained whether there was any conflict or not, and since the east line of Archer is but the prolongation of the east line of Young, it follows that it can not be determined whether any part of the original territory of Cooke is or is not now included with the county of Archer. *Ballaster v. Mann*, 86 Tex. 643, 646, 26 S. W. 494, affirming 24 S. W. 561.

**Milam County.**—There was no error in hearing evidence as to the extent of the county of Milam in 1839, and in instructing the jury that it extended up the Brazos river to the head of the

same. *McKissick v. Colquhoun*, 18 Tex. 148, 150.

The boundaries of Milam county may not have been defined by statute. There is no evidence or suggestion that they were. The presumption is that they were not, otherwise resort would not have been had to the testimony of witnesses. But the fact that Bosque county, or a portion of it at least, lay within the former county of Milam, must have been judicially known to the court which had held its sessions for several years in the county before either Bosque or other counties had been taken from its territory. It would not be attributing any great degree of knowledge to the court to suppose it aware of the fact that Milam formerly extended up the Brazos quite beyond the section where the land in controversy was situated. There was no error in receiving the evidence or charging as to the extent of the county. *McKissick v. Colquhoun*, 18 Tex. 148, 153.

#### VI. Boundaries of Municipalities and Towns.

See, generally, the titles MUNICIPAL CORPORATIONS; TOWNS AND TOWNSHIPS.

**Boundaries of Municipalities Question for Legislature.**—As to such municipalities as have been or may be established by special legislative enactments, their boundaries is a question to be determined by the legislature and not by the courts. *Norris v. Waco*, 57 Tex. 635. *Ewing v. State*, 81 Tex. 172, 177, 16 S. W. 872.

**Legislature Has Authority to Prescribe Boundaries.**—The legislature has the power to describe the boundaries of a municipal corporation. *Norris v. Waco*, 57 Tex. 635, 641.

The legislature has the power to define the limits of an incorporated town, and when it is properly exercised the courts will not interfere. State

*v. Allegree*, 3 Tex. Civ. App. 437, 22 S. W. 289.

**Legislature May Extend Boundaries.**

—The same power which in the first instance may be exercised by the legislature to create a municipal corporation, fix its boundaries, and impose burdens on its inhabitants for municipal purposes, in the absence of some constitutional restraint doubtless may extend the boundaries of an existing corporation without the consent or even against the remonstrance of a majority or all of the inhabitants of the existing corporation or of the territory to be annexed. *Dill. on Mun. Corp.*, 185. *Madry v. Cox*, 73 Tex. 538, 541, 11 S. W. 541.

The legislature may annex, or authorize the annexation, of territory contiguous to the limits of an incorporated town or city, without the consent of the persons residing either in the corporation or the annexed territory. *Graham v. Greenville*, 67 Tex. 62, 2 S. W. 742.

**Authority of Municipal Corporation to Extend Boundary Judicial Question.**

—Whether or not the action of a municipal corporation, incorporated under general laws, in extending its limits, is such as the legislature has conferred upon it, is a judicial question. *Ewing v. State*, 81 Tex. 172, 177, 16 S. W. 872.

**Boundaries Must Be Set Out in Petition for Incorporation.**—Under our statute for the incorporation of towns and villages with adjacent territory for school purposes only, it is essential that the boundaries of the proposed corporation be designated in the petition of the voters upon which the election is ordered. The process by which the law shall be put into effect incorporating such locality for school purposes is in the nature of an act of legislation, and every requisite of the

law must be strictly followed. The county judge has not authority to change the boundary in any respect, or to set out in his order any boundary not contained in the petition; and if the petition of the voters gives no boundary, the order based upon it and the election under it are void. *Furrrh v. State*, 6 Tex. Civ. App. 221, 24 S. W. 1026.

**Order Declaring Result of Election Presumed to Show Boundaries.**—

Where the petition for the incorporation of a town is lost, the order of the county judge declaring the result of the election will be taken, in the absence of evidence to the contrary, as showing the boundaries set out in the petition, and the action of the judge in ordering the election is conclusive that such boundaries contained the requisite number of 200 inhabitants. *Foster v. Hare*, 26 Tex. Civ. App. 177, 62 S. W. 541.

**Extension of Boundaries by Commissioner's Court upon Petition of Few Citizens Void.**—

The action of the commissioners' court in making an order to change the boundaries of an incorporated town upon the petition of twenty-five citizens was void, and such attempt to extend the corporate boundaries is not validated by the Act of 1895. *Sayles' Civ. Stats.*, art. 616c. *Foster v. Hare*, 26 Tex. Civ. App. 177, 180, 62 S. W. 541; *State v. Dunson*, 71 Tex. 65, 9 S. W. 103.

**Boundary of Town Determined by Natural and Artificial Objects.**—

Where the center of a survey is known, and natural and artificial objects are testified to by witness, and there are other surveys calling to bound upon a town tract, the boundary of the town is capable of being ascertained with certainty. *Refugio v. Byrne*, 2 Tex. 193, 198.

## BOUNTIES.

### CROSS REFERENCES.

See the titles MILITIA; PUBLIC LANDS; TAXATION.

**Constitutionality of Bounty Laws.**—An act of the legislature providing for an appropriation for the destruction of wolves and other wild animals is not violative of art. 3, § 48, of the constitution of this state. Its purpose is to protect citizens in the use and enjoyment of their property, and whatever is done in pursuance of this purpose is in "administration of the government." *Dimmit County v. Frazier* (Civ. App.), 27 S. W. 829, affirmed in 93 Tex. 704, no op. See *Weaver v. Scurry County* (Civ. App.), 28 S. W. 836.

Section 23, art. 16, of the constitution of 1876 provides that "the legislature may pass laws for the protection of stock raisers in the stock raising portions of the state." Hence an act of the twenty-second legislature, entitled "An act to protect stock raiser, farmers, and horticulturists, providing for the destruction of wolves and other wild animals," etc., is constitutional. *Weaver v. Scurry County* (Civ. App.), 28 S. W. 836. See *Dimmit County v. Frazier* (Civ. App.), 27 S. W. 829, affirmed in 93 Tex. 704, no op.

Laws 1891, c. 100, providing for the payment out of the county treasury of bounties for the destruction of wolves and other wild animals is not in contravention of §§ 51, 52, art. 3, of

the constitution, the former of which forbids the granting of public money to any individual, not, however, to prevent the granting of aid in case of public calamity. The latter forbids the legislature to authorize any county, etc., to grant public money to any individual, etc. The act in question does not contemplate the granting of public money to any individual, in the sense of these constitutional provisions. The individual to be recompensed for the killing of the wild animals mentioned in the act is but the means or the instrument chosen by the legislature, within its proper discretion, by which the public calamity wrought by these animals is to be averted. The individual is in no sense the subject of state bounty condemned by these provisions. *Weaver v. Scurry County* (Civ. App.), 28 S. W. 836.

**When Liability of State Ceases.**—Laws 1891, c. 100, § 2, providing that the county shall be liable for payment of the bounty for the destruction of wolves and other wild animals, does not cease to be operative because, by virtue of sections 4 and 5, providing that the liability of the state shall cease on the exhaustion of a certain appropriation, the state is no longer liable. *Weaver v. Scurry County* (Civ. App.), 28 S. W. 836.

## Bounty Warrants.

See the title PUBLIC LANDS.

## Bowling Alleys.

As to validity of ordinance forbidding, see the title ORDINANCES.

## Box.

As to jury box, see the title JURY.



# BOYCOTT.

## CROSS REFERENCES.

See the titles CONSPIRACY; RESTRAINT OF TRADE; STRIKES.

### Use of Term Boycott in Pleading.

—In an action by the proprietor of a boarding house against a railroad company to recover damages for injury to plaintiff's business, the petition alleged that plaintiff's house was located in a city on defendant's road; that defendant did unlawfully inaugurate a "boycott" against plaintiff and used its influence to drive away his custom, and destroy his business. Held, that such petition need not allege facts constituting a conspiracy because of the use of the term "boycott" to describe the wrong committed by defendant, though such word imports a conspiracy, since the legal characteristics of a cause of action are determined from the act alleged, and not from the name given it by the pleader. *International, etc., R. Co. v. Greenwood*, 2 Tex. Civ. App. 76, 21 S. W. 559.

### Right of Employer over Employee.

—In such action the petition alleged that a certain division road master of defendant's road, whose duty it was to employ and control more than 1,000 men, acting by authority of defendant, publicly declared it to be his intention to discharge and refuse employment to any men who should patronize plaintiff, "either by eating at his house or drinking at his bar," that such road master did discharge a large number of men because of their patronage of plaintiff; and, that, influenced by such conduct of such road master, many others were deterred from patronizing him. Held, that such petition was not insufficient because defendant had a right to prohibit his servants from patronizing plaintiff's hotel and saloon, since it would not be justified in discharging them for

so doing. *International, etc., R. Co. v. Greenwood*, 2 Tex. Civ. App. 76, 21 S. W. 559. See, generally, the title MASTER AND SERVANT.

**Terms of Employment.**—Defendant is not liable in such action for giving notice that it would not take into its service any person who patronized plaintiff, since it had a right to determine whom it would thereafter employ. *International, etc., R. Co. v. Greenwood*, 2 Tex. Civ. App. 76, 21 S. W. 559.

### Presumption as to Lawful Business.

—In such case the petition did not allege that plaintiff's business was lawful, since the law presumes that it was lawful. *International, etc., R. Co. v. Greenwood*, 2 Tex. Civ. App. 76, 21 S. W. 559.

**Loss of Custom.**—Such petition sufficiently alleges that plaintiff lost the custom of defendant's employees by reason of its conduct. *International, etc., R. Co. v. Greenwood*, 2 Tex. Civ. App. 76, 21 S. W. 559.

**Defenses.**—Defendant can not show, in such action, under a general denial, that plaintiff's business was unlawful. *International, etc., R. Co. v. Greenwood*, 2 Tex. Civ. App. 76, 21 S. W. 559.

**Order Not to Patronize Plaintiff Unauthorized.**—In such case defendant would not be justified in instructing its employees not to patronize plaintiff, in order to prevent troublesome litigation with him, or interference with their customs or regulations, in the absence of evidence showing a necessity for such instructions. *International, etc., R. Co. v. Greenwood*, 2 Tex. Civ. App. 76, 21 S. W. 559.

Evidence that some of defendant's employees, in trading with plaintiff, had transferred to him their papers entitling them to receive wages, and that plaintiff brought harassing suits thereon from time to time, does not show such necessity, since defendant might have forbidden such assignments. *International, etc., R. Co. v. Greenwood,*

2 Tex. Civ. App. 76, 21 S. W. 559.

**Exemplary Damages.**—Where the evidence shows that defendant did not act maliciously, a recovery of exemplary damages is erroneous. *International, etc., R. Co. v. Greenwood,* 2 Tex. Civ. App. 76, 21 S. W. 559. See the title EXEMPLARY DAMAGES.

### Brakeman.

See the titles FELLOW SERVANTS; MASTER AND SERVANT.

### Branch Citation.

See the title SUMMONS AND PROCESS.

## BRANDS AND MARKS.

### CROSS REFERENCES.

See the titles ANIMALS, vol. 1, p. 269; CONTRACTS; CONSTITUTIONAL LAW; GIFTS; FRAUDS, STATUTE OF; HERD LAWS; SALES; STATUTES.

As to levy of attachment upon brands and marks, see the title ATTACHMENT, vol. 2, p. 296. As to sufficiency of description by brands and marks in chattel mortgage, see the title CHATTEL MORTGAGES. As to trademarks, see the title PATENTS AND TRADEMARKS.

**Statutory Limitation as to Number.**—Rev. St., art. 4556, providing that a party shall have but one mark and brand for his cattle, was not intended to prohibit a stock owner from changing his mark and brand where, on removing his cattle from one county to the other, he finds that his former brand is claimed by other parties. *McClure v. Sheek,* 68 Tex. 426, 4 S. W. 552.

**Brands and Marks as Evidence of Ownership—Effect of Possession.**—Possession is not prima facie evidence of ownership of stock. It must be established by mark or brand. *Beyman v. Black,* 47 Tex. 558, 568.

**Effect of Record.**—A recorded mark and brand are evidence of ownership of an animal branded. *Beyman v.*

*Black,* 47 Tex. 558; *Schneider & Co. v. Fowler,* 1 App. Civ. Cases, §§ 856, 858; *De Garca v. Galvan,* 55 Tex. 53, 58; *Love v. Hudson,* 24 Tex. Civ. App. 377, 59 S. W. 1127.

**Constructive Notice of Title.**—The record of the mark or brand in a county where the stock is found, as provided for by Rev. St. § 4556, is constructive notice of title to the stock in the person in whose name the mark and brand is recorded. *Schneider v. Fowler,* 1 White & W. Civ. Cas. Ct. App. § 858.

**Proving Identity.**—It is proper to permit a party to prove that he was the owner of certain cattle on the range by unrecorded marks, where such evidence is not for the purpose of proving title, but of identifying the

cattle. *Gregory v. Nunn* (Civ. App.), 25 S. W. 1083.

**Changing Brands and Marks.**—The records of different counties showing different brands for the same cattle are admissible to show ownership, where it appears that the owner, on removing his cattle from one county to another, registered there a different brand, for the reason that the former was claimed by other parties. *McClure v. Sheek*, 68 Tex. 426, 4 S. W. 552.

**When Presumption of Ownership May Be Rebutted.**—The presumption that live stock belonging to one person, but which is, in fact, branded in the recorded brand of another, shall, as to creditors and purchasers without notice, be deemed the property of such other person, is not conclusive, but may be repelled by proof. *Rankin v. Bell*, 85 Tex. 28, 19 S. W. 874.

**Sale by Marks and Brands—Definition.**—See, generally, the title SALES.

"A sale of a mark and brand" is for an owner of a stock of horses or cattle to sell his entire stock, that is to say, all the animals that he owned running on the range, in a particular mark or brand. *Nance v. Barber*, 7 Tex. Civ. App. 111, 26 S. W. 151.

**Sayles' Civil Statutes, arts. 4562, 4563**, provide that on the sale of stock actual delivery thereof shall be accompanied by a written transfer, and that on the trial of the right of property of any stock animal, possession without the transfer shall be deemed illegal. Held, that title may be shown to have passed, though there was no written transfer, by evidence of a bona fide sale on sufficient consideration. *First Nat. Bank v. Brown*, 85 Tex. 80, 23 S. W. 862.

This statute is directory, and the presumption of illegality may be rebutted. *Swan v. Larkin*, 8 Tex. Civ. App. 421, 28 S. W. 217.

**Necessity for Registration of Bill of Sale.**—For a sale of live stock not

running at large in the range, a bill of sale is required by the statutes as evidence of title, and in default of it the prima facie presumption obtains that the possession by one claiming to be a purchaser, is illegal. If the live stock consists of cattle running on the range, a bill of sale and record thereof are absolutely prerequisite to the acquisition of title; and if the instrument be not recorded, it does not take effect in favor of any one for any purpose. *Black v. Vaughan*, 70 Tex. 47, 48, 7 S. W. 604; *Prude v. Campbell*, 85 Tex. 4, 19 S. W. 890; *Boutwell v. Hiltbold*, 4 App. Civ. Cases, § 65, 15 S. W. 501; *Panhandle Nat. Bank v. Emery*, 78 Tex. 498, 15 S. W. 23; *Rainwater-Boogher Hat Co. v. O'Neal*, 7 Tex. Civ. App. 242, 26 S. W. 462; *Holloway v. Cabell*, 3 Tex. Civ. App. 320, 22 S. W. 531; *Nance v. Barber*, 7 Tex. Civ. App. 111, 26 S. W. 151; *Ft. Worth Nat. Bank v. Daugherty*, 81 Tex. 301, 306, 16 S. W. 1028.

It follows that a parol transfer of cattle in the range is a nullity; but it does not follow that a parol agreement to transfer in the manner prescribed by the statute is void, if founded upon a valid consideration and unmixed with fraud. *Prude v. Campbell*, 85 Tex. 4, 19 S. W. 890.

**Exception—Where There Has Been Actual Delivery.**—**Sayles' Civ. Stat.**, art. 4564, provides that persons may dispose of stock animals as they run in the range by sale and delivery of the brands and marks, but for the purchaser to acquire title, his transfer shall be recorded. Held, that where there was actual delivery of the cattle, title passed, though the bill of sale describing them by certain marks and brands was not recorded. *First Nat. Bank v. Brown*, 85 Tex. 80, 23 S. W. 862.

And in *Boutwell v. Hiltbold*, 4 App. Civ. Cases, § 65, 15 S. W. 501, the court held, that on a sale of cattle accompanied by actual delivery, though

the purchaser returns the cattle to the range, the bill of sale is not required to be recorded, under Rev. St. Tex. 1879, art. 4564.

**Where Brands and Marks Not Sold but Used for the Purpose of Identity.**

—Article 4564, Rev. Stat., does not embrace a sale of stock of horses and cattle of a certain brand running on the range in a certain county, the purchaser receiving a bill of sale and taking no immediate possession of the property, there being no evidence that the vendor owned or intended to sell the brand, it being evidence that he intended to convey the stock only, and that the brand named was merely a matter of identity. *Rainwater-Boogher Hat Co. v. O'Neal*, 7 Tex. Civ. App. 242, 26 S. W. 462.

Where the seller owned a stock of cattle in one county and removed a part of them to another county which he sold to plaintiff designating a portion as 116 head bearing certain brands and marks, the transaction was not a transfer by sale of brands and marks within Rev. St., § 4562 requiring the conveyance to be recorded, such section being confined to the transfer of live stock as they run in the range by the sale and delivery of the brands and marks. *Nance v. Barber & Jackson*, 7 Tex. Civ. App. 111, 26 S. W. 151.

Without selling the mark and brand it is competent, however, to prove a sale and actual delivery of branded cattle not including the whole of the stock so branded, but such sale passes on title to the brand as evidence of title. *Rankin v. Bell*, 85 Tex. 28, 19 S. W. 874.

**When Vendee Has Taken Possession.**—Nor will the statute be extended to facts where the vendee named in the bill of sale not recorded has received and actually taken possession of the cattle. A court of equity under such circumstances will require the purchaser to do equity without regard

to defects attending the attempted transmission of title. *Panhandle Nat. Bank v. Emery*, 78 Tex. 498, 499, 15 S. W. 23.

**Where There Has Been a Judicial Sale.**—Revised Statutes, art. 4564, does not apply to a judicial sale of stock, and a purchaser at such sale, having rounded up and taken possession of the stock, does not fail to acquire title because the sheriff's bill of sale, for want of an acknowledgment under seal, can not be properly recorded. *Holloway v. Cabell*, 3 Tex. Civ. App. 320, 22 S. W. 531. See the title JUDICIAL SALES.

**A sale by brand of horses rounded up and under control of a herder on the range is not within the purview of Rev. Stat., art. 4563, which requires a bill of sale in case of a sale of horses by brand while running on the range.** *Scofield v. Douglass* (Civ. App.), 30 S. W. 817.

**Rules for Sale of Cattle, Requiring Registration, Have No Extraterritorial Effect.**—The statutes prescribing the rules for sale of cattle on the range by bill of sale and registration should not be given an extraterritorial effect. Held, not to apply to sale of cattle in the Indian Territory between citizens of Texas, where actual possession passed and the cattle brought into the state. *Ft. Worth Nat. Bank v. Daugherty*, 81 Tex. 301, 16 S. W. 1028.

**Bill of Sale Properly Registered in One County, Removal of Stock Does Not Defeat Sale.**—Husband and wife resided in Mason county, and a stock of cattle was conveyed to the separate estate of the wife, and was there registered. The parties moved the stock to Lipscomb county, taking with them the cattle. Held, a failure to register the bill of sale in Lipscomb county did not subject the cattle to levy under execution against the husband. *Blum v. Light*, 81 Tex. 414, 16 S. W. 1090.

**Title Not Passed by Causing Transfer to Be Made on Record.**—The

owner of a mark and brand did not pass title to his stock horses running at large by causing an entry to be made upon the registry of marks and brands that he had transferred his mark and brand. *Hickman v. Hickman*, 5 Tex. Civ. App. 99, 27 S. W. 31.

**Question for Jury.**—It is purely a question of fact for the jury whether certain cattle were "running on the range," within the meaning of Rev. Stat., art. 4564, so as to authorize a sale of them by a written transfer of marks and brands, as provided in that article. *Swan v. Larkin*, 8 Tex. Civ. App. 421, 28 S. W. 217.

A written instrument signed by the maker, authorized another in terms to kill "all the cattle of certain ages in designated brands" for which he was "to pay for same \$3 per head, collecting them at his own expense." It also authorized him to take the beeves in certain other brands at a price mentioned per head. Held, the meaning of the instrument being doubtful from an inspection of the language used,

whether a sale was intended was a question for the jury, and an instruction that the instrument was not to be regarded as a bill of sale of the brands therein mentioned, but merely as a power given to kill out of certain stock certain classes of cattle, was not correct, except as to the stocks from which the beeves were to be taken. *Grimes v. Watkins*, 59 Tex. 133.

**In an action for damages** for alleged wrongful branding of plaintiff's cattle by defendant, third persons intervened, alleging that the branded cattle belonged to them, and were branded by the defendant for their benefit. Held, that the pleadings did not justify a judgment for damages in favor of plaintiff, and against the interveners. *Taylor v. Long* (Sup.), 16 S. W. 1084.

**The measure of damages** for wrongful branding of cattle can not be proved by opinion evidence. *Taylor v. Long* (Sup.), 16 S. W. 1084. See the title EXPERT AND OPINION EVIDENCE.

### Breach.

As to breach of contract, see the titles CONTRACTS; VENDOR AND PURCHASER. As to breach of warranty, see the titles COVENANTS; WARRANTY. As to breach of trust, see the title TRUSTS AND TRUSTEES.

# **BREACH OF PROMISE OF MARRIAGE.**

BY G. A. B. DOVELL.

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**I. The Contract.****A. FORMATION AND EXECUTION.****1. In General.****Language of Offer of Marriage.—**

"The offer of marriage by the one party and its acceptance by the other need not be expressed in any formal language either written or spoken. It is sufficient to establish a contract of marriage if it is shown by a preponderance of the evidence that the parties had mutually agreed to marry each other." *Barber v. Geer*, 94 Tex. 581, 583, 63 S. W. 934.

**2. Offer and Acceptance.**

See, generally, the title CONTRACTS.

"In order to constitute a valid and binding contract of marriage, there must be an offer of marriage or promise to marry by the one party, which offer or promise must be made known to and accepted by the other party." *Barber v. Geer*, 94 Tex. 581, 583, 63 S. W. 934.

**3. Necessity for Written Contract.**

In order that the statute of frauds should invalidate a contract to marry, it must appear from the contract itself that it was not to be performed within a year, not merely that it might not be. *Clark v. Reese*, 26 Tex. Civ. App. 619, 64 S. W. 783 (see 95 Tex. 675, no op.). See, generally, the title FRAUDS, STATUTE OF.

**B. CAPACITY OF PARTIES.**

**Capacity of Infants.**—"The general rule is that a minor is not bound by an executory contract to marry." *Wells v. Hardy*, 21 Tex. Civ. App. 454, 455, 51 S. W. 503, affirmed in 93 Tex. 697,

no op. See, generally, the title INFANTS.

Therefore, a female minor, though above the age of 18, is not bound by an executory contract to marry, nor liable in a suit for breach thereof. *Wells v. Hardy*, 21 Tex. Civ. App. 454, 51 S. W. 503, affirmed in 93 Tex. 697, no op.

**II. Action for Breach of Contract.****A. NATURE OF ACTION.**

**Tort or Contract.**—"A breach of promise of marriage is, by the authorities generally, classed as a tort." *Glasscock v. Shell*, 57 Tex. 215, 221.

But the contrary has been held by one of the courts of civil appeals, in which it was said that an action for breach of a contract of marriage is in no sense a tort, but essentially a demand arising upon a contract. *Biela v. Urbanczyk*, 38 Tex. Civ. App. 213, 85 S. W. 451.

**B. DEFENSES.**

**Evidence that defendant was lame** was not admissible either to excuse his breach of the promise of marriage, or to show improbability of his having made such promise. *Lohner v. Coldwell*, 15 Tex. Civ. App. 444, 39 S. W. 591.

**Insanity in Plaintiff's Family.**—Nor can defendant excuse his breach of promise by alleging a taint of insanity in the family of his fiancée, where, if such was the case, he knew of it before making the promise, and it does not appear that the contract was broken on that account. *Lohner v. Coldwell*, 15 Tex. Civ. App. 444, 39 S. W. 591. See, generally, the title INSANITY.

**Reproaching Defendant and Forbidding Further Calls.**—It is no justification, that, when defendant met plaintiff after his failure to duly appear at the appointed date (he not offering at such meeting to carry out the contract) she reproached him, and forbade his further calls. *Lohner v. Coldwell*, 15 Tex. Civ. App. 444, 39 S. W. 591.

### C. DAMAGES.

See, generally, the title DAMAGES.

#### 1. Measure and Elements of Damage.

##### a. In General.

"No well-considered case can be found in which it has been held, under a system of pleading like ours, that upon a mere allegation of simple breach of promise of marriage, as in the present case, the law would imply any other than compensatory damages." *Glasscock v. Shell*, 57 Tex. 215, 224.

The usual elements of actual damages include the disappointment of reasonable expectations; the money value or worldly advantages of the proposed marriage; the injury to the feelings and affections; the wounding of the pride, and the actual outlay in the preparation for the marriage, etc. If relied upon, they should be alleged and proven. *Glasscock v. Shell*, 57 Tex. 215.

If such specific facts are not alleged and proven as elements of damage, upon objection made in the proper time and manner, the plaintiff would be entitled only to nominal damages. *Glasscock v. Shell*, 57 Tex. 215.

##### b. Evidence.

See post, "Evidence," II, F.

#### (1) Pecuniary and Social Standing of Defendant.

In an action for breach of promise of marriage the jury may consider the pecuniary as well as the social standing of the defendant, as tending to show the condition in life which the plaintiff would have secured by the marriage, and such pecuniary standing

may be proved by reputation. *Ortiz v. Navarro*, 10 Tex. Civ. App. 195, 30 S. W. 581, affirmed in 93 Tex. 716, no op.

Therefore it is not error for the court to allow the appellee to prove that appellant was reputed to be the owner of property, and that he and his family moved in the best circles of society. *Ortiz v. Navarro*, 10 Tex. Civ. App. 195, 199, 30 S. W. 581, affirmed in 93 Tex. 716, no op.

#### (2) Previous Engagements.

Evidence is not admissible of previous engagements in a breach of promise suit on the question as to the measure of damages, for the previous engagements were too remote and they were not breached by reason of any fault upon the part of the appellant. *Edge v. Griffin* (Civ. App.), 63 S. W. 148.

#### (3) Grief and Anguish.

In an action for breach of promise of marriage, it is admissible for plaintiff to show the grief and anguish caused her by defendant's conduct in breaking his promise to her and engaging himself to another woman. *Ortiz v. Navarro*, 10 Tex. Civ. App. 195, 30 S. W. 581, affirmed in 93 Tex. 716, no op.

#### (4) Pregnancy.

It was not error to charge the jury that if they should find from the testimony that, induced by the promise to marry, the plaintiff, within twelve months before the filing of the suit, had submitted to sexual intercourse with defendant, and had become pregnant by him, they might consider that fact in estimating damages. *Daggett v. Wallace*, 75 Tex. 352.

#### (5) Loss of Other Opportunities.

An averment that plaintiff, in suit for breach of promise of marriage, lost, by reliance on defendant's promise, an advantageous marriage with one to whom she was previously engaged and from whom she secured a release to marry defendant, was not supported by proof of an order of marriage from



such third party, after her engagement to defendant, and rejected in reliance on that engagement. *Clark v. Reese*, 26 Tex. Civ. App. 619, 64 S. W. 783 (see 95 Tex. 675, no op.).

**c. Excessiveness of Damages.**

See, generally, the title DAMAGES.

**\$1,000 Not Excessive.**—A man who promises to marry a woman and then, without just excuse, wholly makes default of appearance at the time appointed for the nuptial ceremony, is not entitled to relief against a verdict in her favor for \$1,000, as being excessive. *Lohner v. Coldwell*, 15 Tex. Civ. App. 444, 39 S. W. 591.

**\$7,500 Not Excessive.**—See facts in a breach of promise suit where a verdict for \$7,500 damages was not considered excessive. *Daggett v. Wallace*, 75 Tex. 352.

**2. Aggravation and Mitigation of Damages.**

**a. Circumstances in Aggravation.**

**Seduction of Plaintiff.**—The policy of the law refuses to allow the right of the female seduced to recover solely for the seduction, but it is settled by a majority of cases that in an action for breach of a promise of marriage such seduction, if alleged and proved, is proper to be considered in estimating the damages. *Daggett v. Wallace*, 75 Tex. 352.

**b. Circumstances in Mitigation.**

**Illicit Intercourse with Other Men.**—

Proof of a woman's testimony on a former trial as to her illicit intercourse with persons other than the defendant before her engagement to him, with evidence that defendant had no knowledge thereof prior to the engagement, was admissible in mitigation of damages. *Clark v. Reese*, 26 Tex. Civ. App. 619, 64 S. W. 783 (see 95 Tex. 675, no op.).

Testimony of a third party to repeated illicit intercourse with plaintiff before and during her engagement to defendant and not known to the latter before such engagement, was admissi-

ble in mitigation of damages from breach of promise of marriage, accompanied by seduction, under the issues raised by a general denial. *Clark v. Reese*, 26 Tex. Civ. App. 619, 64 S. W. 783 (see 95 Tex. 675, no op.).

**Ill-Health.**—In order to mitigate the damages resulting from the breach of the marriage contract by reason of inability to perform it on account of ill-health, it must be pleaded. *Edge v. Griffin* (Civ. App.), 63 S. W. 148.

**Evidence of plaintiff's reputation for truth and veracity** is not admissible in an action for breach of promise of marriage, for the purpose of mitigating the damages claimed to have resulted from wounded feelings and injured reputation. *Barber v. Geer*, 31 Tex. Civ. App. 176, 71 S. W. 792, affirmed in 97 Tex. 626, no op.

**3. Exemplary Damages.**

See, generally, the title EXEMPLARY DAMAGES.

A general averment of claim for exemplary damages, as "that the manner of his breach (of the contract of marriage) and his treatment of plaintiff in and about the breach thereof were by him wantonly, maliciously, and wilfully done, for the purpose and with the intent on the part of defendant of scandalizing, humiliating, and seducing this plaintiff," was sufficient to admit proof in the absence of special exception. *Clark v. Reese*, 26 Tex. Civ. App. 619, 64 S. W. 783 (see 95 Tex. 675, no op.).

**D. LIMITATION OF ACTION.**

See, generally, the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

Where there was no dispute as to the fact that the promise was made within one year before the filing of the suit, there was no error in the refusal to charge upon the issue made by the plea of limitation. *Daggett v. Wallace*, 75 Tex. 352.

In an action for breach of promise, in which the statute of limitation of

one year was pleaded in bar of the action, it was held that the testimony of the plaintiff warranted a finding that the promise of marriage had been renewed from time to time, as alleged, up to within less than one year before the institution of the suit, that the court did not err in admitting testimony of plaintiff as to what had occurred between her and defendant more than a year before the filing of the suit, and that limitation having been pleaded as a bar, as such was admitted to the jury in the charge. *Cain v. Corley*, 44 Tex. Civ. App. 224, 99 S. W. 168, affirmed in 102 Tex. 579, no op.

### E. PLEADINGS.

See, generally, the titles CONTRACTS; PLEADING.

#### 1. Necessary Allegations.

##### a. In General.

In a petition in a breach of promise suit it was averred that the contract to marry was made; the breach of defendant's promise; that by reason of the breach she has sustained the loss of an advantageous matrimonial connection (he being a man of wealth and social position); and that her affections have been disregarded and blighted, her feelings lacerated, and her spirits wounded, resulting in mental distress and humiliation. Held, that the allegations are sufficient to recover. *Daggett v. Wallace*, 75 Tex. 352.

In an action for breach of promise the petition presented a cause of action in a clear and concise manner, and was not open to the objections to it, where it alleged that appellant and appellee had agreed to marry, and that she incurred expense in preparing for the marriage, which was set for a certain time, and where it was also alleged that, "through the promise of defendant, plaintiff was induced to give him the devotion of her heart, and was induced to entertain

that affection towards defendant which every good woman should entertain towards the man she expects to marry," and that "she had prepared herself to become for defendant a loving and dutiful wife." *Lohner v. Coldwell*, 15 Tex. Civ. App. 444, 39 S. W. 591.

##### b. Allegation of the Contract.

See, generally, the title CONTRACTS.

**Contract by Correspondence and by Parol.**—In an action for breach of a contract of marriage plaintiff's petition alleged a contract made by correspondence, on the strength of which she came to Texas and met defendant, and that at divers times thereafter she and defendant discussed their relation to each other and their matrimonial engagement, and defendant at all times expressed much love and affection for her, and at all times expressed himself so as to assure her he would certainly carry into effect his agreement and would marry her, but finally refused to do so. Defendant requested a charge to the jury that if no contract by correspondence was shown, plaintiff could not recover, and assigned error to its refusal. Held, in this opinion, Associate Justice Hunter dissenting, that the petition alleged both an agreement to marry by correspondence and by parol; but upon the ruling of the supreme court upon certificate of dissent, it is held that the allegation of what transpired after plaintiff came to Texas did not set up any contract, and that it was error to refuse the requested charge. *Barber v. Geer*, 26 Tex. Civ. App. 89, 63 S. W. 934.

##### c. Assignment of Breaches.

See, generally, the title CONTRACTS.

**An allegation of the marriage of appellant to another** is simply one way of showing that he had broken his promise to marry the appellee, which,

coupled with the fact that he was at the time of its consummation engaged to marry her, constituted a cause of action. Therefore the petition is not subject to demurrer on account of such allegation. *Ortiz v. Navarro*, 10 Tex. Civ. App. 195, 198, 30 S. W. 581, affirmed in 93 Tex. 716, no op.

**Objections to Defendant Marrying Another Woman.**—It is not necessary, in an action for breach of promise of marriage, for the plaintiff to allege or prove specifically that she objected to the act of the defendant in marrying another woman. It is sufficient that the petition does not show that she released him from his promise. *Ortiz v. Navarro*, 10 Tex. Civ. App. 195, 30 S. W. 581, affirmed in 93 Tex. 716, no op.

**d. Allegation of Damage.**

See, generally, the title DAMAGES.

**Facts of Damages Must Be Set Out.**

—In an action for breach of promise to marry, it is necessary that the facts be set out which are relied upon as damages. *Glasscock v. Shell*, 57 Tex. 215.

**Necessity of Pleading Special Damages.**—The authorities require special damages to be pleaded in an action for a breach of promise of marriage, else they can not be the basis for a recovery. *Glasscock v. Shell*, 57 Tex. 215, 221.

**2. Unnecessary Allegations.**

**a. Allegation of Plaintiff's Age.**

See, generally, the title PLEADING.

It is not necessary to allege the age of the plaintiff in a suit for breach of promise to marry, so that the court may thereby judge whether plaintiff was of marriageable age at the making of the alleged contract. *Glasscock v. Shell*, 57 Tex. 215.

**b. Time of Performance.**

See, generally, the title TIME.

It is not necessary to allege a definite time within which a promise to

marry was to be performed, the general promise implying that it was to be performed within a reasonable time; but a promise to marry when the promisor should have completed a building for residence was sufficiently definite. *Clark v. Reese*, 26 Tex. Civ. App. 619, 64 S. W. 783 (see 95 Tex. 675, no op.).

**c. Tender of Performance.**

See, generally, the title TENDER.

**Tender of Performance Need Not Be Alleged.**—In an action for breach

of promise of marriage, it is sufficient if plaintiff show that defendant has violated his promise by refusing to marry her, without averring or proving an offer on her part to marry the defendant. The principles of tender do not apply to actions of this character. *Ortiz v. Navarro*, 10 Tex. Civ. App. 195, 30 S. W. 581, affirmed in 93 Tex. 716, no op.

**F. EVIDENCE.**

See ante, "Evidence," II, C, 1, b. See, generally, the title EVIDENCE.

**1. Relevancy.**

See, generally, the title EVIDENCE.

**a. Receiving Attention from Other Men.**

It was held in *Edge v. Griffin* (Civ. App.), 63 S. W. 148, that it was not admissible in an action for breach of promise of marriage that another besides the defendant had visited the plaintiff with matrimonial intentions, such fact not having been pleaded nor it appearing that he was encouraged in this purpose by the plaintiff.

**b. Plaintiff's Age.**

See, generally, the title CONTRACTS.

The age of the plaintiff can not generally be shown, because it is not material to the issue. There is fully as much culpability in breaking a promise of marriage made to an elderly woman as to a young woman. *Lohner v. Coldwell*, 15 Tex. Civ. App. 444, 39 S. W. 591.

### c. Proof of Previous Lewd Conduct of Plaintiff.

A woman suing for damages from breach of promise to marry could not be cross-examined as to her illicit intercourse with persons other than defendant before her engagement to him. *Clark v. Reese*, 26 Tex. Civ. App. 619, 64 S. W. 783 (see 95 Tex. 675, no op.).

### 2. Documentary Evidence.

See, generally, the titles DOCUMENTARY EVIDENCE; PRODUCTION OF DOCUMENTS.

**In General.**—Letters written by the plaintiff to the defendant, in a breach of promise suit, are admissible in evidence. *Hill v. Houser* (Civ. App.), 115 S. W. 112, 116.

Love letters sent plaintiff by defendant are admissible in an action for breach of promise to marry. *Cain v. Corley*, 44 Tex. Civ. App. 224, 99 S. W. 168, affirmed in 102 Tex. 579, no op.

**Letters Containing Erasures.**—But where, to prove defendant's promise to marry, plaintiff offered in evidence a letter written to herself by him showing the complete erasure of several words in a material part, and which erasure was of a suspicious character, indicating a material change made in plaintiff's interest, the error in admitting the letter without any explanation offered by plaintiff as to the erasure, was such, the promise to marry being the principal issue and the evidence thereon conflicting, as to necessitate a reversal of the judgment. *Barber v. Geer*, 23 Tex. Civ. App. 531, 57 S. W. 58.

### 3. Declarations and Admissions.

See, generally, the title DECLARATIONS AND ADMISSIONS.

**Defendant's admissions of an intention to marry the plaintiff**, made at any time, whether before the promise, or after its breach and suit filed, are admissible in evidence as tending to prove the contract. *Lohner v. Cold-*

*well*, 15 Tex. Civ. App. 444, 39 S. W. 591.

### 4. Proof of Release.

**Plaintiff Returning Defendant's Ring and Letters.**—In a breach of promise suit the return by appellee to appellant of his ring and letters does not show as a matter of law that she has released him from his promise to marry her. It is only a fact to be considered with all the testimony on that issue, and its probative force is for the jury to determine. *Ortiz v. Navarro*, 10 Tex. Civ. App. 195, 199, 30 S. W. 581, affirmed in 93 Tex. 716, no op.

### 5. Proof of the Contract or Promise.

See, generally, the title CONTRACTS.

"A contract of marriage can be established like any other contract. The agreement may be established by facts and circumstances, and it is not necessary that it should always be dependent upon an express promise." *Edge v. Griffin* (Civ. App.), 63 S. W. 148.

It was not error in a breach of promise of marriage suit to permit the plaintiff to testify, "About six months after Christmas, 1876, she became engaged to the defendant." It was testimony to a fact. *Daggett v. Wallace*, 75 Tex. 352.

### Construction of Letters for Jury.

Where plaintiff in an action for breach of promise of marriage sought to show such a promise made through written correspondence, some of the letters not being produced, but oral testimony as to their contents being admitted, the charge of the court properly left to the jury the construction of the letters relied on. *Barber v. Geer*, 31 Tex. Civ. App. 176, 71 S. W. 792, affirmed in 97 Tex. 626, no op.

### 6. Presumption of Capacity to Marry.

Plaintiff need not prove her capacity to enter into the marriage contract, as such capacity will be presumed. *Ortiz v. Navarro*, 10 Tex. Civ. App.

195, 30 S. W. 581, affirmed in 93 Tex. 716, no op.

### G. INSTRUCTIONS.

See, generally, the title INSTRUCTIONS.

#### 1. Must Not Invade Province of Jury.

In an action for breach of promise a requested instruction directing the jury not to consider the testimony of certain witnesses, as to statements made by the defendant subsequent to the filing of the suit, except for the purpose of determining the motive of the defendant in breaching the contract of marriage, was properly refused, because some of the testimony referred to tended to prove the existence of the contract of marriage as alleged by the plaintiff. *Hill v. Houser* (Civ. App.), 115 S. W. 112, 117.

In a breach of promise suit where the appellant asked the court to instruct the jury, that if they believed from the evidence that appellee requested and obtained from appellant the letters written by him during their correspondence, and then voluntarily destroyed them before instituting suit, they could presume such letters contained matters of evidence in favor of appellant and against the right of appellee to recover, it was held, that the charge would have been on the weight of evidence, and was correctly refused. *Ortiz v. Navarro*, 10 Tex. Civ. App. 195, 199, 30 S. W. 581, affirmed in 93 Tex. 716, no op.

#### 2. Must Be Based on Pleadings and Evidence.

The charge should apply to the allegations and proof in each case, and the proper rule for the measure of damages should be given in such cases; a failure is error. *Glasscock v. Shell*, 57 Tex. 215.

**Instructing as to Time of Performance.**—In *Hill v. Houser* (Civ. App.), 115 S. W. 112, 116, where the pleadings presented the question of the de-

fendant's failure to perform the contract within a reasonable time, it was held not to be error for the court to instruct the jury that, if there was a contract of marriage and no time fixed therefrom, the law would presume a contract of marriage within a reasonable time.

#### Instructing as to Implied Contract.

—It is not error, in a breach of marriage promise suit, to submit to the jury any issue as to an implied contract. *Hill v. Houser* (Civ. App.), 115 S. W. 112, 116.

### III. Appellate Practice.

See the title APPEAL AND ERROR, vol. 1, p. 313.

**Harmless Error.**—In an action for breach of marriage promise, it was held not to be reversible error for the court to submit to the jury for their consideration the question of renewal of the contract of marriage, if it appears that the jury could not have been misled thereby. *Hill v. Houser* (Civ. App.), 115 S. W. 112, 116.

Where, in an action for breach of contract of marriage, the plaintiff alleged that she had been engaged to marry M., but had terminated the same to marry defendant, an instruction submitting the question of damages resulting from her failure to marry M. is not ground for reversal, on the ground that the failure to marry M. resulted from her own conduct. *Clark v. Reese*, 26 Tex. Civ. App. 619, 64 S. W. 783 (see 95 Tex. 675, no op.).

**Affirmance of Judgment.**—Although there is a conflict in the testimony, yet if that submitted on the plaintiff's behalf support the verdict, that the contract was made and breached as alleged, the judgment will be affirmed, although it may have been unwise for the defendant to have performed his promise. *Hill v. Houser* (Civ. App.), 115 S. W. 112.

## Brewing Companies.

See the title FRAUDS, STATUTE OF.

# BRIDGES.

BY W. F. SOUDER.

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## CROSS REFERENCES.

See the titles CORPORATIONS; CONSTITUTIONAL LAW; COUNTIES; CROSSINGS; EMINENT DOMAIN; FERRIES; MUNICIPAL CORPORATIONS; NAVIGABLE WATERS; NEGLIGENCE; NUISANCES; RAILROADS; STREETS AND HIGHWAYS; TAXATION; TURNPIKES AND TOLL ROADS; WATERS AND WATERCOURSES.

As to expert evidence as to whether a bridge was unskillfully constructed or in a dangerous condition, see the title EXPERT AND OPINION EVIDENCE. As to a bridge being part of a highway, see the title STREETS AND HIGHWAYS.

## I. Establishment of Bridges.

### A. IN GENERAL.

#### 1. Statutory Privilege.

See post, "Necessity for Franchise," I, B.

The maintaining a bridge at a point where a highway crosses a navigable stream is not a right incident to the ownership of the bank, but a public franchise, within the gift and control of the legislature. Such preference as is given to the landowner is a statutory privilege, and liable to repeal. *Hudson v. Cuero Land & Emigration Co.*, 47 Tex. 56, 26 Am. Rep. 289.

The establishment of bridges is matter of public policy, dependent on the legislative will for their creation, and are equally dependent upon the same will for their continued existence. *Bass v. Fontleroy*, 11 Tex. 698, 704; *Jones v. Keith*, 37 Tex. 394, 401, 14 Am. Rep. 382.

#### 2. Situation.

The description in a charter to erect a bridge "at the town of Clinton" is sufficiently answered where a public ferry had existed at the point in question for more than 30 years, generally spoken of as the "Ferry at the Town of Clinton," though not within the limits of the town. *Hudson v. Cuero Land & Emigration Co.*, 47 Tex. 56, 26 Am. Rep. 289.

### B. NECESSITY FOR FRANCHISE.

The establishing and maintaining of public bridges where public roads cross navigable streams, lakes, or bays, and the charging of toll for passing across the same, has always been held in Texas to be a franchise, subject to the regulation and control of the legislature, or to the municipal authorities to which it has been committed by the legislature. *Hudson v. Cuero Land, etc., Co.*, 47 Tex. 56, 68, 26 Am. Rep. 289. See ante, "Statutory Privilege," I, A, 1.

**Preference of Riparian Owners.**—The riparian proprietor may be

given a preference over others when applying for the right to exercise a toll bridge franchise but his position in that respect does not confer the franchise. *Williams v. Davidson*, 43 Tex. 1.

### C. EXCLUSIVE FRANCHISE—FORDS.

The grant of exclusive bridge privileges for a distance of five miles on a river does not confer the right to close up existing public fords. *Compton v. Waco Bridge Co.*, 62 Tex. 715.

### D. INFRINGEMENT OF EXCLUSIVE FRANCHISE BY FREE BRIDGES.

Act April 23, 1874, § 79, which provides that, whenever any persons shall file with the secretary of state articles of incorporation for the purpose of erecting and maintaining a bridge or ferry, it shall not be lawful for any other toll bridge or toll ferry to be established on the same stream within three miles above or below such bridge or ferry, does not prohibit the establishment of a free bridge within the limit named. *Victoria County v. Victoria Bridge Co.*, 68 Tex. 62, 4 S. W. 140.

The incorporators, having established their bridge, subsequently applied for and obtained from the county court a grant of the right to use the site and approaches from the public road for a term of 10 years. Held, that this was a mere license, and not a contract between the county and bridge company, which would not prevent the county from afterwards establishing a free bridge at the same point, with the same right of approach from the public road. *Victoria County v. Victoria Bridge Co.*, 68 Tex. 62, 4 S. W. 140.

## II. Construction and Maintenance.

### A. CONSTRUCTION.

#### 1. In General.

**Statutory Authority.**—Under Rev.

St. 1895, art. 4792, conferring on the commissioners' court full authority to cause all necessary bridges to be built in their respective counties, the county, in the absence of any statute restraining the exercise of such power, may contract for the construction of a bridge according to plans differing from those originally adopted. *Webb County v. Hasie* (Civ. App.), 113 S. W. 188.

**Contract.**—A contract for the construction of a county bridge, calling for the construction of a bridge "in accordance with plans on file and forming a part of this contract," refers to the plans on file at the time of the execution of the contract, though the plans originally adopted differed therefrom. *Webb County v. Hasie* (Civ. App.), 113 S. W. 188.

**Tracing of Plan Admissible to Show Compliance with Contract.**—Where, in an action on a contract for the construction of a county bridge, the petition alleged that the plans referred to in the contract and on file in the county clerk's office when the contract was made were those in accordance with which the contractor had built the bridge, the court did not err in admitting in evidence the tracing of a plan for the bridge to show the fact alleged. *Webb County v. Hasie* (Civ. App.), 113 S. W. 188.

## 2. Right to Appropriate Streets or Commons.

The fact that a bridge company has constructed the approach of its bridge on a city street, and the use of the street is necessary for the safety of the bridge, does not give it the right to appropriate the street without the consent of the city. *Waco Bridge Co. v. City of Waco*, 85 Tex. 320, 20 S. W. 137.

In an injunction suit to restrain the city from interfering with a street on which defendant bridge company had erected its bridge support, evidence considered and held insufficient to

show any legal or equitable title on the defendant to the street, so as to sustain the injunction. *Waco Bridge Co. v. City of Waco*, 85 Tex. 320, 20 S. W. 137. See, generally, the title **STREETS AND HIGHWAYS**.

The city council granted the right to the bridge company for the term of twenty-five years, to the use of so much of the "reserve" or "common" as was necessary for anchorage of the bridge keeper's house and stock pens. Held, that this did not authorize the bridge company to use the "reserve" or "common," so as to close the highways leading across the same to the fords, and that it did not authorize such use of the "reserve" by the company as to practically exclude the public therefrom. *Compton v. Waco Bridge Co.*, 62 Tex. 715, 723.

## 3. Liability of Railroad for Obstruction of Water.

See the titles **RAILROADS**; **STREETS AND HIGHWAYS**; **WATERS AND WATERCOURSES**.

## 4. Eminent Domain.

See post, "Rights of Riparian Owners," II, C.

As to the right of bridge companies to exercise the power of eminent domain upon construction of bridge, see the title **EMINENT DOMAIN**.

## B. CONSEQUENTIAL DAMAGE ENTITLING PLAINTIFF TO EQUITABLE RELIEF—NUISANCE.

The petition in an action to enjoin the owners of a bridge from collecting toll for travel thereon alleged that the bridge was a part of the highway, and that there was no other passage across the river within the town tract, of four leagues square on both sides of the river; that there was no public road on the west side of the river, or street on the east side, in the city proper, provided and kept up by the public authorities of the city or county, to cross at any other place than at the bridge:



that the ford to which the road had formerly led had been obstructed by the previous proprietor of the bridge franchise, and such obstruction acquiesced in by the city and county; that the public road on the west side of the stream had been changed so as to come to the bridge after it was built, and had been laid out and worked by the authority of the county court; that the latter court recognized this bridge as a part of the highway by fixing the amount of toll that should be charged; that the city council had procured its erection under the contract made with a previous proprietor, and repeatedly confirmed to his successors, permitting all other crossings to be obstructed, and binding the city to establish no ferry or other bridge during the continuance of the contract; that the defendants had no grant from the county court or from the legislature of the state to erect and keep a toll bridge within the city limits, but had erected such bridge solely by virtue of the authority granted by the mayor and aldermen of the city; that the plaintiffs were corporators within the city limits, some of them residing on the east and others on the west side of the river; that they owned land which was diminished in value by the charging of toll on the bridge, and that they were also specially damaged by the payment of such toll, they having, in common with all other corporators, a right to the free use and passage over the highways of said city. Held that, if the bridge was a part of the public highways of the city, and of such a character as to constitute a nuisance, the facts alleged, if true, entitled the plaintiffs to maintain a suit for equitable relief. *Williams v. Davidson*, 43 Tex. 1. See the title NUISANCES.

**C. RIGHTS OF RIPARIAN OWNERS.**

See the title WATERS AND WATERCOURSES.

Where a bridge spans a stream at

the crossing of a highway, and within the limits of the highway, it is part of the highway; and a legislative charter for the erection of such a bridge imposes no new servitude on the land of the riparian owners, and entitles them to no compensation. *Jones v. Keith*, 37 Tex. 394.

The legislature may authorize the erection of a toll bridge at the crossing of a stream by a public highway, without compensation to the riparian owners, even though the latter are operating a ferry at the crossing, and its value will be impaired thereby. *Jones v. Keith*, 37 Tex. 394, 14 Am. Rep. 382.

Where a grant of a ferry franchise is to one not the owner of the land, and it becomes necessary for him to take the property of the riparian owner, the owner of the franchise will be required to make adequate compensation to the riparian owner for the property so taken. *Hudson v. Cuero Land & Emigration Co.*, 47 Tex. 56, 26 Am. Rep. 289.

The erection, by authority of the legislature, of a toll bridge in a highway across stream where a ferry had been previously operated by the riparian owner, imposes no new servitude on the land. *Hudson v. Cuero Land & Emigration Co.*, 47 Tex. 56, 26 Am. Rep. 289. See the title STREETS AND HIGHWAYS.

### III. Regulation and Use as to Toll Charge.

A railroad company granted to a bridge company its right of way across a stream, and the bridge company built a bridge thereon, which was used by the railroad company. Held, that the bridge company could not lawfully charge passengers on the railroad company's trains a toll for crossing the bridge in excess of the amount that the railroad company was allowed, by law, to charge. *Southern Pac. R. Co. v. Patterson*, 7 Tex. Civ. App. 451, 27 S. W. 194.

#### IV. Liability for Injuries Resulting from Defective Bridges.

##### A. OF COUNTIES.

See, generally, the title COUNTIES.

**Counties Not Liable for Defective Bridges.**—A county is not liable for injuries caused by a defective bridge. *Heigel v. Wichita Co.*, 84 Tex. 392, 19 S. W. 562; *Navasota v. Pearce*, 46 Tex. 525, 535.

Such liability does not exist at common law or by statute. *Heigel v. Wichita Co.*, 84 Tex. 392, 19 S. W. 562. As to the liability of a county for negligence, see the title COUNTIES.

##### B. OF CITIES AND TOWNS.

See the title STREETS AND HIGHWAYS.

**Liability, Where Negligence Is Proximate Cause.**—A city is liable for damages of which the negligence and improper construction of a bridge built by it was the natural and proximate cause. *Austin v. Emanuel*, 74 Tex. 621, 12 S. W. 318. See, also, *Heigel v. Wichita Co.*, 84 Tex. 392, 19 S. W. 562; *Galveston v. Posnansky*, 62 Tex. 118. And see the titles MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS.

Where the proximate cause of an accident was the negligence of a city in failing to maintain a guard rail on a bridge the city is not relieved from liability because the horse which the injured person was driving was frightened by a passing engine, and backed off the bridge, though, before meeting the train, such person had crossed the bridge, and the horse backed on it again. *Eads v. City of Marshall (Civ. App.)*, 29 S. W. 170.

Where travelers in a carriage at night are injured by the sudden and unaccountable fright and shying of the horse, whereby the rig is precipitated over a 9-foot embankment, constituting an approach to a bridge in a city street, the want of a guard rail, which

would have prevented the accident, is the proximate cause of the injury. *Gulf, C. & S. F. Ry. Co. v. Sandifer*, 69 S. W. 461, 29 Tex. Civ. App. 356.

**Must Use Ordinary Care.**—The measure of a city's duty in regard to the safety of bridges within its limit is to exercise ordinary care and diligence to see that they are reasonably safe for travel. *City of Marshall v. McAllister*, 18 Tex. Civ. App. 159, 43 S. W. 1043.

The end of one of the stringers on which a bridge floor rested protruded about three feet, and crooked up at the end some three or four inches. This stringer caught the wheel of plaintiff's buggy while he was attempting to drive over the bridge at a slow trot, causing the buggy to stop suddenly, throwing plaintiff onto the ground, and severely injuring him. The horses were frightened, broke from the buggy, and ran away. The bridge had been out of repair for some time, which was known to defendant. Held sufficient to support a verdict for plaintiff for the injuries sustained. *City of Marshall v. McAllister*, 54 S. W. 1068, 22 Tex. Civ. App. 214.

**Necessity for Notice.**—See the title STREETS AND HIGHWAYS.

When a city's liability depends upon its failure to repair a bridge and not upon any original defective construction, the city must either have knowledge that the bridge was out of repair or that it was negligence not to know it. *Sherman v. Nairey*, 77 Tex. 291, 13 S. W. 1028; *Austin v. Ritz*, 72 Tex. 391, 9 S. W. 884.

Thus, a municipal corporation is liable in damages for injury resulting to one who is injured by the dangerous condition in which a bridge within the corporate limits was permitted to remain, though the street commissioner whose duty it was to repair did not after examination discover its defects before the accident. If he might, by proper diligence in performing his

duty, have known it, the fact that he examined is unimportant. *Sherman v. Nairey*, 77 Tex. 291, 13 S. W. 1028.

**Constructive Notice Sufficient.**—A city maintaining a bridge is liable for injuries caused by a defect therein, even in the absence of proof of actual notice to it of the defect, where the defect, though not patent, was one which, with reasonable and proper care, should have been ascertained and remedied. *Phillips v. City of Dallas*, 3 Wilson, Civ. Cas. Ct. App. § 294.

Thus, where plaintiff was driving a horse hitched to an empty wagon across a bridge and a plank about the middle of the bridge broke, causing the horse to be injured, from which injuries he later died, the court held the city would be liable although they did not have actual notice of the defective plank in the bridge. *Phillips v. Dallas*, 3 App. Civ. Cases, § 294.

But in an action against a city for personal injuries received by falling through a hole in a bridge, it being the duty of certain officers of the city to keep the bridge in repair, the mere fact that the hole had been there a month, the bridge having been closed on account of other defects, does not necessarily show constructive knowledge of the hole by the officers. *Austin v. Colgate* (Civ. App.), 27 S. W. 896.

**As to Constructive Notice Being a Question for Jury.**—See post, "Constructive Notice," IV, E, 3, b.

**Notice to Officers Not Charged with Care of Bridge as Notice to City.**—Notice to officers of a city not charged with the care of a bridge that it is defective, and the failure of the city to repair the bridge, do not render it liable for an injury resulting from its defective condition. *City of San Antonio v. Ball* (Civ. App.), 66 S. W. 713; *Austin v. Colgate* (Civ. App.), 27 S. W. 896.

**Contributory Negligence.**—If one injured by alleged defective city

bridges failed to use such care as an ordinarily prudent person in like circumstances would have used to avoid injury to herself and if but for her own want of care, she would not have been injured, she can not recover against the city. *Shelley v. City of Austin*, 74 Tex. 608, 12 S. W. 753.

The fact that one injured while crossing a bridge was driving at an unlawful speed will not preclude a recovery, unless such violation of the law contributed thereto. *City of Marshall v. McAllister*, 43 S. W. 1043, 18 Tex. Civ. App. 159.

**As to Contributory Negligence Being Question for Jury.**—See post, "Contributory Negligence," IV, E, 3, c.

## C. OF RAILROAD COMPANIES.

See, generally, the title RAILROADS.

**Care as to Bridges.**—A railway company is not held to absolutely insure the safety of its bridges, but its liability depends upon the use of ordinary care in their construction and maintenance. *Galveston, etc., R. Co. v. Daniels*, 9 Tex. Civ. App. 253, 28 S. W. 548, 711.

In an action for injuries through defects in a bridge, it was error to charge that "if the bridge was defective and unsafe in construction or from want of repair, and the injury resulted in consequence, and the defendant could have known of the defect by the use of due diligence, defendant is guilty of negligence; and if, at the time of the injury, plaintiff's intestate was using due care in performing his duty as an employee of defendant, then defendant is liable." *Galveston, H. & S. A. Ry. Co. v. Daniels*, 9 Tex. Civ. App. 253, 28 S. W. 548, 711.

**Where a railroad company constructs on its right of way a bridge over a ravine, together with approaches; the bridge and approaches being likewise in, and constituting a part of, the roadway of a city street; the whole leading up to the railroad**

crossing,—and one of the approaches is dangerous to travelers, from want of a guard rail to prevent falling over its side into the rocky ravine, nine feet below, both the city and the railroad company are liable for injuries to travelers thereby occasioned. *Gulf, C. & S. F. Ry. Co. v. Sandifer*, 69 S. W. 461, 29 Tex. Civ. App. 356.

**Contract Shifting Liability.**—*Sayles' Ann. Civ. St.* 1897, arts. 4426, 4438, permit a railroad company to construct its road, with the city's consent, along, upon, or over any street, but require that it shall so restore the street to its former state as not to unnecessarily impair its usefulness, and shall keep such crossing in repair. Held that, as to an injured person, a railroad company could not escape liability for an unguarded approach to a bridge in a street on its right of way, leading up to its crossing, by pleading a contract with the city whereby the company was to build such bridge and approaches, and the city was to forever keep them in repair. *Gulf, C. & S. F. Ry. Co. v. Sandifer*, 69 S. W. 461, 29 Tex. Civ. App. 356.

**Necessity of Notice.**—Where a railroad company's liability depends upon its failure to repair a bridge, and not upon any original defective construction, it follows that it must either actually have known that the bridge was out of repair, or the condition of the bridge must have been shown to have been such that it was negligence not to know of it. *Sherman v. Nairey*, 77 Tex. 291, 13 S. W. 1028; *Austin v. Ritz*, 72 Tex. 391, 9 S. W. 884; *Klein v. Dallas*, 71 Tex. 280, 8 S. W. 90; *Gulf, etc., R. Co. v. Taylor* (Civ. App.), 31 S. W. 214, 216.

In an action for injuries caused by plaintiff's horse catching his foot in a hole in defendant's bridge, it is error to charge that plaintiff could recover if defendant failed to keep the bridge in a reasonably safe condition, as this would authorize a recovery, though de-

fendant was unaware that the bridge was out of repair, and by the exercise of reasonable care would not have discovered it. *Gulf, C. & S. F. Ry. Co. v. Taylor* (Civ. App.), 31 S. W. 214.

**Contributory Negligence.**—Plaintiff attempted to cross a bridge of defendant's on a portion of the public road, crossing its right of way. He knew the bridge was not in good repair, but that it was crossed by travelers in wagons and on horseback. This was the only practicable crossing for him in the direction he was traveling. While crossing on horseback he was injured by reason of a defect in the bridge. Held, that a verdict for plaintiff would not be set aside on the ground that his conduct showed contributory negligence. *Gulf, C. & S. F. Ry. Co. v. Gasscamp*, 69 Tex. 545, 7 S. W. 227.

A mother and minor daughter, who drive a gentle horse along an approach to a bridge at about 8 o'clock in the evening,—it being dark, but the way well known,—and who are injured by the sudden and unaccountable fright and shying of the horse, whereby it and the carriage are precipitated over the unguarded side of the approach to the rocky bottom of a ravine 9 feet below, are not guilty of contributory negligence. *Gulf, C. & S. F. Ry. Co. v. Sandifer*, 69 S. W. 461, 29 Tex. Civ. App. 356.

As to contributory negligence being question for jury, see post, "Contributory Negligence," IV, E, 3, c.

#### D. OF TOLL BRIDGE PROPRIETOR.

**Duty of Bridge Owner.**—The owner of a toll bridge must keep safe railings to guard against danger from frightened teams, although such fright be not caused by any want of care on his part. *Baldrige & Courtney Bridge Co. v. Cartrett*, 75 Tex. 628, 13 S. W. 8.

An instruction that plaintiff can not recover if his mules became frightened, after entering upon the bridge, with-

out fault on the part of defendants, and backed the wagon against a portion of the railing which had been passed, knocking it off, and precipitating the wagon to the ground, was properly refused. *Baldrige & Courtney Bridge Co. v. Cartrett*, 75 Tex. 628, 13 S. W. 8.

## E. REMEDIES.

### 1. Petition.

A petition showing that plaintiff, in crossing a toll bridge, stopped to pay toll, when his mules, for some unknown reason, became frightened, and before he could get control of them, backed the wagon against the railing, which was defective, and gave way, is not demurrable as showing an intervening cause of the injury. *Baldrige, etc., Co. v. Cartrett*, 75 Tex. 628, 13 S. W. 8.

### 2. Evidence.

#### a. Admissibility.

**Plaintiff's Opinion.**—In an action for injuries caused by plaintiff's mules becoming frightened on defendant's bridge, and breaking through the railing of the bridge, it being alleged that plaintiff was guilty of contributory negligence in not jumping from his wagon before it fell, he may testify that while his mules were backing he looked around, and saw the railing to the bridge, and thought that would stop them. *Baldrige & Courtney Bridge Co. v. Cartrett*, 75 Tex. 628, 13 S. W. 8. See the title EXPERT AND OPINION EVIDENCE.

**Irrelevant Evidence on the Question of Notice.**—Where it appears that plaintiff, while riding on horseback, was injured by her horse's falling backward into an open space between a wagon way and a footbridge, evidence that another person had been injured at the same place by falling from the footbridge is not admissible on the question of notice, as it has no tendency to show that the wagon way was unsafe for travel on horseback.

*Shelley v. City of Austin*, 74 Tex. 608, 12 S. W. 753.

#### b. Weight and Sufficiency.

In an action against a city for damages alleged to have resulted from the city's negligence in constructing a bridge, testimony of the mayor, of the city engineer, who superintended the construction of the bridge, and of a member of the city council, that the bridge was built by the city, sufficiently supports a finding to that effect, though there was no evidence that the city council passed an ordinance authorizing the bridge to be built. *City of Austin v. Emanuel*, 74 Tex. 621, 12 S. W. 318.

### 3. Question for Jury.

#### a. In General.

In an action for injuries caused by plaintiff's team becoming frightened, and breaking through the railing of a bridge, an instruction that plaintiff can not recover if his mules became unmanageable on account of his whipping them, and trying to urge them forward, was properly refused, as it was a question for the jury whether it was prudent to whip the mules. *Baldrige & C. Bridge Co. v. Cartrett*, 75 Tex. 628, 13 S. W. 8.

#### b. Constructive Notice.

Whether a city has constructive notice of a defective bridge is a question for the jury under proper instructions from the court. *Phillips v. Dallas*, 3 App. Civ. Cases, § 294.

#### c. Contributory Negligence.

When plaintiff had crossed a bridge six times, and drove twenty-five or thirty head of mules across the bridge four times on the day the accident occurred, he testifying that he had never seen the hole before he was hurt, and that he was getting old and his eyesight was not good, and that it was dark when he was hurt, held, it was proper to submit the question of contributory negligence to the jury. *Sherman v. Nairey*, 77 Tex. 291, 293, 13 S.

W. 1028; Gulf, etc., R. Co. v. Gasscamp, 69 Tex. 545, 7 S. W. 227.

#### 4. Instructions.

**Misleading.**—In an action against a railway company for injuries, alleged to have been caused by plaintiff's horse catching its foot in a hole in a bridge maintained by the company over a private way, which it impliedly requested the public to use, it is error to qualify a charge that plaintiff can not recover unless the accident was caused by a hole in the bridge by stating that if the flooring of the bridge was loose, and plaintiff's horse, by stepping on a tie, knocked it from the sill, thus making a hole, it would be such a hole as was meant by the allegation in the complaint. Gulf, C. & S. F. Ry. Co. v. Taylor (Civ. App.), 31 S. W. 214.

In an action for injuries caused by plaintiff's team becoming frightened, and breaking through the railing of a bridge, an instruction that plaintiff can not recover if he could have got out of the wagon after the mules began to back, and by so doing prevented the injury to himself, was properly refused, as plaintiff is entitled to recover for the injury to his team, if not to his person. Baldrige & C. Bridge Co. v. Cartrett, 75 Tex. 628, 13 S. W. 8.

**Submitting Question to Jury.**—An instruction that if the jury, looking to

all the circumstances, find that the city used ordinary care and prudence in keeping a bridge of the dimensions shown (that is, if the bridge was reasonably safe for the public), then to find for the city; but if the city failed to exercise such care, etc., then to find for plaintiff,—sufficiently submits to the jury the question whether the bridge was of sufficient dimensions to relieve the city of negligence in its construction and keeping. Shelley v. City of Austin, 74 Tex. 608, 12 S. W. 753.

### V. Toll Bridges.

**Rights upon Paying Toll.**—Every man who pays his toll upon a toll road or bridge has as unrestricted and unqualified a right to travel the road or bridge, as if it were free from toll, and he paid his tax in the ordinary way. Jones v. Keith, 37 Tex. 394, 402.

As to rights of riparian owner upon construction and maintenance of toll bridges, see ante, "Rights of Riparian Owners," II, C.

**As to liability of toll bridge proprietor from defective bridges,** see ante, "Of Toll Bridge Proprietor," IV, D.

**As to regulation and use of toll bridges,** see ante, "Regulation and Use as to Toll Charges," III.

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**I. Definition, Nature and Purpose.**

**Definition and Nature.**—Under the new rules the brief is a mere statement of the points or propositions relied upon to reverse or affirm the judgment, the matters in the record pertinent to sustain or rebut these points, and a reference to the authorities relied upon by the parties. *Haley v. Davidson*, 48 Tex. 615. See, also, *Shanks v. Carroll*, 50 Tex. 17; *Vaughn v. G. C. & S. F. R. Co.*, 3 App. Civ. Cases, § 230.

"The brief contemplated by these rules is entirely dissimilar from what is meant by this word, as used and understood in the former rules. Heretofore it has indicated a written or printed argument, upon which the case might be submitted. By the rules as now framed, it is a mere statement of the points or propositions relied upon to reverse or affirm the judgment, the matters in the record pertinent to sustain or rebut these points, and a reference to the authorities relied upon by the parties. It should not contain either 'arguments, reasons, conclusions, or inferences.'" *Haley v. Davidson*, 48 Tex. 615. See, also, *Vaughn v. G. C. & S. F. R. Co.*, 3 App. Civ. Cases, § 230.

**Purpose.**—Briefs are intended not only to aid the appellate court in reaching a correct decision, but also to enable the court to dispose of the cause with the least labor and consumption of time. *Guffey Petroleum Co. v. Nearn*, 45 Tex. Civ. App. 192, 100 S. W. 967, in which case the court took occasion to condemn the growing evil of preparing lengthy briefs.

The main object of the brief, as provided for under the new rules, is to get something definite—capable of being understood alike by the court and by both parties—to found an argument upon. *Texas Land Co. v. Williams*, 48 Tex. 602.

The rules of the district court and of the supreme court, lately adopted, are shaped with reference to each other, and are designed to establish a connected system of judicial procedure, from the petition filed in the district or county court, to the final judgment in the supreme court or court of appeals. The rules are also designed to require the parties, through their counsel, to assume the responsibility of selecting the material questions at issue, as presented in the record, and to present them by their briefs in such way as to exhibit them plainly to the court, and as will require the counsel to meet each other understandingly in the consideration and discussion of the same questions. *Texas Land Co. v. Williams*, 48 Tex. 602, 606.

The leading purpose in requiring the assignment of errors and copy of brief to be filed in the time and manner prescribed in the rule, was to facilitate attorneys in representing their cases in the supreme court without appearing in person. *Shanks v. Carroll*, 50 Tex. 17.

**II. Necessity.****A. IN GENERAL.**

**An Essential to Preparation of Case for Submission.**—Under the rules for the courts of Texas, as well as by the Revised Statutes, the appellant or

plaintiff in error, in order to prepare properly a case for submission when called, is required to file a brief of the points relied on, in a prescribed time and manner. Rev. Stat., art. 1417. Rules 29-45 of the rules for the courts of civil appeals. *Chappell v. Missouri Pac. R. Co.*, 75 Tex. 82, 12 S. W. 977; *Bowman v. Hoffman*, 28 Tex. Civ. App. 311, 67 S. W. 152.

Under the former practice, such brief was also required on appeal to the supreme court. Rule 40 of rules for the supreme court. *Shanks v. Carroll*, 50 Tex. 17.

Under the present practice Rule 11 of the rules for the supreme court provides that "a party who elects to file in this court a brief in addition to the brief filed in the court of civil appeals, shall comply as near as may be with the rules prescribed for briefing causes in the latter court, and shall confine his briefs to the points raised in the motion for a rehearing and present it in the application for a writ of error." Rules for the supreme court, 102 Tex. xxi, xxiv.

**As to necessity for brief by appellee or defendant in error**, see post, "Brief of Appellee or Defendant in Error," VI.

## B. EFFECT OF FAILURE TO FILE.

### 1. In General.

**Operation as Abandonment of Appeal.**—The failure of appellant to file briefs in the appellate court is not a "slight infraction" of the rules but a gross failure to properly prepare a cause for submission, and should be treated as an abandonment of the appeal. *Bowman v. Hoffman*, 28 Tex. Civ. App. 311, 67 S. W. 152. See, also, *Davison v. Keeton*, 32 Tex. Civ. App. 65, 73 S. W. 1083; *Richards v. Minster*, 29 Tex. Civ. App. 85, 70 S. W. 98.

Appeal of defendants not having filed briefs in supreme court not considered. *Wyatt v. Foster*, 79 Tex. 413, 15 S. W. 679.

**Operation as Waiver of Assignments of Error.**—An appellant failing to file briefs in the supreme court will be considered as having waived his assignments of error. They will not be considered, although the appellee urges his cross assignment. *St. Louis, etc., R. Co. v. Prather*, 75 Tex. 53, 12 S. W. 969.

**As to waiver of particular assignments not copied into the brief**, see post, "Effect of Failure to Comply with Rule," IV, B, 4, a, (2).

**As to the effect of failure to file in prescribed time and manner**, see post, "Effect of Failure to File in Prescribed Time and Manner," III, F.

**Judgment Affirmed in Absence of Fundamental Error.**—Where no brief is filed either by appellant or appellee, the appellate court will examine the record only for fundamental errors, and, if none are found, will affirm the judgment of the lower court. *Unsworth v. Straughan* (Civ. App.), 43 S. W. 290; *Beck v. Hancock* (Civ. App.), 122 S. W. 419; *Avant v. Cowley* (Civ. App.), 47 S. W. 1036.

Where one of the parties to a judgment has not filed a brief in the appellate court, and does not complain of the judgment against him, it will not be disturbed, even though erroneous. *Peck v. Cain*, 27 Tex. Civ. App. 38, 63 S. W. 177, affirmed in 94 Tex. 707, no op.; *Stephensville Oil Mill v. McNeill* (Civ. App.), 122 S. W. 911.

Judgment affirmed where plaintiff has not briefed his case in such a manner as, under the rules of the court of civil appeals, will permit such court to consider any of his assignments of error, and there is no error apparent of record. *Scanlon v. Galveston, etc., R. Co.*, 45 Tex. Civ. App. 345, 100 S. W. 982, affirmed in 102 Tex. 592, no op.

In *Cox v. Hickman-Cumbie Co.* (Civ. App.), 110 S. W. 549, the appellant failed to file a brief, and the case was submitted upon a brief filed for the appellee. Appellant not having

prosecuted his appeal by filing a brief pointing out errors relied on for reversal, and the appellate court having discovered no fundamental error, the judgment was affirmed.

In *Clark v. Cox* (Civ. App.), 26 S. W. 1116, there was no distinct specification of error either in the assignments or in the brief. Both were framed in complete disregard of the rule. The court of civil appeals held them to be insufficient to present any question for their decision, and the judgment, being apparently correct, was affirmed.

In *Gulf, etc., R. Co. v. Lewis* (Civ. App.), 22 S. W. 665, the assignments of error referred to bills of exception for the error relied upon, without pointing out the supposed error, and the brief failed to set out the exceptions reserved. No error being made to appear in the assignment or brief, the judgment was affirmed.

**As Ground for Dismissal of Appeal.**—Where there is no assignment of errors and no brief for either party, the supreme court is justified ordinarily in dismissing the appeal for want of prosecution. *Dyer v. Dement*, 37 Tex. 431.

The failure to file a brief in the district court as prescribed in rule 37 of rules for the supreme court is a ground for dismissing the appeal. Rule 39. *Pearson v. Household, etc., Mach. Co.*, 78 Tex. 385, 14 S. W. 890.

Where neither appellant nor any of the appellees filed a brief, the appeal will be dismissed. *Suderman-Dolson Co. v. Carson* (Civ. App.), 122 S. W. 401; *Lopez v. Vogis* (Civ. App.), 78 S. W. 239.

Although plaintiff in error duly files the transcript in the supreme court, but fails to file its brief in accordance with law and the rules of the supreme court, the appeal will be dismissed on motion of the defendant in error. *Texas, etc., R. Co. v. Hare*, 4 Tex. Civ. App. 18, 20, 23 S. W. 42, affirmed in 93 Tex. 651, no op.

Where one of several appellants fails to prosecute the appeal by filing briefs, the appeal will be dismissed as to him. *Ft. Worth, etc., R. Co. v. Hagler*, 38 Tex. Civ. App. 52, 84 S. W. 692.

## 2. Fundamental Errors Considered Though Not Urged in Brief.

Fundamental errors in a cause will be considered by the appellate court, though not urged in the brief. *Brotherhood of R. Trainmen v. Roberts*, 48 Tex. Civ. App. 325, 107 S. W. 626; *McColpin v. McColpin* (Civ. App.), 75 S. W. 824. And see *Dyer v. Dement*, 37 Tex. 431.

## III. Filing.

### A. BY WHOM FILED.

The duty of appellant or plaintiff in error to file a brief has already been considered, ante, "In General," II, A.

As to the right and duty of appellee or defendant in error to file a brief, see post, "Brief of Appellee or Defendant in Error," VI.

**Propriety of Joint Briefs by Parties Whose Interests Are Adverse to Each Other.**—In *Richards v. Minster*, 29 Tex. Civ. App. 85, 70 S. W. 98, an appellant and an intervenor whose interests were adverse to each other, though common as against the appellee, were permitted to file a joint brief where no objection was made, although the propriety of such practice was doubted.

### B. PLACE OF FILING.

The brief of the appellant or plaintiff in error should be filed in the trial court. Revised Statutes 1895, art. 1417 (1416a). Rule 39 of rules for courts of civil appeals; Rule 101 of rules for the district and county court. *San Antonio, etc., R. Co. v. Holden*, 93 Tex. 211, 54 S. W. 751; *Paris, etc., R. Co. v. Killingsworth* (Civ. App.), 43 S. W. 1046; *Jones v. Erwin* (Civ. App.), 45 S. W. 39, affirmed in 93 Tex. 665, no op.; *Austin v. Cahill* (Civ.

App.), 88 S. W. 536; *Patterson v. Seeton*, 19 Tex. Civ. App. 430, 432, 47 S. W. 732, affirmed in 93 Tex. 716, no op.

Unless such filing below has been waived by the opposite party. See *Connor v. Zachry* (Civ. App.), 115 S. W. 867; *Brown v. Reed* (Civ. App.), 62 S. W. 73; *Bowden v. Patterson* (Civ. App.), 108 S. W. 177.

The acknowledgment by appellee of the receipt of a copy of appellant's brief is a waiver of the filing of the brief in the court below. *Brown v. Reed* (Civ. App.), 62 S. W. 73.

"An appellant has no right to file a brief in this court unless he has first, within the time prescribed by law, filed a copy in the trial court." *Jones v. Erwin* (Civ. App.), 45 S. W. 39, affirmed in 93 Tex. 665, no op.

If, however, the clerk of the court of civil appeals should inadvertently or improperly permit a brief to be filed in such court and, in answer to the motion to strike out, a sufficient excuse is shown for not having filed the brief in the court below, it will not be stricken out, but such excuse will be treated as an application for permission to file the brief in court of civil appeals, notwithstanding the failure to file it in the court below within the time prescribed. *Jones v. Erwin* (Civ. App.), 45 S. W. 39, affirmed in 93 Tex. 665, no op.

## C. TIME OF FILING.

### 1. In Trial Court.

#### a. In General.

Article 1417 of the Revised Statutes provides that the appellant or plaintiff in error shall file a copy of his brief with the clerk of the district court not less than five days before the time of filing the transcript in the court of civil appeals. *San Antonio, etc., R. Co. v. Holden*, 93 Tex. 211, 54 S. W. 751; *Harris v. Bryson*, 31 Tex. Civ. App. 514, 73 S. W. 548, affirmed in 97 Tex. 635, no op.; *Paris, etc., R. Co. v.*

*Killingsworth* (Civ. App.), 43 S. W. 1046; *Werner v. Kasten* (Civ. App.), 25 S. W. 317; *Jones v. Erwin* (Civ. App.), 45 S. W. 39, affirmed in 93 Tex. 665, no op.; *Hunt v. Glasscock*, 27 Tex. Civ. App. 322, 65 S. W. 209, affirmed in 95 Tex. 680, no op.; *Lynch v. Munson* (Civ. App.), 61 S. W. 140; *Elkins v. Kempner* (Civ. App.), 66 S. W. 576; *Niday v. Cochran*, 48 Tex. Civ. App. 259, 106 S. W. 462; *Ft. Worth, etc., R. Co. v. Moore* (Civ. App.), 106 S. W. 190; *Bowden v. Patterson* (Civ. App.), 108 S. W. 177; *Missouri, etc., R. Co. v. Milliron* (Civ. App.), 115 S. W. 655; *Connor v. Zachry* (Civ. App.), 115 S. W. 867.

**Rule Construed to Mean Five Days before Transcript Actually Filed.**—The supreme court, construing Revised Statutes, art. 1417, in *San Antonio, etc., R. Co. v. Holden*, 93 Tex. 211, 54 S. W. 751, says: "We are of opinion that the statute means that appellant or plaintiff in error shall file his brief five days before the transcript is actually filed in the court of civil appeals."

The statute, in requiring appellant's brief to be filed below "not less than five days before the time of filing the transcript in the court of civil appeals," means five days before the transcript is actually so filed regardless of when it is filed, so that it is filed within the ninety days fixed by the statutes. *Hunt v. Glasscock*, 27 Tex. Civ. App. 322, 65 S. W. 209, affirmed in 95 Tex. 680, no op., following *San Antonio, etc., R. Co. v. Holden*, 93 Tex. 211, 54 S. W. 751.

**The object of the law** is to afford the appellee or defendant in error a convenient opportunity, and sufficient time to prepare his brief in answer to that of his adversary. *San Antonio, etc., R. Co. v. Holden*, 93 Tex. 211, 54 S. W. 751; *Hunt v. Glasscock*, 27 Tex. Civ. App. 322, 65 S. W. 209, affirmed in 95 Tex. 680, no op.; *Harris v. Bryson*, 31 Tex. Civ. App. 514, 73 S. W. 548,

affirmed in 97 Tex. 635, no op.; *Lynch v. Munson* (Civ. App.), 61 S. W. 140; *Ft. Worth, etc., R. Co. v. Windham* (Civ. App.), 120 S. W. 248.

**Under Rule 37 of the rules for the supreme court under the former practice,** a copy of the brief was required to be filed in the office of the clerk of the district court at least ten days before the first day of the assignment of the term of the court to which the case was returnable. *San Antonio, etc., R. Co. v. Holden*, 93 Tex. 211, 54 S. W. 751.

**b. Necessity for Written Agreement for Extension of Time.**

An agreement of counsel provided for the filing of appellant's brief on or before a certain date, and that a copy thereof should be delivered to appellee on or before that date. No briefs were filed as stipulated, nor until the day the cause was set for submission; and a copy was not furnished attorneys for appellee until two days before they were filed, and appellee filed no briefs. Appellant's attorneys alleged an oral agreement with attorneys for appellee, extending the time for filing briefs. It was held that under rule 46 of rules for courts of civil appeals, requiring such agreements to be in writing, appellant could claim no benefit therefrom; and, having shown no excuse irrespective of the agreement, the appeal will be dismissed. *Emerson v. Shapleigh Hardware Co.* (Civ. App.), 66 S. W. 570.

**2. In Appellate Court.**

In *Werner v. Kasten* (Civ. App.), 25 S. W. 317, it was held that as no time was directly prescribed by statute or fixed by the rules within which the appellant or plaintiff in error should file his brief in the court of civil appeals, it would be sufficient, if, having filed his brief in the court below within the time provided by law, he filed it in the appellate court before the cause was submitted.

Where appellee by written stipulation waived filing and service of appellants' brief, and agreed that it might be filed with the clerk of the court of civil appeals without imposing any condition as to when the brief should be so filed, appellants were entitled to file their brief at any time before submission of the case. *Connor v. Zachry* (Civ. App.), 115 S. W. 867.

Rule 37 of the rule for the supreme court under the former practice required that a copy of the brief of the appellant or plaintiff in error "shall be filed in the district court, to be there kept with the papers of the cause, at least ten days before the first day of the assignment of the term of the court to which the case is returnable—which fact, with its date, shall be evidenced by the certificate of the clerk of the district court, indorsed on another copy of the brief, which copy of the brief, with its indorsement, shall be filed in the supreme court on the first day of the same assignment, there to remain with the transcript; and a copy thereof for each of the justices of the court shall be filed before the hearing." See *Sabine, etc., R. Co. v. Joachimi*, 58 Tex. 452, in which case it was held that "the rules do not require more than one brief to be filed on the first day of the assignment. The others will be in time if filed before the hearing of the cause."

**D. MANNER OF FILING.**

When the appellant or plaintiff in error has filed a copy of his brief with the clerk of the court below, such copy is to be deposited by the clerk with the papers of the cause, with the date of filing indorsed thereon. Revised Statutes, art. 1417. *San Antonio, etc., R. Co. v. Holden*, 93 Tex. 211, 54 S. W. 751; *Werner v. Kasten* (Civ. App.), 25 S. W. 317; *Bowden v. Patterson* (Civ. App.), 108 S. W. 177; *Connor v. Zachry* (Civ. App.), 115 S. W. 867.

## B. NOTICE OF FILING.

**Necessity and Manner.**—By art. 1417, Rev. Stat., it is made the duty of the clerk of the district court with whom a copy of the brief has been filed to forthwith give notice to the appellee or defendant in error, or his attorney of record, of the filing of such brief. *San Antonio, etc., R. Co. v. Holden*, 93 Tex. 211, 54 S. W. 751; *Werner v. Kasten* (Civ. App.), 25 S. W. 317; *San Antonio, etc., R. Co. v. Brock* (Civ. App.), 77 S. W. 953; *Niday v. Cochran*, 48 Tex. Civ. App. 259, 106 S. W. 462; *Connor v. Zachry* (Civ. App.), 115 S. W. 867. And see *Emerson v. Shapleigh Hardware Co.* (Civ. App.), 66 S. W. 570; *Jones v. Erwin* (Civ. App.), 45 S. W. 39, affirmed in 93 Tex. 665, no op.

**Effect of Failure to Receive Notice.**—Where it did not appear that appellees, who did not receive from the clerk of the district court the statutory notice of the filing of the brief of appellant in the district court, did not have notice otherwise in ample time to prepare and file a brief, if they desired, the appeal will not be dismissed because of the failure to receive such notice from the clerk. *Moonshine Co. v. Dunman* (Civ. App.), 111 S. W. 161.

## F. EFFECT OF FAILURE TO FILE IN PRESCRIBED TIME AND MANNER.

### 1. General Rule.

By Rule 39 of the rules for the government of the court of civil appeals, it is provided that "the failure of appellant or plaintiff in error to file an assignment of errors and briefs in the lower court and in the appellate court in the time and in the manner prescribed by law and by the rules, shall be ground for dismissing the appeal or writ of error for want of prosecution, by motion made by appellee or defendant in error, or other motions under rule 8, unless good cause is shown why it was not done in the time and manner prescribed, and that they

have been filed at such time and under such circumstances as the appellee or defendant in error has reasonably not suffered any material injury in the defense of the cause in the appellate court. In deciding such motion, the court will give such direction to the case as will cause the least inconvenience or damage from such failure, so far as practicable." *Hurt v. Glasscock*, 27 Tex. Civ. App. 322, 65 S. W. 209, affirmed in 95 Tex. 680, no op.; *San Antonio, etc., R. Co. v. Holden*, 93 Tex. 211, 54 S. W. 751; *Krisch v. Richter* (Civ. App.), 125 S. W. 935; *Jones v. Erwin* (Civ. App.), 45 S. W. 39, affirmed in 93 Tex. 665, no op. And see *Emerson v. Shapleigh Hardware Co.* (Civ. App.), 66 S. W. 570.

Appellant's failure to file briefs in the court of civil appeals is cause for dismissing the appeal, even though there are assignments in the record presenting fundamental error. *Bowman v. Hoffman*, 28 Tex. Civ. App. 311, 67 S. W. 152.

### 2. Rule Construed and Applied.

#### a. Rule Held Not Mandatory but Merely as Empowering Dismissal.

Rule 39 has been construed as not absolutely requiring dismissal in every case where there has been a failure to file the brief in time, and no cause is shown for the delay, but simply as making the failure a "ground for dismissal." *San Antonio, etc., R. Co. v. Holden*, 93 Tex. 211, 54 S. W. 751.

"This, as we think, was meant merely to empower the court to dismiss when the delay was of such a character as to demand that course, and not to make it mandatory to do so when no injury has resulted to the appellee. The last provision in the rule is noteworthy. It reads: 'In deciding said motion, the court will give such direction to the case as will cause the least inconvenience or damage from such failure, so far as practicable.' It does not say that in case the motion

to dismiss be overruled, 'the court shall give such direction to the case as will cause the least inconvenience,' etc., to the appellee; but that 'in deciding the motion,' the court shall do this. We think it was meant by the language last quoted that in deciding the motion all the circumstances should be considered and that the court should not be bound to dismiss when no delay or other injury had resulted to the appellee." *San Antonio, etc., R. Co. v. Holden*, 93 Tex. 211, 54 S. W. 751.

The purpose of the statute and rule requiring the appellant to file his briefs in the trial court five days before the record is filed in the appellate court is to give the appellee time and opportunity to prepare and file his briefs in reply. Where the purpose of the rule has been accomplished, an appeal will not be dismissed because appellant's briefs have not been filed within the time. *Lynch v. Munson* (Civ. App.), 61 S. W. 140; *Deaton v. Feazle* (Civ. App.), 85 S. W. 1167; *Harris v. Bryson*, 31 Tex. Civ. App. 514, 73 S. W. 548, affirmed in 97 Tex. 635, no op.; *Bull v. San Antonio, etc., R. Co.*, 33 Tex. Civ. App. 547, 78 S. W. 525; *Niday v. Cochran*, 48 Tex. Civ. App. 259, 106 S. W. 462; *Peoples v. Evans* (Civ. App.), 111 S. W. 756.

Where, however, the appellant or plaintiff in error has failed to give a good excuse for noncompliance with the statute, and such a failure will result in depriving the appellee or defendant in error of some substantial right, the statute should be enforced and the appeal dismissed. *Ft. Worth, etc., R. Co. v. Windham* (Civ. App.), 120 S. W. 248; *Dodd v. Presley* (Civ. App.), 81 S. W. 811; *Niday v. Cochran*, 48 Tex. Civ. App. 259, 106 S. W. 462, 463; *Ft. Worth, etc., R. Co. v. Moore* (Civ. App.), 106 S. W. 190. See, also, *Harris v. Bryson*, 31 Tex. Civ. App. 514, 73 S. W. 548, affirmed in 97 Tex. 635, no op.; *Hunt v. Glass-*

*cock*, 27 Tex. Civ. App. 322, 65 S. W. 209, affirmed in 95 Tex. 680, no op.; *Booher v. Anderson*, 35 Tex. Civ. App. 436, 80 S. W. 385; *Gulf, etc., R. Co. v. Hall*, 32 Tex. Civ. App. 476, 74 S. W. 778; *Elkins v. Kempner* (Civ. App.), 66 S. W. 576; *Nigro & Co. v. Hodges* (Civ. App.), 85 S. W. 1169; *Bowman v. Hoffman*, 28 Tex. Civ. App. 311, 67 S. W. 152.

Where appellant fails to file briefs in the court below within the time required by law so as to deprive appellee of the time allowed (20 days before submission) within which to reply to the briefs, the appeal will be dismissed. *Nigro & Co. v. Hodges* (Civ. App.), 85 S. W. 1169; *Gulf, etc., R. Co. v. Hall*, 32 Tex. Civ. App. 476, 74 S. W. 778.

Appellee is entitled to have the case submitted on the day set for submission, and to deprive him of that right and of the privilege accorded him by law to have the twenty days time allowed in which to reply to appellant's brief, would result in depriving him of substantial rights. *Ft. Worth, etc., R. Co. v. Windham* (Civ. App.), 120 S. W. 248, 249.

**Court of Civil Appeals May Not Affirm on Certificate for Noncompliance with Statute.**—Where appellant has complied with the law in filing his transcript on appeal to the court of civil appeals within the time required, the court of civil appeals has no authority to affirm the judgment of the trial court on certificate, because of a failure to comply with the statute requiring briefs to be filed by the appellant in the lower court, as articles 1016 and 1017 of the Revised Statutes limit the power of the courts of civil appeals to affirm on certificate to cases where the record on appeal has not been filed in the court of civil appeals within the time required by the statute. *Gulf, etc., R. Co. v. Hall* (Civ. App.), 76 S. W. 590.

Generally as to the propriety and manner of affirmance on certificate, see

the title APPEAL AND ERROR, vol. 1, p. 669, et seq.

**b. Applications of Rule.**

**Instances in Which Dismissal Proper.**—Where appellant's brief was filed in the trial court after filing the transcript on appeal and only thirteen days before the time for submission, since appellee was thereby deprived of a substantial right, the appeal should be dismissed. *Harris v. Bryson*, 31 Tex. Civ. App. 514, 73 S. W. 548, affirmed in 97 Tex. 635, no op.

Where appellant has failed to file brief in the appellate court and offers no excuse for his failure to file it in the court below twenty days before the day set for the submission of the case, his application for leave to file brief will be refused and the appeal dismissed. *Booher v. Anderson*, 35 Tex. Civ. App. 436, 80 S. W. 385, following *Harris v. Bryson*, 31 Tex. Civ. App. 514, 73 S. W. 548, affirmed in 97 Tex. 635, no op.

Where an appeal was perfected May 19, 1901, and the transcript filed in the court of civil appeals on June 27th, delay by appellant in filing briefs until October 12, 1901, not excused, was such gross negligence and such a violation of the statute providing that the briefs shall be filed not less than five days before the filing of the transcript in the court of civil appeals, as warrants sustaining a motion to strike out the briefs and dismiss the case for want of prosecution. *Rev. Stats.*, art. 117. *Hunt v. Glasscock*, 27 Tex. Civ. App. 322, 65 S. W. 209, affirmed in 95 Tex. 680, no op.

The record was filed on appeal on September 21, 1909, and the cause was set for submission for February 16, 1910. Appellee's agreement to waive the filing of appellant's brief expired in November, 1909. The brief of appellant was filed February 7th. The attorney most familiar with the case for appellant was in poor health during

November and December, and was compelled to quit work, and was absent in January. The record was lost, and not found until about the middle of January. Held, that the failure to file the brief within a reasonable time before the day of submission was not excused, necessitating a dismissal of the appeal on appellee's motion. *Krisch v. Richter* (Civ. App.), 125 S. W. 935.

Where the appeal was perfected December 17, 1907, and the transcript applied for and filed in the appellate court on March 16, 1908, and on Nov. 5, 1908, the case was set down for submission in its regular order on Nov. 19, 1908, but no briefs were filed by appellant in the district court, and none in the appellate court until the day set for submission, November 19, and a motion to dismiss was filed in the appellate court on November 17, having been prepared by appellees' counsel on the 16 inst. and at that time appellees' counsel had not been furnished with a copy of appellant's brief, and had no knowledge that such brief would be filed, and no answer was made to the motion, and no excuse offered for failure to comply with the rule. Held, the appeal should be dismissed. *Longbotham v. Abercrombie* (Civ. App.), 114 S. W. 428.

In *Elkins v. Kempner* (Civ. App.), 66 S. W. 576, the judgment appealed from was rendered on the 6th day of June. The appeal was perfected on the 13th of July, and a transcript of the record was filed in the court of civil appeals on the 11th day of October, 1901. A copy of appellant's brief was not filed in the court below until the 6th day of January 1902; and copies were not filed in the court of civil appeals until the 8th of said month—the day the case was set for submission. It is thus seen that appellant took the entire time allowed by *Rev. Stat.*, art. 1015, to file the record in the court of civil appeals. Not less than five days before filing the transcript in the latter court, he should have filed with the



clerk of the district court a copy of his brief (Rev. Stat., art. 1417). It was not filed there until the expiration of ninety two days from the time the record was filed in a court of civil appeals, which was only two days from the time the case was set for submission. This gave the appellee no time to prepare and file his briefs in answer to appellants. He was entitled to twenty days after notice of the filing appellant's brief in the court below. It was held, that this was an infraction of the statute so grossly negligent and inexcusable as to make it the duty of the court of civil appeals to dismiss the appeal. (Citing *Hunt v. Glasscock*, 27 Tex. Civ. App. 322, 65 S. W. 209, affirmed in 95 Tex. 680, no op.; *San Antonio, etc., R. Co. v. Holden*, 93 Tex. 211, 54 S. W. 751; *Paris, etc., R. Co. v. Killingsworth* (Civ. App.), 43 S. W. 1046.)

In *Dodd v. Presley* (Civ. App.), 81 S. W. 811, the record in the case was delivered to the attorneys for the appellant on April 13th, 1904, and they filed their briefs in the trial court on the 13th day of May, 1904. The case thereafter was set down for submission, and was submitted on the first day of June, 1904. Notice of the filing of the briefs was issued and served on appellee on the 13th of May, 1904. From the latter date appellee was entitled to twenty days time in which to file his brief in the court of civil appeals. Twenty days had not expired when the case was submitted in the latter court, and there were no briefs on file for the appellee. The court of civil appeals therefore concluded that the failure of the appellant to comply with the statute as to the time of filing the brief, deprived the appellee of a substantial right and sustained a motion to dismiss the appeal for such noncompliance.

Where a case is not one of much magnitude, the record not voluminous, and containing but seven assignments of error, the appeal will be dismissed

because of appellant's failure to file a brief within the required time, and excuse on the ground of business engagements and illness of counsel not being sufficient, in the absence of an excuse for not securing the services of some other attorney to prepare the brief. *Lasker, etc., Ass'n v. Word* (Civ. App.), 123 S. W. 709.

An affidavit to excuse failure to file briefs in time is too indefinite and uncertain where it does not state cause of delay and the court of civil appeals must, in the absence of a statement to the contrary, presume that the clerk of the court performed his duty in promptly filing appellant's brief when it was received, and if he had then promptly issued notices of the filing of the brief, and the same had been promptly served upon appellees or their counsel, they would not have had twenty days from that time to the submission of the case in which to file their brief. *Harris v. Bryson*, 31 Tex. Civ. App. 514, 73 S. W. 548, affirmed in 97 Tex. 635, no op.

**Instances in Which Dismissal Properly Refused.**—An appeal will not be dismissed where appellant has shown to the appellate court a good and satisfactory excuse for not filing his brief in the trial court five days before filing the transcript in the court of civil appeals, as required by Revised Statutes 1895, art. 1417. *Missouri, etc., R. Co. v. Milliron* (Civ. App.), 115 S. W. 655.

A writ of error will not be dismissed for failure of plaintiff in error to file brief within the time prescribed, where such brief has been filed and fully answered by the opposing party, and no delay has resulted. *Gulf, etc., R. Co. v. Mitchell*, 21 Tex. Civ. App. 463, 51 S. W. 662.

Appeal was perfected June 7th; brief filed August 28th; transcript required to be filed in the appellate court by September 5th. but actually filed August 30th, the next term beginning on

October 2d. Held, that appellee was not prejudiced by the failure to postpone the filing of the transcript until five days after the filing of the brief, and the appeal should not be dismissed. *San Antonio, etc., R. Co. v. Holden*, 93 Tex. 211, 54 S. W. 751.

Where it appears from the condition of the docket that a case will not be reached during the term of the court, the failure of appellant to file his brief in the court below within the time required by the statute will not prejudice the right of appellee. *Peoples v. Evans* (Civ. App.), 111 S. W. 756.

### 3. Waiver of Objection for Failure to File in Time.

The failure of appellants to file their briefs in time is waived where counsel for appellees treat the briefs as properly filed and make no complaint until a few days before the submission of the cause. *Gibson v. Morris*, 28 Tex. Civ. App. 555, 67 S. W. 433 (see 95 Tex. 483, no op.).

Appellee waived his rights to insist upon the filing of appellant's brief in the court below within the time required by the statute where appellee makes an agreement with appellant's counsel, which agreement was filed among the papers of the case, that the submission of the case be postponed, in order that appellant might have time within which to file his brief. *San Antonio, etc., R. Co. v. Turnham* (Civ. App.), 77 S. W. 625, 626.

## IV. Scope Contents and Sufficiency.

### A. SCOPE AND LIMITATION.

**In General.**—The brief of the appellant or plaintiff in error must be in accordance with and confined to the distinct specifications of error assigned, and to such fundamental errors of law as are apparent upon the record. Rule 29 of rules for courts of civil appeals. *Cooper v. Hiner*, 91 Tex. 558, 45 S. W. 554; *Chappell v. Missouri Pac. R. Co.*,

75 Tex. 82, 12 S. W. 977; *Pitts v. Wood* (Civ. App.), 125 S. W. 954; *New England Land, etc., Co. v. Chamberlain*, 70 Tex. 138, 8 S. W. 116.

"As errors not assigned or fundamental are waived, only such points as are covered by the assignments of error can be made." *Haley v. Davidson*, 48 Tex. 615.

**Where there are no assignments of error found in the record**, the appellate court will not consider the assignments presented in the appellant's briefs, and where there is no fundamental error in the record, the judgment will be affirmed. *Smith v. Smith* (Civ. App.), 107 S. W. 888.

Assignments of error not in the record but appearing in appellant's brief under the head "additional assignment," can not be considered. *Morrow v. Terrell*, 21 Tex. Civ. App. 28, 50 S. W. 734, affirmed in 93 Tex. 715, no op.

**As to the rule that propositions not germane to the assignments will not be considered**, see post, "Necessity for Propositions to Be Germane to Assignments," IV, B, 5, b, (1), (c).

## B. CONTENTS, FORM AND SUFFICIENCY.

### 1. In General.

As has been already seen, one purpose of the brief is to enable the appellate court to dispose of the cause with the least labor and consumption of time. See ante, "Definition, Nature and Purpose," I.

A party desiring to question a judgment in a suit involving title to property, must present in his briefs the particular matters complained of. *Herman v. Dunman*, 95 S. W. 80 (see 101 Tex. 641, no op.).

And the appellant or plaintiff in error should so present his case by his brief as to relieve the appellate court from examining the record, unless the opposite party shall make an issue as to the statements made by the appellant

or plaintiff in error. *Patrick v. Laprelle* (Civ. App.), 37 S. W. 872 (see 93 Tex. 693, no op.).

A brief should be so made as to enable the court to decide the case upon it, without reference to, or an examination of, the transcript. *McManus v. Wallis*, 52 Tex. 534; *Krick v. Dow* (Civ. App.), 84 S. W. 245.

Where complainant so presents his case as to require the appellate court to search the record as to the assignments of error, such assignment will be disregarded. *Patrick v. Laprelle* (Civ. App.), 37 S. W. 872 (see 93 Tex. 693, no op.).

## 2. Necessity for Compliance with Rules of Court Governing Briefs.

**In General.**—The rules of court plainly point out the manner in which the appellant or plaintiff in error shall call the attention of the appellate court to the rulings of the court below, of which he complains. *Johnson v. Flint*, 75 Tex. 379, 12 S. W. 1120.

And a brief in the preparation of which no attention is paid to the rules of court, and which does not present the errors relied on in such a way as to enable the appellate court to intelligently pass upon them, will not be considered on appeal. *Lowry v. Haynes*, 44 Tex. Civ. App. 431, 98 S. W. 1068, affirmed in 102 Tex. 587, no op.; *Blackwell v. Mayfield* (Civ. App.), 69 S. W. 659.

While the supreme court may, of its own motion, notice any fundamental error of law, apparent on the face of the record, parties in preparing their briefs will be deemed to have waived any matter not presented as required by the rules governing practice in the supreme court. *T. M. R. Co. v. Herbeck*, 60 Tex. 602.

Agreement of counsel affecting the rights alone of parties will usually be enforced, but where such agreements infringe upon the rules of the supreme court, and entail an unnecessary and

additional burden upon the appellate court, as in searching the records of other cases for briefs adopted by agreement, they will not be upheld or allowed. *Galveston, etc., R. Co. v. Crawford*, 9 Tex. Civ. App. 245, 27 S. W. 822, 29 S. W. 958, affirmed in 93 Tex. 706, no op.

**Procedure Where Brief Defective.**—See post, "Procedure Where Brief or Briefs Found Insufficient," VII.

**Consideration of Briefs Not Complying with Rules.**—The appellate court may reverse a judgment upon errors assigned, though not presented in compliance with the rules governing briefs, especially where the ruling complained of partakes of the nature of fundamental error. *Pinkston v. Boyd*, 43 Tex. Civ. App. 568, 97 S. W. 103. And see *T. M. R. Co. v. Herbeck*, 60 Tex. 602.

Though the brief of the appellant does not in all things conform to the rules, where the issue of the sufficiency of the evidence to sustain the verdict against his claim in reconviction for damages is presented by assignment in the brief, and it also contains statements from the record sustaining that proposition, the appellate court would not be justified in ignoring the assignment. *Masterson v. Heitman & Co.*, 33 Tex. Civ. App. 464, 77 S. W. 983.

The appellate court will not refuse to consider an assignment of error complaining of an instruction, merely because the point is not presented in appellant's brief by such proposition as is contemplated by the rules. *Key-stone Mills Co. v. Chambers* (Civ. App.), 118 S. W. 178, 179.

## 3. Introductory Statement of Nature and Result of Suit.

The appellant or plaintiff in error, in preparing his brief, should make a general and succinct statement of the nature and result of the suit, as an introduction. Rule 30 of the rules for the courts of Texas. *Gallagher & Co. v.*

Goldfrank, etc., Co., 75 Tex. 562, 12 S. W. 964; *Shanks v. Carroll*, 50 Tex. 17; *Arnold v. Chamberlin* (Civ. App.), 33 S. W. 767; *Denecamp v. Townsend* (Civ. App.), 33 S. W. 254; *Meston v. Davies* (Civ. App.), 36 S. W. 805, affirmed in 93 Tex. 646, no op.; *Missouri, etc., R. Co. v. Jahn* (Civ. App.), 42 S. W. 1042. And see *Maldonado v. Arthur* (Civ. App.), 70 S. W. 562.

By this statement is meant, not a history of the case, nor a particular and detailed account of the entire action, but merely a brief designation of the character of the suit, and of the disposition of the cause in the final judgment. *Gallagher & Co. v. Goldfrank, etc., Co.*, 75 Tex. 562, 12 S. W. 964; *Shanks v. Carroll*, 50 Tex. 17.

"The statement of the nature and result of the suit is very different from a statement of the case, which would be a full statement of all such important matters as are found in the record. If that were done, and then the several propositions were consecutively stated, the particular matters relating to any one of such propositions might be known to the attorney who prepared the brief, but not in like manner known to the opposite counsel, or to the court; therefore it is better that only the general nature and result of the suit should be stated as an introduction, as required in rule 30, and the matters in the record pertaining to each proposition should be stated under it, thereby giving notice to the opposite side, and to the court, of what are the matters in the record that are relied on as relating to such proposition. Thus will the court and both of the parties be brought to the consideration of the same matters in the record relating to such proposition. This is one of the leading objects of the rule 31 that has been quoted." *Texas Land Co. v. Williams*, 48 Tex. 602, 612.

The following example of a preliminary statement is given in rule 30 of the rules for the courts of civil appeals,

as amended March 15, 1906: "This was an action of trespass to try title which was brought by the appellant against the appellee, and in which judgment was rendered for the defendant."

#### 4. Incorporation of Assignments of Error and Presentation of Grounds of Error Thereunder.

##### a. Necessity for Copying Assignments of Error.

###### (1) General Rule.

It is expressly required by the rules of court governing briefs, that assignments of error must be copied in the brief to be entitled to consideration. Rule 29 of rules for the courts of Texas. *Mosely v. Gainer*, 10 Tex. 578; *Blum v. Whitworth*, 66 Tex. 350, 1 S. W. 108; *Hughes v. Galveston, etc., R. Co.*, 67 Tex. 595, 4 S. W. 219; *Oppenheimer v. Halff & Bro.*, 68 Tex. 409, 4 S. W. 562; *Coleman v. Colgate*, 69 Tex. 88, 6 S. W. 553; *Gulf, etc., R. Co. v. Wilson*, 69 Tex. 739, 744, 7 S. W. 653; *Chappell v. Missouri Pac. R. Co.*, 75 Tex. 82, 12 S. W. 977; *St. Louis, etc., R. Co. v. McClain*, 80 Tex. 85, 15 S. W. 789; *Goodman v. Henley*, 80 Tex. 499, 16 S. W. 432; *Worthington v. Wade*, 82 Tex. 26, 17 S. W. 520; *Texas, etc., R. Co. v. Eberheart*, 91 Tex. 321, 43 S. W. 510, affirming 40 S. W. 1060; *Cooper v. Hiner*, 91 Tex. 658, 45 S. W. 554; *Houston, etc., R. Co. v. Rutherford*, 94 Tex. 518, 62 S. W. 1056, affirming 62 S. W. 1069; *Gulf, etc., R. Co. v. Shelton*, 96 Tex. 301, 72 S. W. 165, affirming 30 Tex. Civ. App. 72; *Cooper v. Lee*, 1 Tex. Civ. App. 9, 17, 21 S. W. 998; *Reagan v. Evans*, 2 Tex. Civ. App. 35, 40, 21 S. W. 427; *Barnes v. Miller*, 3 Tex. Civ. App. 468, 22 S. W. 659; *Harris v. Crabtree*, 4 Tex. Civ. App. 321, 23 S. W. 474; *San Antonio, etc., R. Co. v. Adams*, 6 Tex. Civ. App. 102, 24 S. W. 839 (see 93 Tex. 694, no op.); *Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. 286, affirmed in 93 Tex. 699, no op.; *Galveston, etc., R. Co. v. Crawford*, 9 Tex. Civ. App. 245, 27 S. W. 822, 29

S. W. 958, affirmed in 93 Tex. 706, no op.; Calhoun v. Stark, 13 Tex. Civ. App. 60, 35 S. W. 410, affirmed in 93 Tex. 701, no op.; Traylor v. State, 19 Tex. Civ. App. 86, 46 S. W. 81, affirmed in 93 Tex. 722, no op.; Yarbrough v. De Martin, 28 Tex. Civ. App. 276, 67 S. W. 177, affirmed in 95 Tex. 690, no op.; Bowman v. Hoffman, 28 Tex. Civ. App. 311, 67 S. W. 152; Hollywood v. Wellhausen, 28 Tex. Civ. App. 541, 68 S. W. 329, affirmed in 95 Tex. 679, no op.; Gray v. Moore, 37 Tex. Civ. App. 407, 84 S. W. 293; Dean v. Cate, 39 Tex. Civ. App. 187, 87 S. W. 234; Missouri, etc., R. Co. v. Barnes, 42 Tex. Civ. App. 626, 95 S. W. 714, affirmed in 101 Tex. 648, no op.; Poland v. Porter, 44 Tex. Civ. App. 334, 98 S. W. 214; Faison v. Meyenberg, 44 Tex. Civ. App. 555, 98 S. W. 1066; Koch v. Missouri, etc., Iron Co., 46 Tex. Civ. App. 84, 102 S. W. 136; Missouri, etc., R. Co. v. Moore, 47 Tex. Civ. App. 531, 105 S. W. 532; Tabb v. Smart (Sup.), 12 S. W. 977; Blankenship, etc., Co. v. Kelly (Civ. App.), 23 S. W. 27; Haney v. Franco-Texan Land Co. (Civ. App.), 23 S. W. 414; Parker County v. Jackson, 5 Tex. Civ. App. 36, 40, 23 S. W. 924; Howell v. Hanrick (Civ. App.), 24 S. W. 823; Winkler v. Winkler (Civ. App.), 26 S. W. 893; Thurmond v. Bank (Civ. App.), 27 S. W. 317; Bonham v. Crider (Civ. App.), 27 S. W. 419; Webb v. Brewer (Civ. App.), 28 S. W. 94; Texas, etc., Ass'n v. Caruthers (Civ. App.), 29 S. W. 48; Langholz v. Western Tanning Co. (Civ. App.), 29 S. W. 831; Galveston, etc., R. Co. v. Norris (Civ. App.), 29 S. W. 950, affirmed in 93 Tex. 707, no op.; Galveston, etc., R. Co. v. Leonard (Civ. App.), 29 S. W. 955, affirmed in 93 Tex. 707, no op.; Smith v. Bibbs, No. 594 (Civ. App.), 30 S. W. 729; Desmuke v. Houston (Sup.), 32 S. W. 1025; Cassetty Oil Co. v. Disborough (Civ. App.), 33 S. W. 1004; House v. Robertson (Civ. App.), 34 S. W. 640; Dewitt v. Chilton (Civ. App.), 35 S. W. 23; Bellah v. Orr, etc., Shoe Co. (Civ. App.), 35 S. W. 301; Burkitt v. Twyman (Civ. App.), 35 S. W. 421, affirmed in 93 Tex. 656, no op.; Patrick v. Laprelle (Civ. App.), 37 S. W. 872 (see 93 Tex. 693, no op.); Childress v. Smith (Civ. App.), 37 S. W. 1076; Texas, etc., R. Co. v. Gay (Civ. App.), 38 S. W. 533, affirmed in 93 Tex. 674, no op.; Gambold v. Galveston, etc., R. Co. (Civ. App.), 40 S. W. 834; Hill v. Grant (Civ. App.), 44 S. W. 1016; Frost v. Foote (Civ. App.), 44 S. W. 1071; Davis v. Converse (Civ. App.), 46 S. W. 910, affirmed in 93 Tex. 703, no op.; Brown v. Boles (Civ. App.), 52 S. W. 120; Horseman v. Coleman County (Civ. App.), 57 S. W. 304; International, etc., R. Co. v. Martinez (Civ. App.), 57 S. W. 689, affirmed in 94 Tex. 705, no op.; Gebhart v. Gebhart (Civ. App.), 61 S. W. 964; Johnson v. Brown (Civ. App.), 65 S. W. 485; Luedde v. Hooper (Civ. App.), 66 S. W. 802; Westinghouse Elec. Mfg. Co. v. Troell, 30 Tex. Civ. App. 200, 70 S. W. 324, affirmed in 97 Tex. 651, no op.; Galveston, etc., R. Co. v. Puente, 30 Tex. Civ. App. 246, 70 S. W. 362; Alexander v. Bowers (Civ. App.), 79 S. W. 342; Kingston v. Austin, etc., Mfg. Co. (Civ. App.), 81 S. W. 813; Missouri, etc., R. Co. v. Dawson Bros. (Civ. App.), 84 S. W. 298; Crawford v. Murphy (Civ. App.), 84 S. W. 1073; Martin v. German American Nat. Bank (Civ. App.), 102 S. W. 131; Laughlin v. Schnitzer (Civ. App.), 106 S. W. 908; Greenlaw v. Dillon (Civ. App.), 108 S. W. 705; Comanche v. Goodson, 49 Tex. Civ. App. 406, 109 S. W. 418; Dignowity v. Sullivan, 49 Tex. Civ. App. 582, 109 S. W. 428; Schutz v. Burges (Civ. App.), 110 S. W. 494; Sullivan v. Fant (Civ. App.), 110 S. W. 507; Kirby v. Blake (Civ. App.), 115 S. W. 674; St. Louis, etc., R. Co. v. Adams (Civ. App.), 118 S. W. 1155; Houston, etc., R. Co. v. Quebedeaux & Son (Civ. App.), 119 S. W. 1158; San Antonio, etc., R. Co. v. Spencer (Civ. App.), 119 S. W. 716; Pitts v. Wood (Civ. App.), 125 S. W.

954; *Houston, etc., R. Co. v. Barron*, 1 App. Civ. Cases, § 1050; *Hurley v. Birdsell*, 1 App. Civ. Cases, § 1183.

**(2) Effect of Failure to Comply with Rule.**

**In General.**—Beyond examining the record for fundamental error, the appellate court will not further examine the case where the brief of appellant does not set out the assignments of error, as required by the rules of court. *Tabb v. Smart* (Sup.), 12 S. W. 977; *Chappell v. Missouri Pac. R. Co.*, 75 Tex. 82, 12 S. W. 977.

And each assignment not so copied and accompanied with its appropriate propositions and statements shall be regarded as abandoned. Rule 29 of rules for the courts of Texas. *Mosely v. Gainer*, 10 Tex. 578; *T. M. R. Co. v. Herbeck*, 60 Tex. 602; *Hughes v. Galveston, etc., R. Co.*, 67 Tex. 595, 4 S. W. 219; *Chappell v. Missouri Pac. R. Co.*, 75 Tex. 82, 12 S. W. 977; *St. Louis, etc., Ry. Co. v. McClain*, 80 Tex. 85, 15 S. W. 789; *Texas, etc., R. Co. v. Eberheart*, 91 Tex. 321, 43 S. W. 510, affirming 40 S. W. 1060; *San Antonio, etc., R. Co. v. Adams*, 6 Tex. Civ. App. 102, 24 S. W. 839 (see 93 Tex. 694, no op.); *Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. 286, affirmed in 93 Tex. 699, no op.; *Yarbrough v. De Martin*, 28 Tex. Civ. App. 276, 67 S. W. 177, affirmed in 95 Tex. 690, no op.; *Koch v. Missouri, etc., Iron Co.*, 46 Tex. Civ. App. 84, 102 S. W. 136; *Missouri, etc., R. Co. v. Moore*, 47 Tex. Civ. App. 531, 105 S. W. 532; *Tabb v. Smart* (Sup.), 12 S. W. 977; *Blankenship, etc., Co. v. Kelly* (Civ. App.), 23 S. W. 27; *Hill v. Grant* (Civ. App.), 44 S. W. 1016; *Luedde v. Hooper* (Civ. App.), 66 S. W. 802; *Dignowity v. Sullivan*, 49 Tex. Civ. App. 582, 109 S. W. 428; *San Antonio, etc., R. Co. v. Spencer* (Civ. App.), 119 S. W. 716, 718; *Pitts v. Wood* (Civ. App.), 125 S. W. 954.

Assignments of error in the original

brief of appellant, on which the case was submitted, will not be considered, though they appear in an additional brief, in the absence of a showing that the assignments are presented by consent. *Sullivan v. Fant* (Civ. App.), 110 S. W. 507.

**Where Delay Suggested.**—In *Langholz v. Western Tanning Co.* (Civ. App.), 29 S. W. 831, the court of civil appeals, in view of the fact that the appellee suggested delay, and asked for damages, considered the assignments of error though not copied in the brief.

Generally, as to examination of entire record on suggestion of delay, see the title *APPEAL AND ERROR*, vol. 1, p. 313.

**Consideration of Assignments Copied in Brief of Appellee.**—In *Buchanan v. Wren*, 10 Tex. Civ. App. 560, 30 S. W. 1077, the appellate court considered an assignment of error not copied even in substance in the appellant's brief, as required by the rules, where appellee had copied it in his brief, and had not objected to its consideration.

**An assignment of error as to the sustaining of a general demurrer** may be presented upon a simple assignment, to the effect that the court erred in sustaining the demurrer, and need not be copied in the brief. *Engelhardt v. Batla* (Civ. App.), 31 S. W. 324.

**b. Manner and Sufficiency of Copying.**  
**(1) In General.**

By the word "copied" used in the rule is not meant that reconstructed or amended assignments should be placed in the briefs, but that the assignments of error contained in the record should be printed in the briefs. *Martin v. German American Nat. Bank* (Civ. App.), 102 S. W. 131.

**Assignments of error in the brief which are not strictly a copy of the assignment in the record**, will not be considered over objection. *Horseman v. Coleman County* (Civ. App.), 57 S. W. 304.

The rules require that the assignments of error relied upon as stated in the record, shall be copied in the appellant's brief, and where the assignments are not copied literally in the brief, but only the substance thereof, it was not a compliance with the rules. *Alexander v. Bowers* (Civ. App.), 79 S. W. 342.

Where an assignment of error, as it appears in the record, is not copied in appellants' brief; but is broken up and its several subdivisions copied separately, and propositions presented under each of them, it is not in compliance with the rules and will not be considered. *St. Louis, etc., R. Co. v. Adams* (Civ. App.), 118 S. W. 1155, 1157.

## (2) Numbering Assignments.

The assignments of error as presented in the brief should be numbered from the first to the last in their consecutive order; but it is not required that they shall be presented in the order in which they appear in the original assignment of errors filed in the office of the clerk of the trial court, and the numbers of such original assignments may be disregarded. Rule 29 of rules for courts of civil appeals. *Lewis v. Houston Elec. Co.*, 39 Tex. Civ. App. 625, 88 S. W. 489, 112 S. W. 593; *New England Land, etc., Co. v. Chamberlain*, 70 Tex. 138, 8 S. W. 116.

Where the numbers of the assignments of error as given in the record, are adhered to in the brief, but there is no attempt to present them consecutively, the assignments will not be considered. Rule 29. *Kirby Lumber Co. v. Chambers*, 41 Tex. Civ. App. 632, 637, 95 S. W. 607, affirmed in 101 Tex. 645, no op.

A technical failure in the brief to number the assignments of error consecutively as required by the rule, and a failure to refer to the page of the transcript from which the statement under an assignment is made—such

statement being full and its accuracy not questioned—held, not to warrant the court in refusing to consider the assignments. *Lewis v. Houston Elec. Co.*, 39 Tex. Civ. App. 625, 88 S. W. 489, 112 S. W. 593.

When in disregard of rule 29 for the government of the supreme court, the propositions contained in appellant's brief are made not only without regard to the assignments of error, but are not numbered as the assignments of error are, rendering it impossible to determine under which assignment either or any of such propositions are made, the judgment of the court below should be affirmed without exploring the record to ascertain if there was error. *New England Land, etc., Co. v. Chamberlain*, 70 Tex. 138, 8 S. W. 116.

## c. Necessity for Separate Presentation of Each Ground of Error under Proper Assignment.

It is expressly provided by rule 29 governing the preparation of briefs that each ground of error shall be separately presented under the proper assignment. *Cooper v. Hiner*, 91 Tex. 658, 45 S. W. 554; *Chappell v. Missouri Pac. R. Co.*, 75 Tex. 82, 12 S. W. 977; *New England Land, etc., Co. v. Chamberlain*, 70 Tex. 138, 8 S. W. 116; *Pitts v. Wood* (Civ. App.), 125 S. W. 954; *Cooper v. Lee*, 1 Tex. Civ. App. 9, 21 S. W. 998. And see cases cited ante, "General Rule," IV, B, 4, a, (1).

The rules of the supreme court for submitting questions by briefs in the courts of civil appeals contemplate that each assignment of error that raises different questions should occupy a separate place in the brief, and not be grouped with other assignments, and that it should be followed with appropriate propositions and statements from the record; so that it may be understood without reference to other parts of the brief or record. *Sanger v. Harris* (Civ. App.), 42 S. W. 645.

### d. Propriety of Grouping Assignments.

#### (1) General Rule.

The rules of practice for the courts of Texas require that the assignments of error shall be copied in the brief of the appellant, and it would also seem to be required that the assignments of error shall be separately stated in the brief, and not all grouped, unless they relate to the same matter, or are so connected with each other that practically they present the same question. *Byrnes v. Morris*, 53 Tex. 213; *Gulf, etc., R. Co. v. Box*, 81 Tex. 670, 17 S. W. 375; *International, etc., R. Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039; *Gulf, etc., R. Co. v. Kizziah*, 4 Tex. Civ. App. 356, 22 S. W. 110, 26 S. W. 242, reversed in 86 Tex. 81; *Kean v. Zundelowitz*, 9 Tex. Civ. App. 350, 29 S. W. 930, affirmed in 93 Tex. 665, no op.; *Robinson v. Chamberlain & Co.*, 29 Tex. Civ. App. 170, 68 S. W. 209, affirmed in 95 Tex. 685, no op.; *Wells v. Houston*, 29 Tex. Civ. App. 619, 69 S. W. 183, affirmed in 97 Tex. 650, no op.; *Neal v. Galveston, etc., R. Co.*, 37 Tex. Civ. App. 235, 83 S. W. 402, affirmed in 98 Tex. 626, no op.; *Galveston, etc., R. Co. v. Worcester*, 45 Tex. Civ. App. 501, 100 S. W. 990, affirmed in 102 Tex. 583, no op.; *Young v. Pecos County*, 46 Tex. Civ. App. 319, 101 S. W. 1055, affirmed in 102 Tex. 597, no op.; *Kidwell v. Carson*, 3 Tex. Civ. App. 327, 22 S. W. 534; *Houston, etc., R. Co. v. Guisar* (Civ. App.), 27 S. W. 1045; *Houston, etc., R. Co. v. Poras* (Civ. App.), 27 S. W. 1046; *Sanger v. Harris* (Civ. App.), 42 S. W. 645; *Hanrick v. Gurlley* (Civ. App.), 48 S. W. 994, affirmed in part in 93 Tex. 458; *International, etc., R. Co. v. True*, 23 Tex. Civ. App. 523, 57 S. W. 977, affirmed in 94 Tex. 705, no op.; *Abernathy v. Southern, etc., Plow Co.* (Civ. App.), 62 S. W. 786; *Maldonado v. Arthur* (Civ. App.), 70 S. W. 562; *Lewis v. Hoeldtke* (Civ. App.), 76 S. W. 309 (see 97 Tex. 639,

no op.); *Galveston, etc., R. Co. v. Fales*, 33 Tex. Civ. App. 457, 77 S. W. 234, 235, affirmed in 98 Tex. 617, no op.; *Houston, etc., R. Co. v. DeBerry*, 34 Tex. Civ. App. 180, 78 S. W. 736, affirmed in 98 Tex. 620, no op.; *Peck v. Peck* (Civ. App.), 83 S. W. 257 (see 98 Tex. 628, no op.); *Evans v. Jackson*, 41 Tex. Civ. App. 277, 92 S. W. 47, 48; *Rice v. Dewberry* (Civ. App.), 93 S. W. 715; *Jones v. Western Union Tel. Co.* (Civ. App.), 101 S. W. 808; *Martin v. German American Nat. Bank* (Civ. App.), 102 S. W. 131; *Hayward Lumber Co. v. Cox* (Civ. App.), 104 S. W. 403, affirmed in 102 Tex. 584, no op.; *Kruegel v. Johnson* (Civ. App.), 112 S. W. 774; *Scott v. St. Louis, etc., R. Co.* (Civ. App.), 117 S. W. 890; *Baum v. McAfee* (Civ. App.), 125 S. W. 984.

"Assignments relating to the same question may be grouped, but those relating to different questions or matters should be separately presented, and each accompanied with appropriate propositions and statements. This has been expressly held by the supreme court in the case of *International, etc., R. Co. v. Anderson*, 82 Tex. 516, 517, 521, 17 S. W. 1039." *Houston, etc., R. Co. v. Guisar* (Civ. App.), 27 S. W. 1045.

Assignments of error can not, under the rules for the courts of civil appeals, be properly grouped in the brief, where they involve separate and distinct rulings of the court, and the same points do not arise from nor can they be stated as propositions under each. *Galveston, etc., R. Co. v. Worcester*, 45 Tex. Civ. App. 501, 100 S. W. 990, affirmed in 102 Tex. 583, no op., citing *Galveston, etc., R. Co. v. Fales*, 33 Tex. Civ. App. 457, 77 S. W. 234, 235, affirmed in 98 Tex. 617, no op.; *Houston, etc., R. Co. v. DeBerry*, 34 Tex. Civ. App. 180, 78 S. W. 736, affirmed in 98 Tex. 620, no op.; *Evans v. Jackson*, 41 Tex. Civ. App. 277, 92 S. W. 47, 48.



**Effect of Improper Inclusion of Assignments upon Those Properly Grouped.**—In *Wyatt v. Lyons*, 25 Tex. Civ. App. 88, 60 S. W. 575, it was held that even if an assignment of error as to the admission of evidence must be disregarded because grouped in the brief with other assignments complaining of the court's action in directing a verdict, this would not preclude consideration of the latter assignments.

**Consideration of Vital Errors Though Assignments Improperly Grouped.**—In *Pinkston v. Boyd*, 43 Tex. Civ. App. 568, 97 S. W. 103, it was held that though appellant's brief did not conform to the prescribed rules, in that all the assignments of error were grouped together, the appellate court would review the questions sought to be presented, especially where it appeared that vital error had been committed.

## (2) Illustrations.

**Instances in Which Grouping Proper.**—In *Sabine, etc., R. Co. v. Ewing*, 1 Tex. Civ. App. 531, 21 S. W. 700, the court of civil appeals held that it was the proper practice, in the preparation of briefs, for the appellant or plaintiff in error to group such assignments as present the same question, as in the case of a defective charge, with the special instructions requested to correct the same; and that such practice is to be commended rather than objected to as in violation of the rules.

**Instances of Improper Grouping.**—Assignments of error, embracing two or more inconsistent propositions of law, can not be grouped. *Combest v. Wall* (Civ. App.), 115 S. W. 354.

Assignments of error—one that a general demurrer should have been sustained, another that a special exception should have been sustained, and two others that evidence on different subjects should not have been admitted—should not be grouped but should be separately presented with

separate propositions and separate statements. *Johnson v. Hulett* (Civ. App.), 120 S. W. 257, 260.

An assignment of error to the sufficiency of the evidence will not be considered where it relates to diverse issues which are grouped in the assignment, and no one of them is separately briefed. *Western Union Tel. Co. v. Bryson*, 25 Tex. Civ. App. 74, 61 S. W. 548, affirmed in 94 Tex. 698, no op.

Assignments of error referring to different clauses of the charge, having reference to different phases of the evidence, will not be considered on appeal, where they are grouped together in appellant's brief and submitted as a "proposition within themselves." *D'Arrigo v. Texas Produce Co.*, 18 Tex. Civ. App. 41, 44 S. W. 531.

Where three assignments of error complained of three different portions of the charge, all relating to the same subject, and each assignment alleged in general terms that the court erred in giving the particular portion of the charge therein complained of, it is not permissible to group said assignments and claim by a proposition thereunder that said charges gave undue prominence to the issue to which they referred and that they were contradictory of each other. To support such a proposition there should have been a separate and distinct assignment to that effect. *Reeves v. Galveston, etc., R. Co.*, 44 Tex. Civ. App. 352, 98 S. W. 929.

Assignments of error relating to various conclusions of law by the court, the admission in evidence of certain orders and decrees of the probate court, and the testimony of a certain witness, which are copied into the brief one after the other, and submitted as propositions, can not, under rule 30 for courts of civil appeals, be considered. *International, etc., R. Co. v. True*, 23 Tex. Civ. App. 523, 57 S. W. 977, 978, affirmed in 94 Tex. 705,

no op.; *Peck v. Peck* (Civ. App.), 83 S. W. 257 (see 98 Tex. 628, no op.); *King v. Fortunata Battaglia*, 38 Tex. Civ. App. 28, 35, 84 S. W. 839, affirmed in 101 Tex. 645, no op.

An assignment of error that the court erred in overruling the motion for a new trial because there was no evidence of a "subletting of the lands in controversy, nor of a transfer to Waggoner of the lease made by plaintiff to Witherspoon," should not be grouped with another that the court erred in overruling the motion for new trial "for the reason that the verdict is contrary to the evidence, against the charge of the court wherein he instructed the jury that, if they found exemplary damages against the defendants, to find against each separately, according to their culpability, and the verdict does not by its terms find separately against each defendant, but assesses the same jointly against said defendants." *Waggoner v. Wyatt*, 43 Tex. Civ. App. 75, 79, 94 S. W. 1076, affirmed in 101 Tex. 663, no op.

In *Houston, etc., R. Co. v. Stuart* (Civ. App.), 48 S. W. 799, reversed on another point in 92 Tex. 540, the sixth assignment complained of two distinct rules given in the general charge, and the ninth of the refusal of a special charge defining "negligence" and "contributory negligence." They were submitted together upon one proposition, which affirmed error in each of the matters specified in the assignments. The appellee's objection to a consideration of these assignments on the ground that they were a violation of the rules for briefing, was sustained.

In *Hearn v. Bitterman* (Civ. App.), 27 S. W. 158, the first five assignments, of which the fourth contained six, and fifth contained seven, subdivisions, were all presented together, and under them all one proposition was stated. Under this were statements intended to support the several assignments

separately. It was held that this part of the brief was not made in accordance with the rules, and would be disregarded.

## 5. Presentation of Reasons in Support of Allegations of Error.

### a. In General.

"The reasons by which allegations of error are sought to be sustained find their proper place in the proposition, statements, and authorities required to be set forth in support of the respective assignments." *Western Union Tel. Co. v. Sanders* (Civ. App.), 26 S. W. 734, quoting from *Clarendon Land, etc., Co. v. McClelland*, 86 Tex. 179, 23 S. W. 1100.

The appellate court will not examine a manuscript record of 300 pages, in order to find what particular objections were considered by the trial court in rulings on evidence complained of in the brief, which does not state the particular grounds of objections. *Godair, etc., Co. v. Tillar*, 19 Tex. Civ. App. 541, 47 S. W. 553, affirmed in 93 Tex. 661, no op.

If the reasons should be stated in the assignment, it will not preclude the stating of others in the brief and their consideration by the appellate court. *Missouri, etc., R. Co. v. James* (Civ. App.), 120 S. W. 269. See, also, *Fuqua v. Pabst Brewing Co.*, 90 Tex. 298, 38 S. W. 29.

The case of *Sickles v. Missouri, etc., R. Co.*, 13 Tex. Civ. App. 434, 35 S. W. 493, affirmed in 93 Tex. 720, no op., merely holds that the proposition could not legitimately grow out of the assignment, and does not undertake to hold that, because appellant had stated one reason in the assignment, he was therefore precluded from urging another and different reason in the proposition germane to the assignment. *Missouri, etc., R. Co. v. James* (Civ. App.), 120 S. W. 269, 271. See the title ASSIGNMENTS OF ERROR, vol. 2, p. 185.

**b. Propositions.****(1) Under Assignments of Error.****(a) Necessity.****aa. General Rule Stated, Construed and Applied.****(aa) Rule Stated and Construed.**

The rules of court require that each point under each assignment shall be stated as a proposition, unless the assignment itself may sufficiently disclose the point, in which event it shall be sufficient to copy the assignment. Rule 30 of rules for the courts of Texas. *Mayfield v. Robinson*, 22 Tex. 385, 55 S. W. 399, affirmed in 93 Tex. 646, no op.; *Texas Land Co. v. Williams*, 48 Tex. 602; *Haley v. Davidson*, 48 Tex. 615; *Shanks v. Carroll*, 50 Tex. 17; *Texas Banking, etc., Co. v. Hutchins*, 53 Tex. 61; *Keowne v. Love*, 65 Tex. 152, 153; *Gulf, etc., R. Co. v. Redeker*, 67 Tex. 181, 2 S. W. 513; *Gulf, etc., R. Co. v. Wilson*, 69 Tex. 739, 7 S. W. 653; *Gallagher & Co. v. Goldfrank, etc., Co.*, 75 Tex. 562, 12 S. W. 964; *Paschal v. Owen*, 77 Tex. 583, 14 S. W. 203; *Gulf, etc., R. Co. v. Box*, 81 Tex. 670, 17 S. W. 375; *Ft. Worth, etc., R. Co. v. Downie*, 82 Tex. 383, 17 S. W. 620; *International, etc., R. Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039; *Rusher v. Dallas*, 83 Tex. 151, 18 S. W. 333; *Texas, etc., R. Co. v. Donovan*, 86 Tex. 378, 25 S. W. 10; *Cooper v. Hiner*, 91 Tex. 658, 45 S. W. 554; *Hanrick v. Gurley*, 93 Tex. 458, 54 S. W. 347, 56 S. W. 330, 55 S. W. 119; *Cammack v. Rogers*, 96 Tex. 457, 73 S. W. 795; *Central Tex., etc., R. Co. v. Gibson*, 99 Tex. 98, 87 S. W. 814, affirming 35 Tex. Civ. App. 66; *International, etc., R. Co. v. Boykin*, 99 Tex. 259, 89 S. W. 639, reversing 85 S. W. 1163; *Gregory, etc., Co. v. Coleman*, 3 Tex. Civ. App. 166, 22 S. W. 181; *Sloan v. Thompson*, 4 Tex. Civ. App. 419, 23 S. W. 613; *Chapman v. Brite*, 4 Tex. Civ. App. 506, 23 S. W. 514; *Parker County v. Jackson*, 5 Tex. Civ. App. 36, 23 S. W. 924; *Alamo Fire Ins. Co. v. Lancaster*, 7 Tex. Civ. App.

677, 28 S. W. 126, affirmed in 93 Tex. 699, no op.; *Gulf, etc., R. Co. v. Cole*, 8 Tex. Civ. App. 635, 28 S. W. 931, affirmed in 93 Tex. 684, no op.; *Weir Plow Co. v. Armentrout*, 9 Tex. Civ. App. 117, 28 S. W. 1045, 29 S. W. 405, affirmed in 94 Tex. 676, no op.; *Adkins v. Galbraith*, 10 Tex. Civ. App. 175, 28 S. W. 291; *Cohen v. Grimes*, 18 Tex. Civ. App. 327, 45 S. W. 210, affirmed in 93 Tex. 702, no op.; *Houston, etc., R. Co. v. Higgins*, 22 Tex. Civ. App. 430, 55 S. W. 744, affirmed in 93 Tex. 664, no op.; *Iiams v. Root*, 22 Tex. Civ. App. 413, 55 S. W. 411, affirmed in 93 Tex. 643, no op.; *McCardell v. Henry*, 23 Tex. Civ. App. 383, 57 S. W. 908, affirmed in 93 Tex. 645, no op.; *International, etc., R. Co. v. True*, 23 Tex. Civ. App. 523, 57 S. W. 977, affirmed in 94 Tex. 705, no op.; *Missouri, etc., R. Co. v. Wells*, 24 Tex. Civ. App. 304, 58 S. W. 842; *Hall v. Clountz*, 26 Tex. Civ. App. 348, 63 S. W. 941, affirmed in 95 Tex. 679, no op.; *Yeager v. Neil*, 26 Tex. Civ. App. 414, 64 S. W. 701, affirmed in 95 Tex. 690, no op.; *Phillips v. Texas Loan Co.*, 26 Tex. Civ. App. 505, 63 S. W. 1080, affirmed in 95 Tex. 684, no op.; *Cassidy v. Scottish-American Mortg. Co.*, 27 Tex. Civ. App. 211, 64 S. W. 1023, affirmed in 95 Tex. 675, no op.; *Boone v. Herald News Co.*, 27 Tex. Civ. App. 546, 66 S. W. 313; *Street v. Robertson*, 28 Tex. Civ. App. 222, 66 S. W. 1120, affirmed in 95 Tex. 687, no op.; *Yarbrough v. De Martin*, 28 Tex. Civ. App. 276, 67 S. W. 177, affirmed in 95 Tex. 690, no op.; *Robinson v. Chamberlain & Co.*, 29 Tex. Civ. App. 170, 68 S. W. 209, affirmed in 95 Tex. 685, no op.; *Wells v. Houston*, 29 Tex. Civ. App. 619, 69 S. W. 183, affirmed in 97 Tex. 650, no op.; *Swift v. Bruce*, 31 Tex. Civ. App. 92, 71 S. W. 321; *International, etc., R. Co. v. Anchonda*, 33 Tex. Civ. App. 24, 75 S. W. 557; *Duckworth v. Ft. Worth, etc., R. Co.*, 33 Tex. Civ. App. 66, 75 S. W. 913, affirmed in 97 Tex. 631, no op.; *Texas*,

etc., *R. Co. v. Huber*, 33 Tex. Civ. App. 75, 75 S. W. 547; *Bull v. San Antonio, etc., R. Co.*, 33 Tex. Civ. App. 547, 78 S. W. 525; *Denison, etc., R. Co. v. Powell*, 35 Tex. Civ. App. 454, 80 S. W. 1054, affirmed in 98 Tex. 614, no op.; *El Paso Elec. R. Co. v. Alderete*, 36 Tex. Civ. App. 142, 81 S. W. 1246, affirmed, no op.; *Castellano v. Marks*, 37 Tex. Civ. App. 273, 83 S. W. 729; *Gray v. Moore*, 37 Tex. Civ. App. 407, 84 S. W. 293; *San Antonio, etc., R. Co. v. Wood*, 41 Tex. Civ. App. 226, 92 S. W. 259, affirmed in 101 Tex. 657, no op.; *House v. Holland*, 42 Tex. Civ. App. 502, 94 S. W. 153; *Gilmore v. Houston Elec. Co.*, 46 Tex. Civ. App. 315, 102 S. W. 168; *Sterling v. DeLaune*, 47 Tex. Civ. App. 470, 105 S. W. 1169; *Hermann v. Allen (Civ. App.)*, 118 S. W. 794; *Galveston, etc., R. Co. v. Bowman (Civ. App.)*, 25 S. W. 140; *Mexican Cent. R. Co. v. Lauricella (Civ. App.)*, 26 S. W. 301, affirmed in 87 Tex. 277; *Lanyon v. Edwards (Civ. App.)*, 26 S. W. 524, affirmed in 93 Tex. 712, no op.; *Wetzel v. Simon (Civ. App.)*, 26 S. W. 642; *Hearn v. Bitterman (Civ. App.)*, 27 S. W. 158; *Johnson v. White (Civ. App.)*, 27 S. W. 174, affirmed in 93 Tex. 665, no op.; *Gulf, etc., R. Co. v. Pendery (Civ. App.)*, 27 S. W. 213; *Bonham v. Crider (Civ. App.)*, 27 S. W. 419; *Mutual, etc., Ass'n v. Sullivan (Civ. App.)*, 29 S. W. 190; *Utley v. Smith (Civ. App.)*, 32 S. W. 906, 908; *Laing v. Hanson (Civ. App.)*, 36 S. W. 116; *Sabine Tram Co. v. Bancroft (Civ. App.)*, 39 S. W. 177, affirmed in 93 Tex. 718, no op.; *Bomar v. Powers (Civ. App.)*, 50 S. W. 142, affirmed in 93 Tex. 655, no op.; *Guerguin v. McGown (Civ. App.)*, 53 S. W. 585; *Mansfield v. Neese*, 21 Tex. Civ. App. 584, 54 S. W. 370, affirmed in 93 Tex. 646, no op.; *Ackermann v. Ackermann Schuetzen Verein (Civ. App.)*, 60 S. W. 366; *Trinity Val. R. Co. v. Stewart (Civ. App.)*, 62 S. W. 1085; *Manly v. Conn (Civ. App.)*, 63 S. W. 160; *Bar-*

*rett v. Independent Tel. Co. (Civ. App.)*, 65 S. W. 1128, affirmed in 93 Tex. 674, no op.; *Denison, etc., R. Co. v. Carter (Civ. App.)*, 70 S. W. 322; *Maldonado v. Arthur (Civ. App.)*, 70 S. W. 562; *Walker v. Texas, etc., R. Co. (Civ. App.)*, 75 S. W. 47; *Missouri, etc., R. Co. v. McFarland (Civ. App.)*, 75 S. W. 811, affirmed in 97 Tex. 641, no op.; *Gulf, etc., R. Co. v. Dunn (Civ. App.)*, 78 S. W. 1080; *Westinghouse Elec. Mfg. Co. v. Troell*, 30 Tex. Civ. App. 200, 70 S. W. 324, affirmed in 97 Tex. 651, no op.; *Taylor v. Houston, etc., R. Co. (Civ. App.)*, 80 S. W. 260; *Contreras v. San Antonio, etc., Co. (Civ. App.)*, 83 S. W. 870; *San Antonio v. Marshall & Co. (Civ. App.)*, 85 S. W. 315; *Central Texas, etc., R. Co. v. Gibson*, 99 Tex. 98, 87 S. W. 814, affirming 35 Tex. Civ. App. 66; *Gulf, etc., R. Co. v. St. John (Civ. App.)*, 88 S. W. 297, affirmed in 101 Tex. 639, no op.; *Ragley v. Godley (Civ. App.)*, 90 S. W. 66; *Kilday v. Perkins (Civ. App.)*, 90 S. W. 215; *Rice v. Dewberry (Civ. App.)*, 93 S. W. 715; *McAllen v. Raphael (Civ. App.)*, 96 S. W. 760, affirmed in 101 Tex. 647, no op.; *Cockrell v. Egger (Civ. App.)*, 99 S. W. 568; *Cantelou v. Trinity, etc., R. Co. (Civ. App.)*, 101 S. W. 1017, affirmed in 102 Tex. 579, no op.; *Galveston, etc., R. Co. v. Quinn (Civ. App.)*, 104 S. W. 397, affirmed in 102 Tex. 583, no op.; *Hayward Lumber Co. v. Cox (Civ. App.)*, 104 S. W. 403, affirmed in 102 Tex. 584, no op.; *Frugia v. Trueheart*, 48 Tex. Civ. App. 513, 106 S. W. 736; *Gulf, etc., R. Co. v. Walters*, 49 Tex. Civ. App. 71, 107 S. W. 369; *Galveston, etc., R. Co. v. Janert*, 49 Tex. Civ. App. 17, 107 S. W. 963, affirmed, no op.; *Grand Lodge v. Williams (Civ. App.)*, 108 S. W. 195; *Missouri, etc., R. Co. v. Hendricks*, 49 Tex. Civ. App. 314, 108 S. W. 745; *Lane v. Delta County (Civ. App.)*, 109 S. W. 866; *Loyal Americans v. McClanahan (Civ. App.)*, 109 S. W. 973; *Texas, etc., R. Co. v.*

Jowers (Civ. App.), 110 S. W. 946; Hess v. Webb (Civ. App.), 113 S. W. 618; De Hoyos v. Galveston, etc., R. Co. (Civ. App.), 115 S. W. 75; Missouri, etc., R. Co. v. Lasater (Civ. App.), 115 S. W. 103; Birge-Forbes Co. v. St. Louis, etc., R. Co. (Civ. App.), 115 S. W. 333; Kirby v. Blake (Civ. App.), 115 S. W. 674; International, etc., R. Co. v. Garcia (Civ. App.), 117 S. W. 206; Lowrance v. Woods (Civ. App.), 118 S. W. 551; Hermann v. Allen (Civ. App.), 118 S. W. 794; Ft. Worth v. Williams (Civ. App.), 119 S. W. 137; Steely v. Texas Imp. Co. (Civ. App.), 119 S. W. 319; Louisiana, etc., Lumber Co. v. Kennedy (Civ. App.), 119 S. W. 884; O'Farrell v. O'Farrell (Civ. App.), 119 S. W. 899; Freeman v. Puckett (Civ. App.), 120 S. W. 514; International, etc., R. Co. v. Biles (Civ. App.), 120 S. W. 952; International, etc., R. Co. v. White (Civ. App.), 120 S. W. 958; Capps v. Longview (Civ. App.), 122 S. W. 427; International, etc., R. Co. v. Miller (Civ. App.), 124 S. W. 109; Walker v. Thornton (Civ. App.), 124 S. W. 166; Western Union Tel. Co. v. Timmons (Civ. App.), 125 S. W. 376; Varn v. Varn (Civ. App.), 125 S. W. 639; Baum v. McAfee (Civ. App.), 125 S. W. 984; Vaughn v. G. C. & S. F. R. Co., 3 App. Civ. Cases, § 230.

Only the points presented by propositions under an assignment of error will be considered on appeal. San Antonio, etc., R. Co. v. Wood, 41 Tex. Civ. App. 226, 92 S. W. 259, affirmed in 101 Tex. 657, no op.

Appellants are confined to the objections raised by their propositions. Ariola v. Newman (Civ. App.), 113 S. W. 157, 158.

Where an assignment of error is not a proposition in itself, and is not followed by any proposition pointing out the error of which complaint is made, it must be considered as waived. Boone v. Herald News Co., 27 Tex. Civ. App. 546, 66 S. W. 313.

Assignments too general to be considered as propositions within themselves, must be followed by distinct propositions as required by the rules. Simply labeling an assignment a proposition does not make it one. International, etc., R. Co. v. Garcia (Civ. App.), 117 S. W. 206, 208.

A brief containing no assignment of errors, nor propositions thereunder, but only a statement of the case and the result of the trial, presents no matter for consideration by the appellate court. Barnes v. Miller, 3 Tex. Civ. App. 468, 22 S. W. 659.

**When an assignment contains more than one point,** rule 30 contemplates that each point should be stated in a distinct proposition. San Antonio St. R. Co. v. Muth, 7 Tex. Civ. App. 443, 27 S. W. 752, affirmed in 93 Tex. 719, no op.

The appellant has the right to present all the errors in the record raised by his assignments; therefore he may present as many points under each assignment as it warrants. But each point must present, clearly and tersely, a single proposition. Haley v. Davidson, 48 Tex. 615.

**Propositions under One Assignment Not Considered as Propositions under Another.**—Under the rules of the courts of civil appeals, propositions under one assignment of error will not be considered as propositions under another. San Antonio Foundry Co. v. Drish, 38 Tex. Civ. App. 214, 85 S. W. 440, affirmed in 101 Tex. 657, no op. In this case the eighth assignment claimed error on account of a refusal to give a charge on the subject of assumption of risk, and asked the appellate court to consider, as propositions under this assignment, the propositions under the preceding assignments and under the succeeding one. It was held that this course of practice would not be approved by the appellate court.

Where the sixth and seventh assignments of error stated that the court

erred in certain sections of its charge, and the only proposition thereunder is: "Said charges are a sufficient proposition, and the attention of the court is respectfully called to them, with the eighth assignment of error, and the statement following said assignment," but the eighth assignment refers to another portion of the charge, and no connection exists between it and the sixth and seventh assignments, the latter presents nothing for consideration. *San Antonio, etc., R. Co. v. Spencer* (Civ. App.), 119 S. W. 716, 718.

**Effect of Submitting Additional Propositions under Assignments Themselves Submitted as Propositions.**—In *Gulf, etc., R. Co. v. Hill* (Civ. App.), 58 S. W. 255, affirmed in 93 Tex. 730, no op., it was contended on rehearing, that the appellate court should not have considered some of the matters discussed in the original opinion, because it was urged that the same were not properly presented in appellant's brief. The matters in question were fairly raised by the assignments of error which were copied at length in the brief, and submitted as propositions. "The contention is that, because additional propositions were submitted under the assignments, all points not covered by the additional propositions were waived. We think that because the appellant saw fit to emphasize certain points, by submitting specific propositions thereon, such action would not be a waiver of other points covered by the general proposition, and are of the opinion that appellant's contention is not well taken."

**Necessity and Sufficiency of Statement under Assignment on Application to Supreme Court for Writ of Error.**—Under rule 1 of the present rules for the supreme court of Texas after prescribing the requisites of a petition to the supreme court for a writ of error, it is further stated that "if in the

opinion of counsel the statement of the case as made by the court of civil appeals is sufficiently full and accurate to present properly the questions to be determined by the court, no additional statement should be made under any assignment; but if not, then under each assignment counsel will make a statement, pointing out the alleged omissions, inaccuracies or errors in the court's statement and conclusions of fact so far as may be deemed necessary to properly present the question raised by such assignment, and will support it by reference to the transcript of the proceedings in the trial court. The reference shall cite the particular part or parts of the transcript relied upon, noting the page and line, both of the beginning and of the ending of the matters referred to. Each assignment and statement, if there be any, may be followed by such argument and citation of authority as counsel see proper to present. See *Hanrick v. Gurley*, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330; *San Antonio, etc., R. Co. v. Choate*, 90 Tex. 81, 35 S. W. 472.

Generally as to assignments of error, etc., in petitions to the supreme court for writ of error, see the title APPEAL AND ERROR, vol. 1, p. 503, et seq.

#### (bb) Applications of Rule.

**Assignments Held Sufficient without Proposition.**—It is recognized practice to group assignments together when they relate to the same subject, and when such assignments announce the propositions insisted upon with reasonable precision, they may be used as propositions. *Gulf, etc., R. Co. v. Box*, 81 Tex. 670, 17 S. W. 375.

An assignment of error in admitting certain testimony over defendant's objection on the ground of immateriality and irrelevancy sufficiently discloses the point made, and should be considered, though not followed, in the brief by a proposition. *International,*

etc., *R. Co. v. Boykin*, 99 Tex. 259, 89 S. W. 639, reversing 85 S. W. 1163.

An assignment of error that the court erred in allowing to be read in evidence, over objection on the ground of immateriality and irrelevancy, a certain cross-interrogatory and answer thereto, discloses the legal proposition relied on, within rule 30 (67 S. W. xvi) of the rules of the courts of civil appeals, providing that each point relied on under each assignment shall be stated as a proposition, "unless the assignment itself may sufficiently disclose the point," when it is enough to copy the assignment. *International, etc., R. Co. v. Boykin*, 99 Tex. 259, 89 S. W. 639.

An assignment of error stated that "the court erred in that part of the second paragraph of the general charge wherein it was said in effect that 'if the defendant knew' of the defective condition of the step, etc., under conditions stated, plaintiff would be entitled to recover. This was error because there was not even a scintilla of testimony to show that defendant or any of its employees 'knew' of the defective condition of the step, if it was defective, before the accident, while on the contrary, the facts show positively that the alleged defect was unknown to them." This assignment was presented as a proposition, and in the statement the court is referred to the record on the propositions that there was no evidence as to knowledge of the defect. It was held, that the assignment was sufficient. *Galveston, etc., R. Co. v. Parish* (Civ. App.), 93 S. W. 682.

Where an assignment is, in effect, that the court erred in overruling the motion for a hearing and gives the several grounds which were relied on in that motion, and the other assignments are really propositions under the first and each one in the brief is stated to be a proposition, and they are all grouped, and are followed by one

statement, held, that the several assignments succeeding the first should be treated as propositions under it, and that so treated, the assignments should be held sufficient to raise the question presented, and that it with the accompanying propositions denominated assignments should be passed upon by the court. *Rice v. Dewberry* (Civ. App.), 93 S. W. 715, 721.

**Assignments Held to Require Propositions.**—An assignment relied on as a proposition, to entitle it to consideration by the court, must not contain more than one question. *Mundine v. Pauls*, 28 Tex. Civ. App. 46, 66 S. W. 254.

And where an assignment of error raises more than one distinct proposition, it is not permissible under the rules to treat the assignment itself as a proposition raising all the questions suggested therein, but these questions must be submitted as distinct propositions in the brief. *Kidwell v. Carson*, 3 Tex. Civ. App. 327, 328, 22 S. W. 534; *San Antonio St. R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752, affirmed in 93 Tex. 719, no op.; *Phillips v. Texas Loan Co.*, 26 Tex. Civ. App. 505, 63 S. W. 1080, affirmed in 95 Tex. 684, no op.; *Mundine v. Pauls*, 28 Tex. Civ. App. 46, 66 S. W. 254; *Houston, etc., R. Co. v. De Berry*, 34 Tex. Civ. App. 180, 78 S. W. 736, affirmed in 98 Tex. 620, no op.; *Consolidated Kansas City, etc., Co. v. Taylor*, 48 Tex. Civ. App. 605, 107 S. W. 889; *Houston, etc., R. Co. v. Quebedeaux & Son* (Civ. App.), 119 S. W. 1158; *Freeman v. Puckett* (Civ. App.), 120 S. W. 514; *International, etc., R. Co. v. White* (Civ. App.), 120 S. W. 958.

"The rules require the propositions to be stated separately, and an assignment is multifarious and bad as a proposition if it embodies several propositions." *Driver v. Wilson* (Civ. App.), 68 S. W. 290.

An assignment complaining of the

overruling of a general and several special demurrers and embodying several distinct propositions, and which is relied on as itself a proposition, being followed only by a brief statement, is in violation of the rules and will not be considered. *Street v. Robertson*, 28 Tex. Civ. App. 222, 66 S. W. 1120, affirmed in 95 Tex. 687, no op.; *Estes v. Estes* (Civ. App.), 122 S. W. 304.

An assignment of error, that the court erred in overruling special exceptions 1 and 2, is not in itself a proposition, and if not followed by a proposition, will not be considered. *Chapman v. Brite*, 4 Tex. Civ. App. 506, 23 S. W. 514.

Where the exceptions to the pleadings ruled on appeared to have been special demurrers, the question in such case would be, were such matters properly pleaded, and where there is nothing in the proposition subjoined to these assignments, nor elsewhere in connection with them, that deals with any such question or throws any light upon it, the assignment can not be considered. *McAllen v. Raphael* (Civ. App.), 96 S. W. 760, affirmed in 101 Tex. 647, no op. And see the title ASSIGNMENTS OF ERROR, vol. 2, p. 185.

An assignment calling in question the admission of certain evidence, not accompanied with either proposition or statement thereunder from the record, will not be considered. *Weir Plow Co. v. Armentrout*, 9 Tex. Civ. App. 117, 28 S. W. 1045, 29 S. W. 405, affirmed in 94 Tex. 676, no op.

An assignment of error, which is practically concealed in the brief, and is not followed by a proposition, with statement from the record, showing the contents of a letter the exclusion of which is assigned as error, will be ignored. *Bryant v. Galbraith* (Civ. App.), 43 S. W. 833.

An assignment of error, presented in appellant's brief as a proposition,

that "the court erred, for the reason stated in the defendant's bill of exceptions number 5, in permitting the witness \* \* \* to testify as therein recited," is not a proposition, and therefore can not be considered. *International, etc., R. Co. v. Branch* (Civ. App.), 56 S. W. 542.

Where an assignment alleging error in admitting in evidence a lease and a deposition was followed by a proposition raising only the question of the admissibility of the lease as a recorded instrument, the objection as to the deposition was waived, and as it was not alleged that the lease was not proved by other evidence, or that the written lease was all the evidence on the subject, it was insufficient. *Yarbrough v. De Martin*, 28 Tex. Civ. App. 276, 67 S. W. 177, affirmed in 95 Tex. 690, no op.

An assignment attacking the sufficiency of the evidence to support the verdict, is not entitled to consideration where not accompanied with a proposition or statement as required by the rules. *Missouri, etc., R. Co. v. Lasater* (Civ. App.), 115 S. W. 103, 105.

An assignment of error complaining of the refusal of the court to grant a new trial because the evidence was insufficient to establish the existence, contents, and knowledge of a certain deed can not be considered as a proposition within itself, and where it was not supported by a proposition or statement as required by the rule, will not be considered. *Kirby v. Blake* (Civ. App.), 115 S. W. 674, 677.

An assignment complaining of the court refusing to allow plaintiff to read certain special cross-interrogatories and answers, "to the effect that the witness admits in his answers that he had been convicted and sent to the penitentiary," which is submitted as a proposition, can not be considered as it is merely a statement that the court erred in refusing to allow plaintiff to



read said answers of the witness. This is not a proposition disclosing the point intended to be relied on. *De Hoyos v. Galveston, etc., R. Co.* (Civ. App.), 115 S. W. 75, 78.

An assignment that the court erred in "refusing to permit defendants to offer in evidence the authorized printed abstracts of land titles of the state and the official map of Hardin County lands for the purpose of showing the location and date of the A. W. Smith league, all of which is more fully shown by defendants' bill of exceptions No. 12 here referred to," which is briefed as a proposition in itself, can not be considered, as it is in itself not a proposition. *Houston Oil Co. v. Kimball* (Civ. App.), 114 S. W. 662, 670.

An assignment of error in a charge in submitting an issue not raised by the evidence should point out, in itself or by propositions submitted under it in the brief, the issue claimed to be thus improperly submitted. *Gray v. Moore*, 37 Tex. Civ. App. 407, 84 S. W. 293.

An assignment of error that the trial court erred in giving a certain paragraph of the charge, setting it out, but without any proposition following, will not be considered over objections thereto by the opposing party. *Houston, etc., R. Co. v. Higgins*, 22 Tex. Civ. App. 430, 55 S. W. 744, affirmed in 93 Tex. 664, no op. And see *Galveston, etc., R. Co. v. Quinn* (Civ. App.), 104 S. W. 397, affirmed in 102 Tex. 583, no op.

An assignment that the court erred "in not giving to the jury special charge number 5 asked by plaintiff, which was refused," followed by a copy of the charge, is not a proposition in itself, and where not followed by a proposition pointing out the error of which complaint is made, it will be held as waived. *Boone v. Herald News Co.*, 27 Tex. Civ. App. 546, 66 S. W. 313.

Where a paragraph in the court's charge is long and embraces a number of distinct rules of law, an assignment of error in giving it must be followed by propositions thereunder in the brief pointing out the particulars in which it is claimed to be wrong; errors in it not so presented will not be considered. *Central Texas, etc., R. Co. v. Gibson*, 99 Tex. 98, 87 S. W. 814, affirming 35 Tex. Civ. App. 66; *O'Farrell v. O'Farrell* (Civ. App.), 119 S. W. 899.

An assignment of error, that "the court erred in failing to give instructions on defendant's claim of possession of the land in controversy," unaccompanied by any proposition, or any specific statement or reference to the record, indicating the point of complaint, is not entitled to consideration. *Angel v. Simmonds*, 7 Tex. Civ. App. 331, 26 S. W. 910.

An assignment that the court erred in instructing the jury at defendant's request to return a verdict for defendant, in receiving a verdict for defendant, and in entering judgment thereon that plaintiff pay the costs, did not constitute a "proposition" within the rules governing appeals. *Olivarri v. Western Union Tel. Co.* (Civ. App.), 116 S. W. 392.

In *Washam v. Harrison* (Civ. App.), 122 S. W. 52, the first assignment of error complained of a certain paragraph of the charge, because it did not state that in order to recover under the ten years statute of limitation there should be proof of adverse possession. The statement connected with the assignment of error and propositions thereunder failed to disclose what the court charged on the subject. It was held that the appellate court could properly decline to consider the assignment.

An assignment of error complaining of a paragraph of the charge on the ground that it "imposes upon the defendant company a greater burden than

the law requires," where the proposition attacks the charge on the ground that it is an abstract proposition of law, and incomplete because not applied to the facts of the case, is not followed by a proposition based upon it, and should not be considered. *Galveston, etc., R. Co. v. Hubbard*, 33 Tex. Civ. App. 343, 344, 76 S. W. 764, affirmed, no op.

An assignment of error not followed by any proposition, and which alleges merely that "the special findings of the jury were not sufficient to authorize the judgment," will not be considered, because too general and not in itself a proposition. *Yeager v. Neil*, 26 Tex. Civ. App. 414, 64 S. W. 701, affirmed in 95 Tex. 690, no op.

An assignment of error which is not followed in the brief by any proposition, but is submitted as a proposition in itself, as follows: "The court erred in overruling the defendant's motion for a new trial, and also motion to render judgment for the defendants notwithstanding the verdict, for all the reasons set forth in said motion," held too general to be considered. *Scott v. Farmers', etc., Bank* (Civ. App.), 66 S. W. 485 (see 95 Tex. 685, no op.).

An assignment of error complaining of the action of the court in reconsidering a motion overruled at a previous term of the court to suppress certain depositions and in sustaining said motion, is not a proposition within itself, and is not followed up by an appropriate proposition, as required by the rules, and therefore appellants are not entitled to have the ruling complained of revised. *Adkins v. Galbraith*, 10 Tex. Civ. App. 175, 178, 28 S. W. 291.

"The eighth assignment is to the effect that the court erred in permitting the attorney for plaintiff in his closing argument to make a statement and argument to the jury, unwarranted by the pleading and evidence which was calculated to prejudice and mislead

the jury to the injury of defendants. This assignment is not accompanied by any separate proposition, but is submitted as a proposition itself, and is, we think, under the rules, too general. Besides, looking to the statement made in support of the assignment, we find that it is based upon two distinct statements made to the jury in argument and involves the decision of two separate and distinct questions. This is not in accordance with the rules regulating the briefing of cases in this court and the assignment is not therefore entitled to consideration." *Baum v. McAfee* (Civ. App.), 125 S. W. 984.

#### bb. Where Assignments of Error Numerous.

Where the assignments of error are numerous, counsel should present propositions on those which are most important in the determination of the case, waiving those that can not control the result of the decision in the appellate court—among which may be classed those involving questions of fact, wherein the evidence is so preponderating or so conflicting as that the court under well-established rules of decision, would not set aside the verdict of the jury or judgment of the court upon them. Rule 35 of rules for courts of civil appeals. See *Johnson v. Texas, etc., R. Co.*, 45 Tex. Civ. App. 146, 100 S. W. 206 (see 102 Tex. 586, no op.), in which case the court deprecates the growing disposition to extend briefs beyond reasonable limits by unnecessary multiplicity and repetition of assignments and propositions, and calls attention to the above rule.

#### (b) Form and Sufficiency.

##### aa. General Rule.

**Necessity for Each Proposition to Present a Distinct Ground.**—The propositions, or assignments of error submitted as propositions, in an appellant's brief, should each present a single idea, a distinct ground for re-

versal. *Cage v. Tucker*, 25 Tex. Civ. App. 48, 60 S. W. 579.

The matter stated under each proposition should be sufficient to show its materiality in the decision of the case; otherwise it could not be seen that it is not a mere abstraction, that should not influence the result. *Texas Land Co. v. Williams*, 48 Tex. 602.

In each proposition should be propounded or affirmed some matter or thing done or refused to be done in the court below, embraced in the appropriate assignment of error, for which the judgment should be reversed, or sustained. *Shanks v. Carroll*, 50 Tex. 17. And see *Rusher v. Dallas*, 83 Tex. 151, 18 S. W. 333; *St. Louis, etc., R. Co. v. White Co.*, 97 Tex. 493, 80 S. W. 77, reversing 76 S. W. 947; *Johnson v. Flint*, 75 Tex. 379, 12 S. W. 1120.

Assignments of error, which are not propositions in themselves, and which present nothing in the brief but a statement from the evidence, do not meet the requirement that they state a definite proposition, notwithstanding there is what purports to be a proposition in each; and where there are ten assignments, none of them informing the court that appellant relies on some one point in the so-called propositions, the assignments will not be considered by the court on appeal. *Galveston, etc., R. Co. v. Janert*, 49 Tex. Civ. App. 17, 107 S. W. 963, affirmed, no op.

Where the giving of inconsistent instructions is assigned as error, but appellant's brief does not point out wherein the instructions, which cover several printed pages, are inconsistent, the court will not consider the assignment of error. *Texas, etc., R. Co. v. Horne*, 43 Tex. Civ. App. 490, 95 S. W. 97.

The court of review will not subdivide and reconstruct assignments of error or propositions in order to reverse a judgment for a technical error. *Missouri, etc., R. Co. v. Purdy*

(Civ. App.), 83 S. W. 37, reversed in 98 Tex. 557.

**Propositions Held Insufficient for Failure to Disclose Specific Ground of Error.**—Where the assignment of error is that the court erred in not granting a change of venue and a proposition under it is as follows: "The plaintiff's motion for a change of venue should have been granted," such assignment will not be considered because the propositions under it do not disclose any point. *McAllen v. Raphael* (Civ. App.), 96 S. W. 760, affirmed in 101 Tex. 647, no op.

Where an assignment of error was that the court erred in sustaining a motion to quash a writ of garnishment, because the application for same was in full compliance with the law, a proposition thereunder that: "In constructing garnishment papers the court looks to all papers filed in the garnishment case, and also to papers in the original case; and all affidavits filed in the garnishment for the purpose of obtaining the writ of garnishment must be construed together in ascertaining if all papers necessary to authorize issuance of garnishment have been filed," was insufficient as not showing the specific ground of error complained of. *Lowenthal-Harrison Co. v. Edmiston Bros.*, 40 Tex. Civ. App. 263, 89 S. W. 308.

A proposition in appellant's brief urging error in the refusal to give certain special charges, on its face, fails to affirmatively show error where it fails to show that such special charges were not sufficiently comprehended in the charge given by the court. *Chicago, etc., R. Co. v. Armes*, 32 Tex. Civ. App. 32, 74 S. W. 77, affirmed in 97 Tex. 628, no op.

In a suit against a street railway company for personal injuries, an assignment of error that the charge of the court, on the degree of care required of carriers of passengers, is erroneous, followed by the proposi-

tions that "a charge that does not correctly state the law applicable to the case is erroneous," and "a charge that is indefinite and so much so as to be confusing is erroneous," fails to point out the supposed error in the charge, and is therefore not entitled to consideration. *Gilmore v. Houston Elec. Co.*, 46 Tex. Civ. App. 315, 102 S. W. 168.

An assignment of error that "the court erred in rendering judgment for plaintiff as shown by defendants in the statement of facts, p. 22," and under which the following proposition occurred: "The first case (7675) was against appellants alone. P. 25. The new case (8488) was not only against appellants, but Rogers and Ed Johnson, two distinct parties, interveners, and no testimony justified this, hence it was irrelevant;" and the second proposition under this assignment was "before any judgment could be rendered against appellants setting up title in grantees Ed Johnson and Rogers, some proof must be introduced showing their interest," held, the assignments were too general. *Johnson v. Johnson* (Civ. App.), 35 S. W. 952.

Where, on appeal, an entire paragraph of the charge was assigned as error, the same being lengthy, and embracing a number of distinct rules, and the propositions in the brief of appellant in the court of civil appeals did not point out the particular in which it was claimed that the paragraph was erroneous, on writ of error to the supreme court no reversal will be had because of such paragraph. *Central Texas, etc., R. Co. v. Gibson*, 99 Tex. 98, 87 S. W. 814, affirming 35 Tex. Civ. App. 66.

An assignment of error that the court erred in refusing to give a special charge on the law of agency and of the liability of principals for acts of agents, because the pleadings and the evidence present "this question,"

is not a proposition within the rules of the court of appeals, for it fails to indicate the question sought to be presented. *Hayward Lumber Co. v. Cox* (Civ. App.), 104 S. W. 403, affirmed in 102 Tex. 584, no op.

An assignment of error complaining of the refusal to give requested instructions embracing a number of distinct rules, and evidently intended to present, as shown by the only proposition advanced under it, the various principles deemed applicable to the issues, was not a compliance with the rules of the court of civil appeals. *Southwestern Tel., etc., Co. v. Younger* (Civ. App.), 120 S. W. 530.

**Each point must refer to and show under which assignment of error presented,** and must present clearly and tersely a single proposition. *Haley v. Davidson*, 48 Tex. 615.

**Where the proposition under an assignment is multifarious** it should not be considered under the rules. *De Hoyos v. Galveston, etc., R. Co.* (Civ. App.), 115 S. W. 75, 77.

An assignment of error can not be considered where, as briefed, the proposition subjoined to it deals with more than one subject. *McAllen v. Raphael* (Civ. App.), 96 S. W. 760, 766, affirmed in 101 Tex. 647, no op.

In *Brannin v. Wear-Boogher Dry-Goods Co.* (Civ. App.), 30 S. W. 572, affirmed in 93 Tex. 656, no op., the court declined to consider one of the assignments of error, as it contained quite a variety of propositions, none of which were separately submitted with appropriate statements.

**General or Abstract Propositions Insufficient.**—Where a proposition following an assignment of error, multifarious in its statement of error, is general and abstract, the proposition can not be considered. *Broussard v. South Tex. Rice Co.* (Civ. App.), 120 S. W. 587.

A proposition under an assignment presents nothing tangible, where it is

a mere abstraction or generalization, affirming what is applicable alike to all cases, that "where it appears from the evidence that the verdict of the jury is clearly excessive it is error for the trial court to refuse to set the verdict of the jury aside, and grant the defendant a new trial." *Texas, etc., R. Co. v. Middleton*, 27 Tex. Civ. App. 481, 482, 65 S. W. 378.

An assignment of error will not be considered where it is not in itself a proposition and the proposition submitted under it presents, not a reason for reversal, but a mere legal abstraction. *Texas Cent. R. Co. v. Powell*, 38 Tex. Civ. App. 157, 86 S. W. 21, affirmed in 101 Tex. 662, no op. And see *San Antonio, etc., R. Co. v. Spencer* (Civ. App.), 119 S. W. 716.

A proposition that "unless a witness is shown to be legally qualified to testify as to whether or not there is a market value of a given article at a particular place and time, it is reversible error to permit him to testify in reference thereto," is a mere abstraction, and will not be considered where it is not shown by the statement under the proposition that the witnesses named in it did testify to the market value of the animal. *Galveston, etc., Ry. Co. v. Powers* (Civ. App.), 117 S. W. 459, 461.

#### bb. Where Assignments Relating to Different Subjects Are Grouped.

**In General.**—It has been held to be permissible, although not commendable, to copy all the assignments of error into the brief, one after the other, no matter how many subjects they may relate to; but in such case each proposition must refer to the assignment of error upon which it is based, and a proposition referring as its basis to all the assignments of error will not be considered. *Neal v. Galveston, etc., R. Co.*, 37 Tex. Civ. App. 235, 236, 83 S. W. 402, affirmed in 98 Tex. 626, no op. See, also, *Western Union*

*Tel. Co. v. Bryson*, 25 Tex. Civ. App. 74, 61 S. W. 548, affirmed in 94 Tex. 698, no op.; *Robinson v. Chamberlain & Co.*, 29 Tex. Civ. App. 170, 68 S. W. 209, affirmed in 95 Tex. 685, no op.; *Wells v. Houston*, 29 Tex. Civ. App. 619, 69 S. W. 183, affirmed in 97 Tex. 650, no op.; *Western Union Tel. Co. v. Waller*, 37 Tex. Civ. App. 515, 84 S. W. 695; *Young v. Pecos County*, 46 Tex. Civ. App. 319, 101 S. W. 1053; *Halff v. Goldfrank* (Civ. App.), 49 S. W. 1095, affirmed in 93 Tex. 708, no op.; *Abernathy v. Southern, etc., Plow Co.* (Civ. App.), 62 S. W. 786; *Jones v. Western Union Tel. Co.* (Civ. App.), 101 S. W. 808.

Assignments of error can not be considered, where they are grouped in appellants' brief, and propositions are made under two or more of them raising distinct questions of law. *Lowrance v. Woods* (Civ. App.), 118 S. W. 551.

**Illustrations.**—Where four assignments of error, relating to different subjects, are grouped, and the separate propositions refer to all of them, without stating "each point under each assignment," as required by rule 30 for the courts of civil appeals, the brief will not be considered. *Neal v. Galveston, etc., R. Co.*, 37 Tex. Civ. App. 235, 236, 83 S. W. 402, affirmed in 98 Tex. 626, no op.

"The assignments of error are on subjects not germane to each other, and when grouped as they are should have their subjects separated by propositions relating back to the particular assignment to which the proposition is applicable." *Neal v. Galveston, etc., R. Co.*, 37 Tex. Civ. App. 235, 83 S. W. 402, affirmed in 98 Tex. 626, no op.

The brief of appellant, after stating that assignments of error relating to separate rulings of the court would be presented together, copied the assignments, and, after the first so-called proposition, which was "each and all

of them are here now submitted as a separate proposition," two other propositions were advanced under each, and the same statement was subjoined to all the propositions. Held, that the assignments would not be considered. *Hayward Lumber Co. v. Cox* (Civ. App.), 104 S. W. 403, affirmed in 102 Tex. 584, no op.

Where two assignments of error are submitted as one, followed by the single proposition that, "The requested charges presented the law of the case and should have been given," and the two assignments raise distinct errors relating to different rulings and different subjects, such assignments are not entitled to consideration. *Chicago, etc., R. Co. v. Cain*, 37 Tex. Civ. App. 531, 84 S. W. 682, affirmed in 101 Tex. 631, no op.

Where assignments of error in rulings on general and special exceptions to pleadings, admission and exclusion of testimony, in the court's general charge and failure to charge, are all copied together in the brief, and followed by separate and distinct propositions, which do not relate to all such assignments, no compliance is shown with supreme court rule 30, requiring each point under each assignment to be stated as a proposition in the brief, unless the assignment itself is in shape of a proposition, and such assignments will not be considered. *International, etc., R. Co. v. True*, 23 Tex. Civ. App. 523, 57 S. W. 977, affirmed in 94 Tex. 705, no op.

In *Menger v. Ward* (Civ. App.), 28 S. W. 821, reversed on another point in 87 Tex. 622, while the whole of the assignments of error were copied in connection with the statement of the nature and result of the suit, there were propositions and statements under only four of them, and these alone were considered by the appellate court.

**(c) Necessity for Propositions to Be Germane to Assignments.**

**In General.**—A proposition which is

not germane to, based upon, and supported by, the assignment of error under which it is made, is not entitled to consideration. *Mayfield v. Robinson*, 22 Tex. 385, 55 S. W. 399, affirmed in 93 Tex. 646, no op.; *Haley v. Davidson*, 48 Tex. 615; *Miller v. Vernoy*, 2 Tex. Civ. App. 343, 76 S. W. 764; *Elder & Son v. Peyton*, 4 Tex. Civ. App. 57, 23 S. W. 222, affirmed in 93 Tex. 635, no op.; *Sickles v. Missouri, etc., R. Co.*, 13 Tex. Civ. App. 434, 35 S. W. 493, affirmed in 93 Tex. 720, no op.; *International Light, etc., Co. v. Maxwell*, 27 Tex. Civ. App. 294, 65 S. W. 78; *Weeks v. Texas, etc., Railroad*, 29 Tex. Civ. App. 148, 67 S. W. 1071; *Galveston, etc., R. Co. v. Hubbard*, 33 Tex. Civ. App. 343, 76 S. W. 764; *El Paso Elec. R. Co. v. Harry*, 37 Tex. Civ. App. 90, 83 S. W. 735; *Garrett v. Spradling*, 39 Tex. Civ. App. 60, 88 S. W. 293, affirmed in 101 Tex. 638, no op.; *Missouri, etc., R. Co. v. Sanders*, 42 Tex. Civ. App. 545, 94 S. W. 149; *Scanlon v. Galveston, etc., R. Co.*, 45 Tex. Civ. App. 345, 100 S. W. 982, affirmed in 102 Tex. 592, no op.; *Industrial Lumber Co. v. Bivens*, 47 Tex. Civ. App. 396, 105 S. W. 831, affirmed, no op.; *Sabine Tram Co. v. Bancroft* (Civ. App.), 39 S. W. 177, affirmed in 93 Tex. 718, no op.; *Lynn v. First Nat. Bank* (Civ. App.), 40 S. W. 228; *Horseman v. Coleman County* (Civ. App.), 57 S. W. 304; *Galveston, etc., R. Co. v. Sanders* (Civ. App.), 65 S. W. 889; *Bowman v. Hoffman* (Civ. App.), 74 S. W. 340; *Walker v. Texas, etc., R. Co.* (Civ. App.), 75 S. W. 47; *Missouri R. Co. v. Ingram* (Civ. App.), 83 S. W. 208; *Mansur, etc., Co. v. Graham* (Civ. App.), 85 S. W. 308; *Texas Cent. R. Co. v. Miller* (Civ. App.), 88 S. W. 499; *International, etc., R. Co. v. Glover* (Civ. App.), 88 S. W. 515; *Kruegel v. Bolanz* (Civ. App.), 103 S. W. 435, affirmed in 102 Tex. 586, no op.; *Cruise v. O'Gwin*, 48 Tex. Civ. App. 48, 106 S. W. 757; *Wilkins v. Clawson* (Civ. App.), 110 S. W. 103; *Kirby v. Blake*

(Civ. App.), 115 S. W. 674; *Munroe v. Munroe* (Civ. App.), 116 S. W. 878; *Varn v. Varn* (Civ. App.), 125 S. W. 639.

A proposition under an assignment, relating to a matter not embraced in the assignment, will not be considered. *Ostrom v. Arnold*, 24 Tex. Civ. App. 192, 58 S. W. 630, affirmed in 94 Tex. 706, no op.; *Kahler v. Carruthers*, 18 Tex. Civ. App. 216, 45 S. W. 160, affirmed in 93 Tex. 665, no op.

If the proposition asserted can not be deduced from the assignment of error, it will not be considered. *Savage v. Umphries* (Civ. App.), 118 S. W. 893, 906.

"In considering an assignment we are confined to the proposition asserted under it. Anything embraced in the proposition which can not fairly be evolved from the assignment, but which extends beyond it, must be ignored. As the assignment in question does not involve the court's failure to strike out the witnesses' answers, attention can only be given to its admission in evidence." *Pullman Co. v. Vanderhoeven*, 48 Tex. Civ. App. 414, 107 S. W. 147.

**Instances of Propositions Held Not Germane.**—A proposition as to what the proper measure of damage should be in a given case, is not germane to an assignment of error which merely complains of the insufficiency of the evidence to establish market value. *San Jacinto Oil Co. v. Texas Co.*, 47 Tex. Civ. App. 477, 105 S. W. 1163, affirmed, no op.

An assignment of error to the admission of certain evidence does not require notice where the proposition thereunder in the brief is inapplicable to such evidence. *Missouri, etc., R. Co. v. St. Clair*, 21 Tex. Civ. App. 345, 51 S. W. 666, affirmed in 93 Tex. 715, no op.

A proposition that it is not competent to establish heirship by hearsay evidence is not germane to an assign-

ment of error to the finding of the court as to the heirship of A. S. and grantors of the land to the other appellees, "because not supported by the evidence." *Sullivan v. Solis* (Civ. App.), 114 S. W. 456, 462.

Defendant specially excepted to plaintiff's petition, on the ground that it failed to allege that defendant authorized the misconduct of the brakeman (in leaving open a switch, which caused the injury complained of). The proposition under its assignment of error complaining of the action of the court in overruling this exception was that the petition was defective in failing to aver that the brakeman "had authority by virtue of his employment as brakeman to handle the switch." Held, that the proposition is not contained within the terms of the exception. *Gulf, etc., R. Co. v. Pierce*, 7 Tex. Civ. App. 597, 25 S. W. 1052, affirmed in 87 Tex. 144.

Where an assignment complained that the court refused to strike out, upon an exception, a certain clause of the answer, and the proposition under it was: "When a person is insane at the time she enters into a contract, subsequent acts supposed to be in ratification of the original contract can not be shown, without first alleging and proving that the insane party has been restored to reason at the time of such acts of ratification," but the issue of ratification was not submitted. Held, there is nothing substantial or pertinent in the proposition. *Uecker v. Zuercher* (Civ. App.), 118 S. W. 149, 151.

By an exception forming a part of their answer appellants questioned the sufficiency of the petition on the ground that it "shows upon its face that there is a misjoinder of defendants, for no privity of interest appears in the different causes of action alleged against said two several defendants," and the action of the court in overruling the exception is assigned

as error, and in support of their assignment appellants contend that two causes of action were stated in the petition—one for tort, and one for a debt. Held, the exception to the petition was, not that there was a joinder of causes of action which could not be joined, but that there was misjoinder of defendants, for this reason, if for no other reason, the assignment should be overruled. *Opperman v. Petry* (Civ. App.), 11 S. W. 300.

A proposition that a survey without a concession or order of survey would not be a legal appropriation of the land nor notice to any one that land was appropriated, is not pertinent under the facts of the case to a complaint that copies of record from a surveyor's office were improperly admitted in evidence. *Sullivan v. Solis* (Civ. App.), 114 S. W. 456, 461.

A proposition under an assignment, which is not itself presented as a proposition, that, "so long as the title is imperfect and inchoate, the lands belong to the state of Texas, and the public lands are not a lawful subject matter of private contract, and any attempt to convey the same by one person to another passes no interest whatever in the land and does not create the relation of vendor and vendee," has no proper relation to assignment that the court erred in admitting in evidence the instrument executed by Joseph Sims and in construing the same to be a deed and not a power of attorney. *Sims v. Sealy* (Civ. App.), 116 S. W. 630, 633.

"By the eleventh assignment of error appellant assails the findings of fact of the trial court, as set out in the second paragraph thereof, on the ground that there is no evidence to sustain the same. The proposition under this assignment is that: 'A finding of fact by the court should reflect the spirit and substance of the matters from which he finds, otherwise the finding is insufficient and should not

be sustained.' The proposition presents a question entirely different from that presented by the assignment. The statement does not pretend to show from the evidence that the facts so found by the trial court, being really the substance of certain contracts introduced in evidence and referred to as part of the findings, are not supported by the evidence. The assignment will not be considered." *Weil v. Martinez* (Civ. App.), 124 S. W. 116.

A proposition complaining of the charge of the court in relation to the statute of limitations will not be considered where no such objection is found in the assignment. *Miller v. Vernoy*, 2 Tex. Civ. App. 675, 677, 22 S. W. 64.

A proposition under an assignment of error, complaining of the charge because it eliminates the question of contributory negligence, will not be considered where such proposition is not found in the assignment. *International Light, etc., Co. v. Maxwell*, 27 Tex. Civ. App. 294, 65 S. W. 78, citing *Bender & Son v. Peyton*, 4 Tex. Civ. App. 57, 23 S. W. 222, affirmed in 93 Tex. 635, no op.; *Sickles v. Missouri, etc., R. Co.*, 13 Tex. Civ. App. 434, 35 S. W. 493, affirmed in 93 Tex. 720, no op.

Where an assignment of error does not involve an objection to the designated paragraph of a charge, the proposition complaining of error in the paragraph will not be considered. *Texas, etc., R. Co. v. Hernandez*, 49 Tex. Civ. App. 360, 108 S. W. 765, affirmed, no op.

A proposition complaining of a charge because it tells the jury that the declarations of the testator are competent to establish the influence and effect of the supposed undue influence, does not raise the question that the charge is upon the weight of evidence. *Stubbs v. Marshall* (Civ. App.), 117 S. W. 1030, 1033.

A proposition under an assignment



of error, to the effect that the court's charge was erroneous for the reason that it authorized a recovery for the plaintiff upon a certain state of facts and omitted one essential fact set up in the plaintiff's petition, is not germane to an assignment, which relates to the failure to submit to the jury certain issues of contributory negligence, and see question sought to be raised by such propositions will not be decided. *Houston, etc., R. Co. v. Sentz* (Civ. App.), 120 S. W. 943, 944.

Where the undisputed facts were that the train on which the plaintiff was riding, with its platforms, couplings, lights, etc., was such as was usual and customary with all passenger trains then being operated in Texas, and the court so instructed the jury and an assignment of error was urged to the above charge, as being upon the weight of the testimony and invading the province of the jury, held, that such assignment will not support a proposition that it is the duty of railroads to adopt improved appliances and methods of operation. *Sickles v. Missouri, etc., R. Co.*, 13 Tex. Civ. App. 434, 35 S. W. 493, affirmed in 93 Tex. 720, no op., in which it was held that no such proposition could legitimately grow out of the assignment in question.

An assignment asserting error in a given paragraph of the charge, and stating four specifications of error, relating exclusively to the character of plaintiff as car inspector, and to his duties as such, but without reference to any issue of defective air brakes, will not support a proposition in appellant's brief to the effect that the court erred in submitting the issue whether the air brakes were defective, because there was no evidence to warrant such charge. *Gulf, etc., R. Co. v. Kizziah*, 4 Tex. Civ. App. 356, 22 S. W. 110, 26 S. W. 242.

The proposition, under an assignment of error to the court's refusal to give special instruction, will not be

considered where the proposition submitted thereunder complained rather of what was given in the main charge than of the refusal to give a special instruction, as such propositions are not germane to the assignment. *Texas, etc., R. Co. v. Taylor* (Civ. App.), 58 S. W. 166, 167, reversed in 58 S. W. 844.

An assignment of error in the refusal of the court to give a certain instruction, and under which is the proposition stating that if the charge as asked is not strictly correct it was sufficient to call the court's attention to the issue involved and to require it to give a proper charge upon the subject, can not be considered, where there is no assignment alleging that the court should, in view of this request, have given another and proper charge on this subject. *Equitable Life Assur. Soc. v. Maverick* (Civ. App.), 78 S. W. 560, 561.

In *Coleman v. First Nat. Bank* (Civ. App.), 34 S. W. 93, which was an action against a bank for the conversion of a wife's separate funds which her husband had deposited, checked out and converted, it was assigned as error the refusal of an instruction to the jury to find a verdict in favor of plaintiff less the amount of the checks admitted by the appellant to have been drawn with her consent. The proposition presented under such assignment was in effect that the burden of proof was on the defendant to prove payment, and that it must produce evidence as to whom it was paid, showing proper receipts, vouchers, and orders, and that the same was paid to a person authorized to collect and receive it. It was held that the proposition did not arise under the assignment.

An assignment of error that the court erred to the prejudice of this defendant, in overruling its motion for a new trial, because the verdict of the jury is contrary to the evidence in this case, the preponderance of the testimony showing that the defendant

did not know of any infirmity or unfitness on the part of the coservant rendering him unfit for service in the capacity in which he was employed, but the proof shows that the coservant was competent for the service in which he was engaged, so far as all appearances would indicate, and that he was an able-bodied man, according to plaintiff's own testimony, so far as such appearances disclosed; that if he was suffering from any infirmity of any character, such was not known to this defendant, followed by a proposition, held, that if it be conceded that the propositions raised the issue as to whether there is any evidence to support the verdict, then the propositions are not germane to the assignment and are wholly unsupported thereby. *Texas, etc., R. Co. v. Lee*, 32 Tex. Civ. App. 23, 30, 74 S. W. 345, affirmed in 97 Tex. 648, no op.

The first assignment of error being that the court erred in refusing to transfer the case to Cherokee county, as prayed for by the defendants in their motion for a change of venue, or to some other county out of this judicial district, because the judge of this district is disqualified to try the case, he having been a member of the city council of Palestine when the same questions involved in this case, and between the same parties, were passed upon and decided against these defendants by said council; and the first proposition being, "upon change of venue the case should be removed to some adjoining county, the court house of which is nearest to the court house of the county in which suit is pending," the proposition was not considered, because not germane to the assignment. *Waters-Pierce Oil Co. v. Cook*, 6 Tex. Civ. App. 573, 26 S. W. 96.

### (3) Propositions Relating to Fundamental Errors of Law.

In propositions relating to fundamental errors of law apparent upon the record, enough must be stated to make

the error of law which pervades the case obviously apparent, without requiring the court to search through the record to find errors, which they will not do until properly pointed out, if the judgment is one which the trial court is competent to render in such a case. Rule 34 of Rules for Courts of Civil Appeals. *Western Union Tel. Co. v. Bell*, 42 Tex. Civ. App. 462, 92 S. W. 1036.

Under Courts of Civil Appeals, Rules 30, 34 (67 S. W. XVI), requiring each point under an assignment to be stated as a proposition, and in a proposition relating to errors of law apparent on the record, enough must be stated to make the error obviously apparent, an assignment of error that the court erred in overruling a demurrer to the petition, not followed by a proposition pointing out the defect, is insufficient. *Western Union Tel. Co. v. Bell*, 42 Tex. Civ. App. 462, 92 S. W. 1036.

### c. Statement Explaining and Supporting Proposition.

#### (1) Necessity for Statement and Reference to Record.

**In General.**—To each proposition there should be subjoined a brief statement in substance of such proceedings, or parts thereof, contained in the record, as will be necessary and sufficient to explain and support the proposition, with a reference to the pages of the record. Rule 31 of Rules for Courts of Civil Appeals. A similar provision was contained in rule 31 of rules for the supreme court under the former practice. *Texas Land Co. v. Williams*, 48 Tex. 609; *Haley v. Davidson*, 48 Tex. 615, 619; *Shanks v. Carroll*, 50 Tex. 17; *McManus v. Wallis*, 52 Tex. 534; *Johnson v. Flint*, 75 Tex. 379, 12 S. W. 1120; *Gallagher & Co. v. Goldfrank, etc., Co.*, 75 Tex. 562, 12 S. W. 964; *Little v. State*, 75 Tex. 616, 12 S. W. 965; *International, etc., R. Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039; *Rusher v. Dallas*, 83 Tex. 151, 18 S. W. 333; *Cooper v. Hiner*, 91

Tex. 658, 45 S. W. 554; *St. Louis, etc., R. Co. v. White & Co.*, 97 Tex. 493, 80 S. W. 77; *Hahn v. Broussard*, 3 Tex. Civ. App. 481, 23 S. W. 88; *Sloan v. Thompson*, 4 Tex. Civ. App. 419, 23 S. W. 613; *Parker County v. Jackson*, 5 Tex. Civ. App. 36, 23 S. W. 924; *Bailey v. Chapman*, 15 Tex. Civ. App. 240, 38 S. W. 544; *Bayne v. Denny*, 21 Tex. Civ. App. 435, 52 S. W. 983, affirmed in 93 Tex. 635, no op.; *International, etc., R. Co. v. Stephenson*, 22 Tex. Civ. App. 220, 54 S. W. 1086, affirmed in 93 Tex. 644, no op.; *Missouri, etc., R. Co. v. Wells*, 24 Tex. Civ. App. 304, 58 S. W. 842; *Supreme Tent v. Cox*, 25 Tex. Civ. App. 366, 60 S. W. 971; *Yeager v. Neil*, 26 Tex. Civ. App. 414, 64 S. W. 701, affirmed in 95 Tex. 690, no op.; *Galveston, etc., R. Co. v. Buch*, 27 Tex. Civ. App. 283, 65 S. W. 681, affirmed in 95 Tex. 678, no op.; *Wetz v. Wetz*, 27 Tex. Civ. App. 597, 66 S. W. 869; *Raywood Rice Canal, etc., Co. v. Langford Bros.*, 32 Tex. Civ. App. 401, 74 S. W. 926, affirmed in 97 Tex. 644, no op.; *Chimene v. Baker*, 32 Tex. Civ. App. 520, 75 S. W. 330; *Bull v. San Antonio, etc., R. Co.*, 33 Tex. Civ. App. 547, 78 S. W. 525; *International, etc., R. Co. v. Thompson*, 34 Tex. Civ. App. 67, 77 S. W. 439, affirmed in 98 Tex. 622, no op.; *Galloway v. Floyd*, 36 Tex. Civ. App. 379, 81 S. W. 805; *McCord v. Hames*, 38 Tex. Civ. App. 239, 85 S. W. 504, affirmed in 101 Tex. 647, no op.; *Western Union Tel. Co. v. Ford*, 40 Tex. Civ. App. 474, 90 S. W. 677, affirmed in 101 Tex. 666, no op.; *Peach River Lumber Co. v. Ayers*, 41 Tex. Civ. App. 334, 91 S. W. 387, affirmed in 101 Tex. 652, no op.; *House v. Holland*, 42 Tex. Civ. App. 502, 94 S. W. 153; *American Surety Co. v. Lyons*, 44 Tex. Civ. App. 150, 97 S. W. 1080, affirmed in 102 Tex. 577, no op.; *Poland v. Porter*, 44 Tex. Civ. App. 334, 98 S. W. 214; *Moore v. Woodson*, 44 Tex. Civ. App. 503, 99 S. W. 116; *Duerler Mfg. Co. v. Eichhorn*, 44 Tex. Civ. App. 638, 99 S. W. 715, affirmed in 102

Tex. 581, no op.; *Gilmore v. Houston Elec. Co.*, 46 Tex. Civ. App. 315, 102 S. W. 168; *Young v. Pecos County*, 46 Tex. Civ. App. 319, 101 S. W. 1055, affirmed in 102 Tex. 597, no op.; *Sterling v. DeLaune*, 47 Tex. Civ. App. 470, 105 S. W. 1169, affirmed in 102 Tex. 593, no op.; *McDonald v. McCrabb*, 47 Tex. Civ. App. 259, 105 S. W. 238; *Parker County v. Jackson*, 5 Tex. Civ. App. 36, 23 S. W. 924; *Higgs v. Garrison (Civ. App.)*, 27 S. W. 34; *Lanyon v. Edwards (Civ. App.)*, 26 S. W. 524, affirmed in 93 Tex. 712, no op.; *Johnson v. White (Civ. App.)*, 27 S. W. 174, affirmed in 93 Tex. 665, no op.; *Gulf, etc., R. Co. v. Pendery (Civ. App.)*, 27 S. W. 213; *Hume v. Ware (Civ. App.)*, 29 S. W. 71, affirmed in 93 Tex. 687, no op.; *Kempner v. Ivory (Civ. App.)*, 29 S. W. 538; *Houston City St. R. Co. v. Woodlock (Civ. App.)*, 29 S. W. 817, affirmed in 93 Tex. 641, no op.; *Lutcher, etc., Lumber Co. v. Dyson (Civ. App.)*, 30 S. W. 61; *St. Louis, etc., R. Co. v. Maloney (Civ. App.)*, 33 S. W. 767, 768; *Rosenfield v. Rosenthal (Civ. App.)*, 39 S. W. 193; *D'Arrigo v. Texas Produce Co.*, 18 Tex. Civ. App. 41, 44 S. W. 531, 532; *Guerquin v. McGown (Civ. App.)*, 53 S. W. 585; *Brown v. Vizcaya (Civ. App.)*, 55 S. W. 191; *First Nat. Bank v. Watson (Civ. App.)*, 66 S. W. 232 (see 95 Tex. 351); *Westinghouse Elec. Mfg. Co. v. Troell*, 30 Tex. Civ. App. 200, 70 S. W. 324, affirmed in 97 Tex. 651, no op.; *Galveston, etc., R. Co. v. Puente*, 30 Tex. Civ. App. 246, 70 S. W. 362; *Holton v. Galveston, etc., R. Co.*, 31 Tex. Civ. App. 128, 71 S. W. 408, affirmed in 97 Tex. 636, no op.; *Texas, etc., R. Co. v. Lee*, 32 Tex. Civ. App. 23, 74 S. W. 345; affirmed in 97 Tex. 648, no op.; *King v. Summerville (Civ. App.)*, 80 S. W. 1050; *Rogers v. O'Barr (Civ. App.)*, 81 S. W. 750; *Galloway v. Floyd*, 36 Tex. Civ. App. 379, 81 S. W. 805; *International, etc., R. Co. v. Boykin (Civ. App.)*, 85 S. W. 1163; *Central Tex., etc., R. Co. v. Gibson*, 99

Tex. 98, 87 S. W. 814, affirming 35 Tex. Civ. App. 66; Gulf, etc., R. Co. v. Harbison (Civ. App.), 88 S. W. 452, affirmed in 99 Tex. 536; Gulf, etc., R. Co. v. Wetherly (Civ. App.), 88 S. W. 456; Gulf, etc., R. Co. v. Oates (Civ. App.), 88 S. W. 457; Hubbard City, etc., Gin Co. v. Nichols (Civ. App.), 89 S. W. 795; Kilday v. Perkins (Civ. App.), 90 S. W. 215; Johnston v. Fraser (Civ. App.), 92 S. W. 49, affirmed in 101 Tex. 644, no op.; El Paso, etc., R. Co. v. Darr (Civ. App.), 93 S. W. 166, affirmed in 101 Tex. 635, no op.; Yellow Pine Oil Co. v. Noble (Civ. App.), 97 S. W. 332; Cockrell v. Egger (Civ. App.), 99 S. W. 568; Bluestein v. Collins (Civ. App.), 103 S. W. 687; Missouri, etc., R. Co. v. Hendricks, 49 Tex. Civ. App. 314, 108 S. W. 745; Jones v. Creech (Civ. App.), 108 S. W. 975; Parrish v. Nelson, 49 Tex. Civ. App. 559, 108 S. W. 1189; Colorado Canal Co. v. McFarland (Civ. App.), 109 S. W. 435; Loyal Americans v. McClanahan (Civ. App.), 109 S. W. 973; Ryan v. Teague (Civ. App.), 110 S. W. 117; Luling, etc., Mfg. Co. v. Gohmert (Civ. App.), 110 S. W. 772; Texas, etc., R. Co. v. Jowers (Civ. App.), 110 S. W. 946; Laird v. Murray (Civ. App.), 111 S. W. 780; Spikes v. Howard (Civ. App.), 111 S. W. 792; Cox v. Combs (Civ. App.), 111 S. W. 1069; Galveston, etc., R. Co. v. Olds (Civ. App.), 112 S. W. 787; Fordtran v. Stowers (Civ. App.), 113 S. W. 631; Sullivan v. Solis (Civ. App.), 114 S. W. 456; Texas Cent. R. Co. v. Pool (Civ. App.), 114 S. W. 685; Starkey v. Western Union Tel. Co. (Civ. App.), 115 S. W. 853; McCollum v. Buchner's Orphans' Home (Civ. App.), 117 S. W. 886; Walker v. International, etc., R. Co. (Civ. App.), 117 S. W. 1020; Lowrance v. Woods (Civ. App.), 118 S. W. 551; Brunner Fire Co. v. Payne (Civ. App.), 118 S. W. 602; Louisiana, etc., Lumber Co. v. Kennedy (Civ. App.), 119 S. W. 884; Atchison, etc., R. Co. v. Smythe (Civ. App.), 119 S. W. 892; Haupt v. Cravens & Co. (Civ.

App.), 120 S. W. 541; Broussard v. South Tex. Rice Co. (Civ. App.), 120 S. W. 587; Vann v. Denson (Civ. App.), 120 S. W. 1020; Irvin v. Johnson (Civ. App.), 120 S. W. 1085; Stone v. Stitt (Civ. App.), 121 S. W. 187; Gilmer v. Veatch (Civ. App.), 121 S. W. 545; Beaumont Traction Co. v. Happ (Civ. App.), 122 S. W. 610; Weil v. Martinez (Civ. App.), 124 S. W. 116; Covington v. Sloan (Civ. App.), 124 S. W. 690; Sievert v. Underwood (Civ. App.), 124 S. W. 721; Baum v. McAfee (Civ. App.), 125 S. W. 984.

Ordinarily an assignment of error ought to be complete in itself; and if it is not, and there is something else in the record essential to an intelligent ruling upon it, the latter at least should be embraced in the statement in the brief under the assignment. Robertson v. Coates, 1 Tex. Civ. App. 664, 20 S. W. 875, affirmed in 93 Tex. 694, no op.

Each error relied on, particularly assigned separately, or appropriately grouped, if several present the same point, should be followed by the statement from the record as required by the rules of court. Byrnes v. Morris, 53 Tex. 213.

"Each assignment or proposition should be accompanied by an apposite statement when the matter has not been previously stated under some other proposition." Gallagher & Co. v. Goldfrank, etc., Co., 75 Tex. 562, 12 S. W. 964.

An assignment and proposition not followed by a sufficient statement will not be considered, but will be regarded as waived. Swift v. Bruce, 31 Tex. Civ. App. 92, 71 S. W. 321; Hahn v. Broussard, 3 Tex. Civ. App. 481, 23 S. W. 88; Johnson v. Lyford, 9 Tex. Civ. App. 85, 29 S. W. 57. And see cases cited to preceding paragraph.

**Rule Not Affected by Statute Authorizing Sending Up of Stenographer's Transcript.**—The rule requiring condensed statements from the record

to follow each proposition is still in force, notwithstanding the law authorizing the sending up of the stenographer's transcript. *United Oil, etc., Co. v. Grey*, 47 Tex. Civ. App. 10, 102 S. W. 934.

**Necessity for Separate Statement under Each Proposition, Where Assignments Grouped.**—Where several assignments of error complaining of the admission of different testimony are grouped together in the brief, and there is no separate statement under the several propositions asserted by them, they will not be considered. *Galveston, etc., Co. v. Smith*, 24 Tex. Civ. App. 127, 57 S. W. 999, affirmed in 94 Tex. 705, no op. See, also, *Cage v. Tucker*, 25 Tex. Civ. App. 48, 60 S. W. 579; *Frazier v. Lambert* (Civ. App.), 115 S. W. 1174; *Baun v. McAfee* (Civ. App.), 125 S. W. 984; *Kean v. Zundelowitz*, 9 Tex. Civ. App. 350, 29 S. W. 930, affirmed in 93 Tex. 665, no op.; *McAllen v. Raphael* (Civ. App.), 96 S. W. 760, affirmed in 101 Tex. 647, no op.

**(2) Form, Contents and Sufficiency.**

**(a) Necessity for Abbreviation of Record So Far as Possible.**

**In General.**—The statement required by the rule is to be made without copying the record that is, without copying the whole of any proceeding in it when it can be abbreviated, as it generally can be. *Texas Lard Co. v. Williams*, 48 Tex. 602.

**The statement and counter statement must not be made by copying,** but by stating substantially what the record contains, with reference to the pages of the record. *Haley v. Davidson*, 48 Tex. 615.

Where the only statement under a proposition is a copy of practically the whole of the statement of facts, it is equivalent to the reference to the record for facts, because it entails the same search through the statement of facts as though nothing had been copied in the brief. *International, etc., R. Co. v. Miller* (Civ. App.), 124 S. W. 109.

A brief which contained practically all the testimony of the witnesses in addition to the correspondence which had passed between the parties, all extending through 37 pages, and containing many irrelevant statements and much repetition in the testimony, is not a compliance with Rule 30 (31 S. W. VII) requiring a statement of all the material facts proved upon the trial, in so far as they bear upon the issue to be presented. *Meston v. Davies* (Civ. App.), 36 S. W. 805, affirmed in 93 Tex. 646, no op. And see *Houston, etc., R. Co. v. Smith* (Civ. App.), 46 S. W. 1046.

**(b) Statement Must Be Sufficient to Enable Court to Pass on Question Presented.**

**aa. General Rule Stated and Construed.**

**(aa) Rule Stated.**

The statement required by rule 31 must be made faithfully, in reference to the whole of that which is in the record having a bearing upon said proposition, upon the professional responsibility of the counsel who makes it. *Shanks v. Carroll*, 50 Tex. 17; *Galveston, etc., R. Co. v. Olds* (Civ. App.), 112 S. W. 787; *International, etc., R. Co. v. Miller* (Civ. App.), 124 S. W. 109.

The statement must be a correct reflection of whatever may appear in the record necessary to be shown to enable the court to pass upon the question presented. *Colorado Canal Co. v. McFarland* (Civ. App.), 109 S. W. 435; *Hirsch v. Patton*, 49 Tex. Civ. App. 499, 108 S. W. 1015.

There must be presented the substance of such proceedings contained in the record necessary for the court to know, in determining whether the judgment should be reversed. *Shanks v. Carroll*, 50 Tex. 17; *St. Louis, etc., R. Co. v. White Co.*, 97 Tex. 493, 80 S. W. 77, reversing 76 S. W. 947; *Cage v. Tucker*, 25 Tex. Civ. App. 48, 60 S. W. 579; *International, etc., R. Co. v. Vanlandingham*, 38 Tex. Civ. App. 206, 85 S. W. 847, affirmed in 101 Tex. 644, no

op.; *Johnson v. Lyford*, 9 Tex. Civ. App. 85, 90, 29 S. W. 57; *Hearn v. Bitterman* (Civ. App.), 27 S. W. 158; *Laing v. Hanson* (Civ. App.), 36 S. W. 116.

The object of requiring statements to be made under each assignment of error is that the appellate court may tell therefrom whether or not the assignment is well taken. *Gulf, etc., R. Co. v. Coldwell* (Civ. App.), 102 S. W. 461, citing *Gulf, etc., R. Co. v. Harrison* (Civ. App.), 88 S. W. 452, affirmed in 99 Tex. 536.

When a proposition is presented for the reversal of the judgment, the first inquiry for the court is to ascertain whether the matters in the record warrant and justify it. To enable the court to determine this, the statement must show what is in the record bearing upon the proposition. *Haley v. Davidson*, 48 Tex. 615.

An assignment of error to a charge will be overruled where the facts called to the attention of the appellate court in the statements following the assignments are not sufficiently full to enable the appellate court to determine whether the error, if any, probably resulted in injury to the complainant. *Herring v. Herring* (Civ. App.), 51 S. W. 865, 866, affirmed in 93 Tex. 663, no op.

**Should Contain Evidence Necessary to Support Assignment of Error.**—The statement in a brief should set out enough of the evidence to enable the appellate court to pass intelligently on the assignment of error, without requiring the appellate court to examine the record for the evidence. *Hammond v. Decker*, 46 Tex. Civ. App. 232, 102 S. W. 453; *Storms v. Mundy*, 46 Tex. Civ. App. 88, 101 S. W. 258, affirmed in 102 Tex. 593, no op.; *San Antonio Traction Co. v. Haines*, 45 Tex. Civ. App. 289, 100 S. W. 788, affirmed in 102 Tex. 592, no op.; *Walker v. International, etc., R. Co.* (Civ. App.), 117 S. W. 1020; *Stark v. Burkitt* (Civ. App.), 120 S. W. 939.

Where an assignment, based on the assumption that the evidence shows a certain state of facts, is not followed by any statement of the evidence, it is not entitled to consideration. *Galveston, etc., R. Co. v. Johnson*, 24 Tex. Civ. App. 180, 58 S. W. 622, affirmed in 94 Tex. 705, no op.

An assignment that the court erred in his charge in authorizing a verdict against defendant at and just before the happening of the accident, because there was no evidence upon which to base such a charge, may be disregarded where it is not followed by any statement of the evidence from the record. *Northern Texas Tract. Co. v. Hunt* (Civ. App.), 118 S. W. 827, 829.

The statement under an assignment of error, treated as a proposition, is not sufficient to require its consideration under the rules where, instead of stating from the record the evidence pertaining to the proposition, a conclusion as to the effect of the evidence is stated. *Galveston, etc., R. Co. v. Smith*, 24 Tex. Civ. App. 127, 57 S. W. 999, affirmed in 94 Tex. 705, no op.

Where, in lieu of a statement under an assignment of error, reference is made to many pages of evidence copied in the brief under other assignments, and to certain pages of the transcript, it is not a compliance with the rules for the preparation of briefs. *El Paso, etc., R. Co. v. Foth*, 45 Tex. Civ. App. 275, 276, 100 S. W. 171, reversed in 101 Tex. 133.

For further illustrations of the necessity and sufficiency of setting out the evidence, see post, "Applications of Rule," IV, B, 5, c, (2), (b), bb.

**Necessity under Former Rule, for Statement of All Material Facts Proved.**—Under rule 30 for the courts of civil appeals as amended in 1896, it was provided that the introductory statement of the nature and result of the suit should be followed by "a statement of all the material facts proved upon the trial in so far as they bear upon the issues to be presented, specifying the facts

upon which there is a conflict in the evidence, and giving the substance of the evidence adduced by each party upon such conflict." *Meston v. Davies* (Civ. App.), 36 S. W. 805, affirmed in 93 Tex. 646, no op.; *Connor v. Sewell* (Civ. App.), 39 S. W. 128 (see 90 Tex. 275); *Arnold v. Chamberlin* (Civ. App.), 33 S. W. 767; *Comanche v. Zettlemoyer* (Civ. App.), 40 S. W. 178; *Missouri, etc., R. Co. v. Jahn* (Civ. App.), 42 S. W. 1042; *Houston, etc., R. Co. v. Smith* (Civ. App.), 46 S. W. 1046.

**(bb) Mere Reference to Record Insufficient.**

**In General.**—Statements in a brief are required to expedite and lessen the labors of a court, and mere references to the record do not attain that result. *Haley v. Davidson*, 48 Tex. 615; *McManus v. Wallis*, 52 Tex. 534; *Bayne v. Denny*, 21 Tex. Civ. App. 435, 52 S. W. 983, affirmed in 93 Tex. 635, no op.; *Carlisle v. Gibbs*, 44 Tex. Civ. App. 189, 98 S. W. 192; *Robertson v. Warren*, 45 Tex. Civ. App. 584, 100 S. W. 805; *Waggoner v. Missouri, etc., R. Co.* (Civ. App.), 92 S. W. 1028; *Colorado Canal Co. v. McFarland* (Civ. App.), 109 S. W. 435; *Galveston, etc., R. Co. v. Olds* (Civ. App.), 112 S. W. 787; *Houston Oil Co. v. Kimball* (Civ. App.), 114 S. W. 662; *Walker v. International, etc., R. Co.* (Civ. App.), 117 S. W. 1020; *St. Louis, etc., R. Co. v. Lane* (Civ. App.), 118 S. W. 847; *Johnson v. Hulett* (Civ. App.), 120 S. W. 257; *Broussard v. South Tex. Rice Co.* (Civ. App.), 120 S. W. 587.

References to the record are required merely to verify statements made in the brief. *Mumme v. Gates* (Civ. App.), 120 S. W. 1046. See, also, *International, etc., R. Co. v. Vanlandingham*, 38 Tex. Civ. App. 206, 85 S. W. 847, affirmed in 101 Tex. 644, no op.; *Johnson v. Lyford*, 9 Tex. Civ. App. 85, 29 S. W. 57; *Laing v. Hanson* (Civ. App.), 36 S. W. 116.

A mere naked reference to a pleading as a whole, with the pages of the

record where it is to be found, is clearly not sufficient in assigning error to the ruling of the court in passing upon special exceptions to particular allegations in such pleading. The statement as to such allegations may be brief, but there must be some statement of their substance. *Colorado Canal Co. v. McFarland* (Civ. App.), 109 S. W. 435.

A statement consisting of "see plaintiff's first amended original petition (Tr. pp. 2-10)," is not the statement contemplated by the rules. *Broussard v. South Tex. Rice Co.* (Civ. App.), 120 S. W. 587.

In *Rusher v. Dallas*, 83 Tex. 151, 18 S. W. 333, the statement in appellant's brief under his proposition referred to the record for the petition. The supreme court held that the brief did not comply with the rules and they were not required to consider the case further, but might do so.

**Reference to Transcript Merely Insufficient.**—The rules require a statement from the transcript, and reference to the proper page, in support of each proposition. A reference to the transcript merely is not sufficient, and propositions thus submitted will not be considered. The court can not undertake to search the records for the purpose of supplying defects in the briefs. *Johnson v. Lyford*, 9 Tex. Civ. App. 85, 29 S. W. 57; *Kirby Lumber Co. v. Chambers*, 41 Tex. Civ. App. 632, 95 S. W. 607, affirmed in 101 Tex. 645, no op.

**Mere Reference to Bill of Exceptions Insufficient.**—Where the statement under an assignment of error refers merely to defendant's bill of exceptions, it is insufficient. It is not a part of the duties of the appellate court to study the bill of exceptions to ascertain whether there is any possible force or merit in the assignment based upon it. *San Antonio, etc., R. Co. v. Spencer* (Civ. App.), 119 S. W. 716; *Taylor v. Davidson* (Civ. App.), 120 S. W. 1018; *Heintz v. O'Donnell*, 17 Tex. Civ. App. 21, 42 S. W. 797.

Assignments of error based upon the ruling of the court in admitting or rejecting testimony, referring to certain bills of exceptions, by number, for appellant's reasons for claiming that the court erred, are insufficient where appellant's brief nowhere give the reasons for the assertions that the court committed error in the rulings referred to, and in order to ascertain why he charges error in these matters it is necessary to examine the bills of exceptions in the record, which the rules of court are designed to relieve the court from, except where counsel for the parties differ as to what appears therein. *Robertson v. Coates*, 1 Tex. Civ. App. 664, 673, 20 S. W. 875, affirmed in 93 Tex. 694, no op.

**Reference to Statement of Facts Not a Compliance with Rule.**—In *Bynum v. Hobbs* (Civ. App.), 121 S. W. 900, the statement made in support of the appellant's proposition referred the court to the entire statement of facts in support of its assertion, saying that "we feel it impossible to make reference to the portion of the statement of facts fully showing the condition of the evidence under this issue, and therefore refer the court to the entire statement of facts." It was held that the statement made in support of the proposition could not be considered as a compliance with the rule.

An assignment to the exclusion of certain testimony can not be considered where the brief refers the appellate court to no bill of exception, but refers to the statement of facts where it is found that the court sustained defendants' objection to this testimony, and plaintiff excepted but no mention is made of the ground of the objection. *Ingenhuett v. Hunt*, 15 Tex. Civ. App. 248, 39 S. W. 310, affirmed in 93 Tex. 710, no op.; *Uecker v. Zuercher* (Civ. App.), 118 S. W. 149, 152.

**(cc) Insufficiency of Reference to Other Parts of Brief.**

A reference to another part of the

brief of the appellant, where almost the entire evidence is copied, is not such a statement under an assignment of error as the rules governing appeals contemplate. *Gulf, etc., R. Co. v. Pearce*, 43 Tex. Civ. App. 387, 95 S. W. 1133, affirmed in 101 Tex. 639, no op.

**(dd) Sufficiency of Reference to Preliminary Statement.**

**In General.**—It is neither necessary nor proper to repeat in the statement what has already been presented in the general preliminary statement before mentioned. It will be sufficient in such case to refer to such preliminary statement by the page or pages of the brief on which the particular matter is found. Rule 31 of Rules for Courts of Civil Appeal, as amended 1906. See *Peach River Lumber Co. v. Ayers*, 41 Tex. Civ. App. 334, 91 S. W. 387, affirmed in 101 Tex. 652, no op.

**When Such Reference Insufficient.**—When assignments of error involving distinct and independent questions are merely copied into the brief and submitted as propositions, with a statement at the foot of each, "see statements of fact, ante," referring to a preliminary statement of the facts in the brief, such assignments will not be considered. *Gammon v. Sigel*, 43 Tex. Civ. App. 199, 95 S. W. 730, affirmed in 101 Tex. 638, no op.

**(ee) Sufficiency of Statement Made under So-Called "Argument."**

In *Cobb v. Johnson*, 101 Tex. 440, 108 S. W. 811, affirming 105 S. W. 847, the statement of facts, though made under what was called the "argument," was so separated as not to be mistaken, and gave the substance of the testimony, referring to the pages of the transcript, and recited that it embraced all the testimony on the issue. This was held sufficient to entitle the assignment of error to consideration. See, also, *Luling, etc., Mfg. Co. v. Gohmert* (Civ. App.), 110 S. W. 772.



**(ff) Statement Not Invalid by Reason of Containing Additional Matter Not Germane to Question.**

An assignment of error will not be disregarded because the statement thereunder, which contains all there is in the record bearing on the question presented, also contains other matter not germane thereto. *Green v. Houston, etc., Co.*, 40 Tex. Civ. App. 260, 89 S. W. 442.

**bb. Applications of Rule.**

**Where Assignment Alleges Error in Ruling on Pleadings.**—Assignments of error complaining of rulings on special exceptions to plaintiff's petition, followed by a statement which does not point out the particular portion of the petition excepted to and does not set out or give the substance of the defendant's exception to the petition, can not be considered. *Munroe v. Munroe* (Civ. App.), 116 S. W. 878.

An assignment of error that the court "erred in not sustaining the defendant's first and second special exceptions, as per bill of exceptions number 1," will not be considered on appeal, where appellant's brief contains no statement of the pleadings of the appellee to which such exceptions were addressed. *D'Arrigo v. Texas Produce Co.*, 18 Tex. Civ. App. 41, 44 S. W. 531.

Statements upon propositions advanced under plaintiff's assignments of error, which set out in full the special exceptions referred to, but for the particular portions of the answer to which they are addressed and the rulings of the court refer simply to the pleading as a whole, without setting out the particular allegations complained of, are not sufficient. *Colorado Canal Co. v. McFarland* (Civ. App.), 109 S. W. 435.

When the plaintiff appeals from a final judgment upon a demurrer to his petition, and in his brief does not set out the substance of the petition, the appellate court is not required to consider the case further. Rules 24 and 25.

*Rusher v. Dallas*, 83 Tex. 151, 18 S. W. 333.

In *Kampman v. Rothwell* (Civ. App.), 107 S. W. 120, the first assignment of error was that "the court erred in overruling appellant's demurrer to the petition." There was no reference in the statement to any demurrer that was presented to the petition, and it was only by a reference to the amended answer that it was ascertained that only a general demurrer was presented. The statement was not such a one as is contemplated by the rules.

A statement under an assignment that "the petition contains no sufficient description of the land by metes and bounds or by any certain matter of description or identity and is manifestly void for uncertainty," does not point out the particular defect, and the description appearing to be sufficient on its face, the court is not called upon to search for the supposed defect. *Henry v. McNew*, 29 Tex. Civ. App. 288, 69 S. W. 213, affirmed in 97 Tex. 636, no op.

Where the error assigned is that "the trial court erred in overruling defendant's general demurrer to first amended petition," and the proposition thereunder is general and abstract, and there is no statement thereof, the assignment is not properly presented. *San Antonio, etc., R. Co. v. Spencer* (Civ. App.), 119 S. W. 716, 717.

Where the second proposition under an assignment of error that "the court erred in sustaining defendants' plea in abatement and dismissing plaintiff's suit on the evidence" was as follows: "The receiver had authority to bring and maintain this suit as shown by his letters of appointment and application therefor," and where the statement under this proposition only shows that the order of the county court appointing the appellant receiver authorized him to enter into a contract for G., with attorneys to recover any real property to which he may be entitled,

it was held that the plea in abatement not being copied in the statement, and no statement being made of the substance of the plea or of the grounds therein urged for the abatement of the suit, the appellate court can not say that the fact that the order appointing the receiver authorized him to contract with attorneys for the recovery of any land belonging to G. was an answer to the plea, or that because this fact was shown the court erred in sustaining such plea. *Gray v. Fuller* (Civ. App.), 117 S. W. 919, 920.

**Where Assignments Alleges Error in Rulings on Evidence, Competency and Examination of Witnesses, etc.**—Where complaint is made of the admission or rejection of evidence, enough of the evidence on the proposition to explain and support it must, under rule 31, be given in appellant's brief. *Galveston, etc., R. Co. v. Olds* (Civ. App.), 112 S. W. 787.

Assignments of error contending that the court erred in admitting certain testimony over objections does not comply with the rules of briefing, and could not be considered, where the grounds of such objections are not set out in the assignments nor in any statement therein, and the appellate court is not referred to the record for such information. *Stone v. Stitt* (Civ. App.), 121 S. W. 187, (citing Rules 24, 25, 29, and 31); *Scanlon v. Galveston, etc., R. Co.*, 45 Tex. Civ. App. 345, 100 S. W. 982, affirmed in 102 Tex. 592, no op.; *Poland v. Porter*, 44 Tex. Civ. App. 334, 98 S. W. 214.

An assignment of error to the admissibility of certain evidence claimed to be immaterial, irrelevant and calculated to prejudice defendant's rights, can not be considered, when there is no proper statement in appellant's brief in connection with the assignment, as the appellate court can not determine that there was not some issue of fact or phase of the case which made the testimony relevant. *Ackermann v. Acker-*

*mann Schuetzen Verein* (Civ. App.), 60 S. W. 368, 368.

Where the briefs of parties fail to set out sufficient of the evidence to enable the appellate court to determine the relevancy or irrelevancy of evidence objected to on that ground, an assignment of error based on the admission or exclusion of said evidence can not be considered. *Seago v. White*, 45 Tex. Civ. App. 539, 100 S. W. 1015. And see *Galveston, etc., R. Co. v. Olds* (Civ. App.), 112 S. W. 787.

Where an assignment of error is to the admission of evidence, and the evidence is not stated in the propositions made under the assignment, and the page of the transcript where it may be found is not cited, the assignment will not be considered. *Westinghouse Elec. Mfg. Co. v. Troell*, 30 Tex. Civ. App. 200, 70 S. W. 324, affirmed in 97 Tex. 651, no op. And see *Houston, etc., R. Co. v. Buchanan*, 48 Tex. Civ. App. 129, 107 S. W. 595; *Morgan v. Barber* (Civ. App.), 99 S. W. 730, affirmed in 102 Tex. 588, no op.

An assignment of error to the admission of certain evidence can not be sustained, where the testimony set out in the bill of exceptions as objected to is not quoted in the brief, and seems to have been admissible, while that which is quoted in the brief from the statement of facts as objectionable does not seem to have been objected to. *Mayfield Lumber Co. v. Carver*, 27 Tex. Civ. App. 467, 66 S. W. 216, affirmed in 95 Tex. 682, no op.

In *Draughon v. Sterling* (Civ. App.), 103 S. W. 689, assignments of error and the statement thereunder did not set forth what the evidence was that was objected to, and there was no reference in either to the bill of exceptions. It was held that this was not a compliance with the rules.

Where the proposition under an assignment is: "A verdict manifestly based on testimony not admissible will be set aside," and the statement given

in brief does not specify what testimony is claimed to have been inadmissible, nor why inadmissible, it will be overruled. *Stark v. Burkitt* (Civ. App.), 120 S. W. 939, 941.

An assignment of error to the admission of certain testimony can not be considered, where it does not appear from a statement whether the testimony objected to was favorable or unfavorable to the complainant. *Schneider v. Rabb* (Civ. App.), 100 S. W. 163.

Where an assignment of error assails the admission in evidence of "testimony of G. H. R. as set out in defendant's bill of exceptions No. 3," and does not set out in the brief where the testimony was, the only effort at a statement being a question propounded to G. H. R. by appellee, held, the assignment is not presented with due regard to the ruling governing assignments of error. *San Antonio, etc., R. Co. v. Spencer* (Civ. App.), 119 S. W. 716, 717.

An assignment that the court erred in admitting an answer to a certain interrogatory can not be considered, where the statement of facts mingles that answer and the answer to another interrogatory and affords no means of separating the two. *Barnet v. Houston*, 18 Tex. Civ. App. 134, 44 S. W. 689, affirmed in 93 Tex. 700, no op.

Where testimony taken by itself might be objectionable, the party complaining of its admission must make it appear by the statement in his brief that there was no other testimony in the case to the same effect, in order to show that he was probably injured thereby. *Consolidated Kansas City, etc., Ref. Co. v. Binkley*, 45 Tex. Civ. App. 100, 99 S. W. 181, affirmed in 102 Tex. 581, no op.

The court of civil appeals have repeatedly held that they are not required to examine the statement of facts in order to ascertain the relevancy or rejected evidence, but that its im-

portance and materiality should appear from some statement contained in the brief. *Land v. Roby* (Civ. App.), 120 S. W. 1057, 1088; *Wilkins v. Clawson* (Civ. App.), 110 S. W. 103; *Houston v. Richardson*, 42 Tex. Civ. App. 147, 94 S. W. 454; *Eckert v. McDermott*, 45 Tex. Civ. App. 80, 99 S. W. 572.

The appellate court will ignore an assignment of error taken to the trial court's refusal to admit in evidence a deposition of a witness to contradict another deposition of the same witness, where the brief fails to point out the differences in the testimony. *Mississippi Mills v. Bauman*, 12 Tex. Civ. App. 312, 34 S. W. 681, affirmed in 93 Tex. 714, no op.

In the absence of a statement in appellant's brief of evidence to show that a witness was not qualified to give an opinion upon a certain matter, the appellate court will presume, in favor of the ruling of the trial court, that he was. *El Paso, etc., Ry. Co. v. Smith*, 50 Tex. Civ. App. 10, 108 S. W. 988.

**Where the statements under assignments of error relating to the admissibility of testimony do not show what objections to the testimony were urged,** the assignments will not be considered. *Texas Cent. R. Co. v. Miller* (Civ. App.), 88 S. W. 499. And see *Missouri, etc., R. Co. v. Matlock*, 44 Tex. Civ. App. 565, 99 S. W. 1052, affirmed in 102 Tex. 587, no op.; *Jones v. Humphreys*, 39 Tex. Civ. App. 644, 648, 88 S. W. 403, affirmed in 101 Tex. 645, no op.

Where an assignment complained of the refusal of the court to have plaintiff put on the stand as a witness and of its permitting his two depositions to be read, in which there were alleged contradictory statements, and the statement in the brief, made under the proposition submitted, merely gave quotations from such depositions, but did not show by reference to the record that plaintiff was in attendance at the trial, or that the ruling complained

of was made, or that any exception was taken thereto, the assignment would not be considered. Rule 31, Courts of Civil Appeals. *Texas, etc., R. Co. v. Lee*, 32 Tex. Civ. App. 23, 74 S. W. 345, affirmed in 97 Tex. 648, no op.

**Necessity for Showing Reservation of Exceptions.**—Where it does not appear from the statement in appellant's brief that a bill of exceptions to the admission of evidence complained of was reserved, the assignment will not be considered. *Saenz v. Mumme & Co.* (Civ. App.), 85 S. W. 59; *Morgan v. Barber* (Civ. App.), 99 S. W. 730, affirmed in 102 Tex. 588, no op.

**Where Assignment Alleges Error in Conclusions of Fact, etc.**—In *Weil v. Martinez* (Civ. App.), 124 S. W. 116, 117, an assignment of error was directed to conclusions of fact by the trial court, and in the statement was set out certain evidence contrary to the findings; but it was not stated directly or by inference that it was all the evidence on the question. It was held, that it could not be held that the conclusions were not supported by evidence.

**Where Assignment Alleges Error in Giving or Refusal of Charges.**—Under rule 31 assignments of error complaining of the court's charges can not be considered where the charges referred to in the assignment are not incorporated or referred to in the statement subjoined to the propositions under them. *Feagan v. Barton-Parker Mfg. Co.*, 42 Tex. Civ. App. 373, 93 S. W. 1076; *Galveston, etc., R. Co. v. Stevens* (Civ. App.), 94 S. W. 395, affirmed in 101 Tex. 637, no op.; *Holmes v. Adams* (Civ. App.), 100 S. W. 816.

Where an assignment alleges error in the charge of the court, the portions complained of should be copied in the statement following the proposition, with reference made to the pages of the record on which they may be found. *Parker County v. Jackson*, 5

Tex. Civ. App. 36, 23 S. W. 924; *Holton v. Galveston, etc., R. Co.*, 31 Tex. Civ. App. 128, 71 S. W. 408, affirmed in 97 Tex. 636, no op.

Charges or parts of charges questioned, not set out in the brief, will not be considered, as under Rule 29 (47 S. W. v), they are regarded as abandoned. *Horseman v. Coleman County* (Civ. App.), 57 S. W. 304.

A proposition asserting error in a charge should be followed by a statement showing such charge to have been given, with citation of the page of the record where it may be found. *Cooper v. Hiner*, 91 Tex. 658, 45 S. W. 554; *Westinghouse Elec. Mfg. Co. v. Troell*, 30 Tex. Civ. App. 200, 204, 70 S. W. 324, affirmed in 97 Tex. 651, no op.; *Galveston, etc., R. Co. v. Puente*, 30 Tex. Civ. App. 246, 70 S. W. 362; *Parker County v. Jackson*, 5 Tex. Civ. App. 36, 40, 23 S. W. 924; *Holton v. Galveston H. & S. A. Ry. Co.*, 6 Tex. Ct. Rep. 112; *Texas & Ry. Co. v. Lee*, 7 Tex. Ct. Rep. 44; *Gray v. Moore*, 37 Tex. Civ. App. 407, 410, 84 S. W. 293; *Pippin v. Hayward Lumber Co.* (Civ. App.), 96 S. W. 635.

Assignments as to charges are not entitled to be considered where there is no statement or other matter given in connection with them to show wherein the charges were not correct. *Shiner v. Shiner*, 15 Tex. Civ. App. 666, 671, 40 S. W. 439, affirmed in 93 Tex. 720, no op.

Where an assignment of error to the giving of a charge was followed by a statement that "the testimony being conflicting as to every material point, and strongly in support of plaintiff's cause of action upon every question presented by the pleadings, it was error for the court to so invade the province of the jury," held, such statement, though correct as a proposition, was insufficient as a statement and could not by any latitude of construction, be considered "a brief statement, in substance, of such proceedings, or part

thereof, contained in the record, as will be necessary and sufficient to explain and support the propositions," as is required by rule 31 (67 S. W. xvi). *Walker v. Texas, etc., R. Co.* (Civ. App.), 112 S. W. 430.

Assignments of error complaining of the refusal of special charges will not be considered, when not followed by statements showing that the charges were requested or that they were refused. *Gilmore v. Houston Elec. Co.*, 46 Tex. Civ. App. 315, 102 S. W. 168.

Where requested charges are refused by the court and error is assigned to such refusal, the statement in the appellant's brief should contain the refused charges or show their purport. *First Nat. Bank v. Stephens*, 19 Tex. Civ. App. 560, 47 S. W. 832, affirmed in 93 Tex. 659, no op.; *Laing v. Hanson* (Civ. App.), 36 S. W. 116; *San Antonio, etc., R. Co. v. Robinson*, 73 Tex. 277, 11 S. W. 327.

And assignments of error to the refusal of requested charges, not followed by a statement showing what the charges were, and giving no reference to any page of the record containing such charges, can not be considered. *Butler v. Holmes*, 29 Tex. Civ. App. 48, 68 S. W. 52. And see *Postal Tel.-Cable Co. v. Sunset Const. Co.* (Civ. App.), 109 S. W. 265; *Montgomery v. Amsler* (Civ. App.), 122 S. W. 307; *Kampman v. Rothwell* (Civ. App.), 107 S. W. 120.

**If facts exist rendering the rejection of a charge prejudicial**, they should be pointed out. *Chicago, etc., R. Co. v. Thompson* (Civ. App.), 124 S. W. 144, in which case the statement set out the rejected charge only.

Where the giving or refusal of an instruction, which undertakes to apply the law to the facts, is complained of, it is not sufficient, within rule 31, to set out in appellant's brief the charge or its substance, but enough of the evidence on the proposition to explain and support it should also be given. *Gal-*

*veston, etc., R. Co. v. Olds* (Civ. App.), 112 S. W. 787.

An assignment of error to the court's refusal to give certain charges is futile where no evidence is set out under it, or otherwise appearing, such as would have warranted the giving of the charges. *Ft. Worth, etc., R. Co. v. Kelley*, 33 Tex. Civ. App. 442, 76 S. W. 942; *El Paso Elec. R. Co. v. Furber*, 45 Tex. Civ. App. 348, 100 S. W. 1041, affirmed in 102 Tex. 582, no op.; *Burke v. Holmes* (Civ. App.), 80 S. W. 564; *Davidson v. Jefferson* (Civ. App.), 76 S. W. 765, affirmed in 97 Tex. 630, no op.; *Hirsch v. Patton*, 49 Tex. Civ. App. 499, 108 S. W. 1015; *International, etc., R. Co. v. Stewart* (Civ. App.), 101 S. W. 282; *Laing v. Hanson* (Civ. App.), 36 S. W. 116.

Assignments of error complaining of the refusal to submit certain issues to the jury can not be considered, where the requested charges are not set out in appellant's briefs, as it can not be assumed that they were material. *Armstrong v. Elliott*, 20 Tex. Civ. App. 41, 48 S. W. 605, 49 S. W. 635, affirmed (see 93 Tex. 654, no op.).

An assignment of error complaining of the refusal of the court to give a special charge, and in overruling a paragraph of the defendant's motion for a new trial, is too general where the special charge is not copied in the statement following the assignment, and there is no reference in the record to the charge. *Briggs v. New South Lumber Co.* (Civ. App.), 117 S. W. 885, 886.

Where the correctness of a requested instruction would depend on the state of the testimony, an assignment of error complaining of the refusal of such charge should, in their brief, in connection with such assignment, refer to the evidence making such charge applicable. *Gulf, etc., R. Co. v. Beattie* (Civ. App.), 88 S. W. 367. In the case the brief merely said: "See statement under first assignment." On looking there, there is found what is supposed

to be a copy of all the testimony in the case, covering thirty-three pages of printed matter. The court of civil appeals held, that, under the rule, they ought not to give such assignment any further notice.

Where an assignment of error to the refusal of a lengthy charge embracing all of the issues in the case, is followed by this statement: "See appellant's special charge as requested. Tr. p. 11. Also the evidence of A. McTavish, raising the issue. Statement of facts, p. 67," it is wholly insufficient under the rules for briefing, requiring "a brief statement, in substance, of such proceedings, or part thereof, contained in the record, as will be necessary and sufficient to explain and support the proposition with reference to the pages of the record." Rule 31 (67 S. W. xvi). *Louisiana, etc., Lumber Co. v. Kennedy* (Civ. App.), 119 S. W. 884, 888.

A statement, in support of an assignment that the court erred in directing a verdict for defendant, reciting that, the testimony being conflicting as to every material point, and strongly in support of plaintiff's cause of action on each question presented by the pleadings, it was error for the court to so invade the province of the jury, while correct as a proposition, is insufficient as a statement. *Walker v. Texas, etc., R. Co.* (Civ. App.), 112 S. W. 430.

Under an assignment of error that the court erred in refusing to give a peremptory instruction for the defendant, a statement simply that "there was no affirmative proof showing how the wreck was caused," does not exclude the idea that there was some evidence showing that the wreck was caused in the manner alleged by the plaintiff, and a failure to set out such evidence absolves the appellate court from the duty of considering the assignment. *Texas, etc., R. Co. v. Clippenger*, 47 Tex. Civ. App. 510, 106 S. W. 135, affirmed, no op.

Where an action was brought to recover for death through the negligence of defendant's servant, and defendant pleaded negligence of a fellow servant, contributory negligence assumed risk, and that deceased was, at the time, in the service of an independent contractor, and error was assigned as to the direction of a verdict for defendant, and the statement under such assignment made no reference to any other issue than that as to the independent contractor, held, that such assignment could not be considered, as it would require the appellate court to go through the entire record, with no assistance from the brief, in order that they could understand the state of the evidence on the other issues. *Walker v. Texas, etc., R. Co.* (Civ. App.), 112 S. W. 430, 431.

An assignment complaining of a charge submitting the issue of good faith in incurring the community debts for which the land was sold by the survivor, is properly and sufficiently briefed where the statement forming part of the brief informs the court that the language of the charge is given in the assignment; that the existence of the debts was proved and admitted, referring to the pages of the record, and that there was no evidence as to whether the debts were or were not fairly and honestly made. *Cage v. Tucker*, 29 Tex. Civ. App. 586, 69 S. W. 425.

**Where Assignment Alleges Error in Refusal to Allow Amendment.**—Plaintiff, the receiver of the estate of an insane person, brought suit, and defendants filed a plea in abatement, which was sustained, and the suit dismissed. On appeal plaintiff assigned as error the refusal of the trial court to allow an amendment to his petition, and the statement accompanying the assignment was that "the grounds for abating the suit were laid down in defendants' answer as the improper procedure employed by the county court in making the appointment and the incapacity of

the receiver to maintain the suit." Held, that the statement was insufficient, as not showing that any request for leave to amend was made by plaintiff and refused by the court, and, if this request could be inferred, the statement would still be insufficient because it fails to show when or under what circumstances such request was made, or to state any facts which indicate that any error was committed in refusing to permit the amendment. *Gray v. Fuller* (Civ. App.), 117 S. W. 919, 920.

**Where Assignment Alleges Error in Ruling on Motion for Continuance.**—An assignment of error to the overruling of a motion for a continuance, where the statement following the assignment does not show the grounds of the motion, nor set out the motion itself, but only refers to a bill of exception, in the record, is not a sufficient compliance with rule 31 (67 S. W. xvi) requiring that the statement shall contain enough "of the proceedings, or part thereof, contained in the record as will be necessary and sufficient to explain and support the proposition, with a reference to the pages of the record." *Texas, etc., R. Co. v. Powell* (Civ. App.), 112 S. W. 697, 698.

**Where Assignment Alleges Error in Ruling on Motion for New Trial.**—The appellate court will not consider an assignment to the overruling of a motion for a new trial, as to the recovery of damages for cutting timber, on the ground that the uncontradicted evidence showed that the timber cut was not on the land claimed by appellees, where such assignment is not followed by a statement of all the evidence on the subject, or, at least, of all that tending to sustain the verdict. *Louisiana, etc., Lumber Co. v. Kennedy* (Civ. App.), 119 S. W. 884, 888.

**(c) Must Not Contain Arguments, Reasons or Inferences.**

It is expressly provided by rule of

court that the statement must not contain "arguments, reasons, conclusions or inferences." Rules for Courts of Texas 30 and 31. *Shanks v. Carroll*, 50 Tex. 17; *Texas Land Co. v. Williams*, 48 Tex. 602; *McManus v. Wallis*, 52 Tex. 534; *Galveston, etc., R. Co. v. Smith*, 24 Tex. Civ. App. 127, 57 S. W. 999, affirmed in 94 Tex. 705, no op. And see *Openshaw v. Dean* (Civ. App.), 125 S. W. 989.

"The proper place for each and all of these is in the argument, provided for under rules from 48 to 52." *Texas Land Co. v. Williams*, 48 Tex. 602, 615.

"All inferences and deductions either from the authorities cited or from matters in the record thus stated, are to be presented to the court by an oral, written or printed argument." *Shanks v. Carroll*, 50 Tex. 17, 23.

The propositions, or assignments of error submitted as propositions, in an appellant's brief, should each present a single idea, a distinct ground for reversal, and be supported by a statement giving not argumentative deductions, but copies of the charge complained of or other matter in the record, or at least its substance. *Cage v. Tucker*, 25 Tex. Civ. App. 48, 60 S. W. 579.

The statement in a brief of the evidence pertinent to a proposition should contain a brief summary of the evidence upon the point, and not the bare statement of the legal conclusions of the writer as to the effect of the evidence, with a reference to pages of the transcript. *McDonald v. McCrabb*, 47 Tex. Civ. App. 259, 105 S. W. 238.

The statement under an assignment of error, treated as a proposition, is not sufficient to require its consideration under the rules where, instead of stating from the record the evidence pertaining to the proposition, a conclusion as to the effect of the evidence is stated. *Galveston, etc., R. Co. v. Smith*, 24 Tex. Civ. App. 127, 57 S. W. 999, affirmed in 94 Tex. 705, no op.

A statement accompanying the proposition, that plaintiff filed two papers, not named nor described, further than that, taken together, they contain all the requirements of certain designated articles of the Revised Statutes, is the statement of a legal conclusion, and not of facts taken from the record, as required by the rules. *Lowenthal-Harrison Co. v. Edmiston Bros.*, 40 Tex. Civ. App. 265, 89 S. W. 308.

**(d) Necessity and Purpose of Reference to Record.**

**Necessity.**—The reference to the pages of the record, as required by rule 31, should be strictly observed, as an act of justice to the opposite party, as well as to aid the court in deciding the disputed points made by the parties, or to verify the statements made by them. *Texas Land Co. v. Williams*, 48 Tex. 602; *Stockton v. Brown* (Civ. App.), 106 S. W. 423; *Storms v. Mundy*, 46 Tex. Civ. App. 88, 101 S. W. 258, affirmed in 102 Tex. 593, no op.; *San Antonio Traction Co. v. Haines*, 45 Tex. Civ. App. 289, 100 S. W. 788, affirmed in 102 Tex. 592, no op.; *Stark v. Burkitt* (Civ. App.), 120 S. W. 939.

When no reference is made to the pages of the record where the evidence, set out in a statement, may be found, an assignment of error, based upon such evidence, will not be considered. *Beaumont Traction Co. v. Edge*, 46 Tex. Civ. App. 448, 102 S. W. 746, affirmed in 102 Tex. 578, no op.

In *Kampman v. Rothwell* (Civ. App.), 107 S. W. 120, it was held that the assignments of error referring to the refusal of charges asked by appellant, should have been followed by a statement showing, if nothing more, pages of the transcript on which the charges could be found so that they could be verified by the court.

**Purpose.**—References to the record are required merely to verify statements made in the brief. *Mumme v. Gates* (Civ. App.), 120 S. W. 1046.

And such reference alone is not a compliance with the rule as to statements. See ante, "Mere Reference to Record Insufficient," IV, B, 5, c, (2), (b), aa, (bb).

**(3) Conclusiveness of Statement.**

See post, "Necessity," VI, A.

**d. Impropriety of Reflections on Trial Court.**

In *Ray v. Pecos, etc., R. Co.*, 40 Tex. Civ. App. 99, 88 S. W. 466, the brief was full of reflections and strictures on the fairness and impartiality of the judge who tried the cause, and the court of civil appeals stated that it was only through consideration of the rights of appellant which might be jeopardized by the unauthorized conduct of his attorneys that the briefs were not stricken from the record.

In *Russell v. Nall*, 2 Tex. Civ. App. 60, 20 S. W. 1006, 23 S. W. 901, the appellate court condemned the conduct of the appellant for the language applied in his brief to the judge of the lower court, in which he charged that the judgment of the court was inspired by the malice of the judge.

For similar language applied by counsel in his brief to a judge of the district court, as shown in the case of *Smith v. State*, 5 Tex. 578, proceedings for contempt were instituted both in the district and supreme court; and in the district court the offending counsel was fined and his license revoked.

**6. Citation of Authorities in Support of Proposition.**

**In General.**—There should be annexed to each proposition, with its statement, and at the end of it, a reference simply to the authorities relied on, if any, in support of it, in the following order, to wit: The statutes and decisions of Texas; the statutes and decisions of the United States, if they are applicable to the case; elementary authorities; other decisions in the American and English courts. Rule 36 of



Rules for Courts of Civil Appeals. *Texas Land Co. v. Williams*, 48 Tex. 602.

In citing decisions, those most nearly in point should be cited first, and they should not, usually at least, be so numerous as to require a waste of time in their examination. Rule 39 of Rules for Courts of Civil Appeals. *Texas Land Co. v. Williams*, 48 Tex. 602.

"Rule 36 requires simply a reference to the authorities relied on at the end of each statement to a proposition, and indicates the order in which it should be done. The object of this is to enable either one or both of the parties to file briefs and arguments in their causes without personally attending the court, as our statutes evidently contemplate they shall have a right to do. And, further, it will furnish the court with the authorities when the arguments are oral only, as they may be. (Rule 48.)" *Texas Land Co. v. Williams*, 48 Tex. 602, 614.

The brief should contain a citation simply of the authorities relied upon to maintain the validity or correctness of the propositions asserted. *Shanks v. Carroll*, 50 Tex. 17, 23.

Where error was assigned to portions of the charge, the grounds of objection being that they were contrary to law and irrelevant to the issues and no authorities are cited, nor any aid whatever extended to the appellate court in the consideration of the points sought to be presented, the appellate court need not consider same. *Vann v. Denson* (Civ. App.), 120 S. W. 1020, 1022.

In *Turner v. Houston* (Civ. App.), 43 S. W. 69, no authority was cited in support of the propositions submitted by the plaintiffs in error under their several assignments, save and except that a general reference to the constitution of the state, without designation of any specific article, section, or clause, was made in support of the

proposition submitted under the third assignment, and the court therefore did not feel called on to make further investigation than to examine the record and compare the judgment with the petition, and, having done this, and not discovering any error which would, in their opinion, justify a reversal of the judgment, the same was affirmed.

**Style of Case to Be Given.**—Rule 36 requires when decisions are cited in a brief, that not only the volume and page of the record should be given, but also the style of the case relied on. *McCauley v. Long & Co.*, 61 Tex. 74, 81.

#### 7. Signature.

Though the rules of court require that the brief of the parties should be signed by the party or his counsel, yet in *Smith v. Fordyce* (Sup.), 18 S. W. 663, the supreme court considered the brief though not signed by any one.

#### 8. Requirement as to Written or Printed Briefs.

Rule 37 provides that the copies of briefs filed in the court of civil appeals shall be plainly written or printed, and if covering more than eight pages of foolscap, they shall be printed. *Heath v. Hall* (Civ. App.), 27 S. W. 160; *National Bank v. Lovenberg*, 63 Tex. 506, 512.

Briefs of counsel printed with a typewriting machine, when over eight pages long, will not be considered by the court as a compliance with the rules regulating briefs of counsel; nor will they, if less than eight pages, unless the typewriting is clean and legible. *National Bank v. Lovenberg*, 63 Tex. 506, 512.

A brief consisting of dim and closely typewritten matter covering nominally seven pages but really containing the material of about twice as many pages of properly written manuscript, is wholly inadmissible under the rules. *Stephens v. Taylor* (Civ. App.), 36 S. W. 1083, 1084.

In *Heath v. Hall* (Civ. App.), 27 S. W. 160, the filed copies of the appellant's brief were closely typewritten upon thin paper and partly in very small type so that as much matter was embraced as would cover 20 or 30 written pages of foolscap. Some of them were so closely written that the language could scarcely be read. In others a kind of ink was used, which, of itself, was taxing to the eyes to read. Such briefs were ordered stricken out and appellant required to file copies of his brief, properly written or printed, within 20 days from date under penalty of having the appeal dismissed for failure to do so.

**Discretionary with Court to Disregard Indistinctly Written Briefs.**—In *Bermea Land, etc., Co. v. Adoue*, 20 Tex. Civ. App. 655, 50 S. W. 131, the briefs were typewritten, and on account of defects in the mechanical work or for some other reason, it was difficult to read more than one copy of each brief, and some pages of the one copy even were very dim and almost illegible. The court said that as this was not the first instance in which similar departures from the rules had occurred, they deemed it their duty to say that if such practice was persisted in they would feel compelled thereafter to disregard such briefs.

## V. Amendments.

**General Rule as to Propriety of Amendments.**—Rule 38 of rules for the courts of civil appeals provides that a brief may be amended "by a citation of additional authorities to the respective points or propositions made in it, which must be filed and notice of it given to the counsel for the opposite party, if in attendance, one day before the case is called." *Neal v. Galveston, etc., R. Co.*, 37 Tex. Civ. App. 236, 83 S. W. 402, 403, affirmed in 98 Tex. 626, no op.; *Peck v. Peck* (Civ. App.), 83 S. W. 257 (see 98 Tex. 628, no op.);

*Half v. Goldfrank* (Civ. App.), 49 S. W. 1095, affirmed in 93 Tex. 708, no op.; *Western Union Tel. Co. v. Bryson*, 25 Tex. Civ. App. 74, 61 S. W. 548, affirmed in 94 Tex. 698, no op.; *Wells v. Houston*, 29 Tex. Civ. App. 619, 69 S. W. 183, affirmed in 97 Tex. 650, no op.; *Abernathy v. Southern Plow Co.* (Civ. App.), 62 S. W. 786; *Stubbs v. Marshall* (Civ. App.), 117 S. W. 1030; *Texas, etc., Ass'n v. Caruthers* (Civ. App.), 29 S. W. 48.

This is the only instance in which a party has the absolute right to amend his brief, for it is provided in the latter part of rule 38 that "no other amendment to the brief shall be allowed by the court, unless it is or can be done without injustice or unreasonable inconvenience being thereby imposed on the other party." *Peck v. Peck* (Civ. App.), 83 S. W. 257 (see 98 Tex. 628, no op.); *Neal v. Galveston, etc., R. Co.*, 37 Tex. Civ. App. 235, 236, 83 S. W. 402, affirmed in 98 Tex. 626, no op.

**Applications of Rule.**—An amendment of a brief, incorporating an entirely new proposition pointing out an error not theretofore relied on, offered on the eve of submission of the case, will not be permitted over objection of the adverse party. *Stubbs v. Marshall* (Civ. App.), 117 S. W. 1030, 1034.

The rules provide that briefs may be amended, by leave of the court, by the citation of additional authorities; but there is no rule which authorizes the presentation of an entirely new brief, with additional assignments of error, without leave of the court. *Texas, etc., Ass'n v. Caruthers* (Civ. App.), 29 S. W. 48, 50.

A brief can not be amended on the hearing so as to allow a proper arrangement of the assignments of error, with the propositions under them. *Neal v. Galveston, etc., R. Co.*, 37 Tex. Civ. App. 235, 236, 83 S. W. 402, affirmed in 98 Tex. 626, no op.

"If, after a motion attacking a brief for want of conformity to the rules has

been filed, together with a brief of the appellee, an amendment should be granted that would cure the defective brief, the rules would become nugatory." *Neal v. Galveston, etc., R. Co.*, 37 Tex. Civ. App. 235, 236, 83 S. W. 402, affirmed in 98 Tex. 626, no op.

On rehearing, the appellate court will not allow appellees to amend their brief so as to withdraw admissions of fact therein made and acted upon by the appellate court. *Avery v. Popper* (Civ. App.), 34 S. W. 325, 327.

## VI. Brief of Appellee or Defendant in Error.

### A. NECESSITY.

**In General.**—When the rules prescribed for the preparation of the case for submission have been fully complied with by the appellant or plaintiff in error, the appellate court will, in its discretion, regard his brief as a proper presentation of the case, without an examination of the record as contained in the transcript, and may found its decision thereon, unless the appellee or defendant in error shall also file a brief. Rule 40 of Rules for Courts of Civil Appeals. *El Paso, etc., R. Co. v. Boer* (Civ. App.), 108 S. W. 199; *Maffi v. Stephens* (Civ. App.), 93 S. W. 158. See, also, *Haley v. Davidson*, 48 Tex. 615; *Earnest v. Waggoner*, 49 Tex. Civ. App. 298, 108 S. W. 495.

If an appellee or defendant in error desires to present his side of a case to the appellate court, after his adversary has filed his brief in accordance with its rules, he should do so by briefs filed at least by the time the cause is submitted, and not by a motion for a rehearing after it has been decided adversely to him. *El Paso, etc., R. Co. v. Boer* (Civ. App.), 108 S. W. 199, 202.

In *Stringer v. Singleberry* (Civ. App.), 23 S. W. 1117, it was held that while the error assigned might be immaterial, yet as the case was not briefed by defendants in error, and ap-

peared material from the brief of plaintiffs in error, it was the duty of the appellate court to so treat it.

### Statements of Appellant's Brief Not Contested Considered as Acquiesced in.

—Whatever of the statements of the appellant or plaintiff in error in his brief is not contested, will be considered as acquiesced in. Rule 41 of Rules for Courts of Civil Appeals. A similar provision was made in rule 41 of the rules for the supreme court under the former practice. *Ghio v. Shutt*, 78 Tex. 375, 14 S. W. 860; *Meston v. Davies* (Civ. App.), 36 S. W. 805, affirmed in 93 Tex. 646, no op.; *Colorado Canal Co. v. McFarland* (Civ. App.), 109 S. W. 435; *Wetzel v. Satterwhite* (Civ. App.), 125 S. W. 93; *Denecamp v. Townsend* (Civ. App.), 33 S. W. 254; *Wolfe City Oil Co. v. George* (Civ. App.), 30 S. W. 672; *Miller v. Itasca, etc., Oil Co.* (Civ. App.), 41 S. W. 366.

It is the duty of the appellate court to accept as correct the statements in appellant's brief, the same not being controverted by the appellee. *Miller v. Itasca, etc., Oil Co.* (Civ. App.), 41 S. W. 366.

**Where an appellee in the court of civil appeals submits the cause on suggestion of delay under rule 43; but fails to file a brief in compliance with the rule, all the statements in appellant's brief as to the contents of the record will be considered as acquiesced in.** *Texas, etc., R. Co. v. Pennell*, 2 Tex. Civ. App. 127, 21 S. W. 273.

### B. PLACE, TIME AND MANNER OF FILING.

#### 1. Where Filed.

The appellee is required within a prescribed time to file a copy of his brief with the clerk of the court below. Rev. Stat., art. 1417 (1416a); Rule 101 of Rules for District and County Courts. *Niday v. Cochran*, 48 Tex. Civ. App. 259, 106 S. W. 462, 463; *Austin v. Cahill* (Civ. App.), 88 S. W. 536; *Werner v. Kasten* (Civ. App.), 25 S. W. 317; *Bowden v. Patterson* (Civ. App.), 108 S. W. 177.

And see *Patterson v. Seeton*, 19 Tex. Civ. App. 430, 47 S. W. 732, affirmed in 93 Tex. 716, no op.; *Morrow v. Terrell*, 21 Tex. Civ. App. 28, 50 S. W. 734, affirmed in 93 Tex. 715, no op.

He is also required to file with the clerk of the court of civil appeals four copies. Rev. Stat., art. 1417 (1416a); Rules 40, 41a, of Rules for Courts of Civil Appeals. *Niday v. Cochran*, 48 Tex. Civ. App. 259, 106 S. W. 462; *Werner v. Kasten* (Civ. App.), 25 S. W. 317; *Bowden v. Patterson* (Civ. App.), 108 S. W. 177. And see *Farris v. Gilder* (Civ. App.), 115 S. W. 645.

## 2. Time of Filing.

**In Trial Court.**—The copy of the brief of the appellee or defendant in error is to be filed with the clerk of the court below within 20 days after proper notice has been given by the clerk to said appellee or defendant in error or his attorney of record, of the filing of the brief of appellant or plaintiff in error. Rev. Stat., art. 1417 (1416a). *Niday v. Cochran*, 48 Tex. Civ. App. 259, 106 S. W. 462; *Elkins v. Kempner* (Civ. App.), 66 S. W. 576; *Webb v. Kirby Lumber Co.*, 48 Tex. Civ. App. 543, 107 S. W. 581; *Bowden v. Patterson* (Civ. App.), 108 S. W. 177; *San Antonio, etc., R. Co. v. Brock* (Civ. App.), 77 S. W. 953.

Under Rev. St., 1895, art. 1417, providing that when a brief is filed by appellant in the trial court, the clerk shall give notice to the appellee of such filing and that in 20 days after such notice the appellee shall file a copy of his brief with the clerk, the appellee has 20 full days after the day of notice in which to file the brief, and where appellant's briefs were filed on November 4th, and the case was set for submission in the appellate court on November 25th, as the 20 days would not have expired until the last moment of the 25th, the full 20 days to which the appellee was entitled had not expired and the appeal will be dismissed. *San*

*Antonio, etc., R. Co. v. Brock* (Civ. App.), 77 S. W. 953.

**As to dismissal of appeal** where brief of appellant or plaintiff in error is not filed in time to allow appellee or defendant in error the full time to which he is entitled within which to file his brief, see ante, "Effect of Failure to File in Prescribed Time and Manner," III, F.

**Allowance of Time to Appellee Where Appellant Ordered to File New Brief.**—In *Houston, etc., R. Co. v. Guisar* (Civ. App.), 27 S. W. 1045, where the brief of appellant or plaintiff in error was ordered stricken out and the case to be dismissed unless a brief in accord with the rules was filed within 60 days, it was also ordered that appellee have 30 days after appellant's brief was filed in which to file a reply.

**In Appellate Court.**—The brief of the appellee or defendant in error is to be filed by the time of calling of the case. Rules 40 and 41a of Rules for Courts of Civil Appeals. *El Paso, etc., R. Co. v. Boer* (Civ. App.), 108 S. W. 199.

**Right of Appellee or Defendant in Error to File Brief in Appellate Court Where Appellant Has Failed to Prepare Cause for Submission.**—When appellant or plaintiff in error has failed to prepare the case for submission, by the omission of what is required after bond or affidavit filed for appeal and for writ of error when citation served, the appellee or defendant in error, before the call of the case, may file in the appellate court a brief in the manner required of the appellant or plaintiff in error—except that his propositions will be shaped so as to show the correctness of the judgment—which the court may, in its discretion, regard as a correct presentation of the case, without examining the record further than to see that the judgment is one that can be affirmed upon the view of the case as presented by appellee or defendant in error. The

appellee or defendant in error shall be entitled to the custody of the transcript after it is filed in the appellate court, for the purpose of preparing his brief. Rule 42 of Rules for Courts of Civil Appeals. *Ball v. Dignowity* (Civ. App.), 68 S. W. 800; *Schulz v. Ruedrich* (Civ. App.), 81 S. W. 324.

The appellate court, on motion, will strike out appellant's brief, and consider the case as presented by appellee's brief, where no reason is given by appellant for his noncompliance with provision of the statute as to the preparation and filing of briefs, the delay having prevented appellee from seeing the brief and replying to same. *Vernon v. Montgomery* (Civ. App.), 33 S. W. 608.

### C. FORM, REQUISITES AND SUFFICIENCY.

**In General.**—Generally speaking, the same rules as to the form, requisites and sufficiency of the brief by the appellant or plaintiff in error, apply to the brief of the appellee or defendant in error. Rules 40, 41 and 45 of Rules for Courts of Civil Appeals. See ante. "Contents, Form and Sufficiency," IV, B; post, "Procedure Where Brief or Briefs Found Insufficient," VII. And see *Meston v. Davies* (Civ. App.), 36 S. W. 805, affirmed in 93 Tex. 646, no op.

**Incorporation of Cross Assignments of Error.**—In *Willis v. Smith*, 72 Tex. 565, 10 S. W. 683, appellee filed cross assignments of error, but they were not referred to in his brief, nor were the independent propositions contained in his brief predicated upon his assignments of error, nor were they in any way germane to his assignments. It was held that the questions attempted to be presented by appellee's independent propositions could not, therefore, be considered.

By Rule 101 of the rules for the district and county courts, it is provided that "the appellee or defendant in error may file cross assignments with

the clerk of the trial court when he files his brief, which assignments may be incorporated in his brief and need not be copied in the transcript. In such case one of the copies filed in the courts of civil appeals shall contain a certificate of the clerk of the trial court showing that it is a copy of the brief filed in his office, and the date of its filing." *Lauchheimer & Sons v. Coop*, 99 Tex. 386, 89 S. W. 1061, 90 S. W. 1098, reversing 86 S. W. 57; *Farris v. Gilder* (Civ. App.), 115 S. W. 645; *Meyers v. Maverick* (Civ. App.), 28 S. W. 716; *Austin v. Cahill* (Civ. App.), 88 S. W. 536.

Where no such certificate is shown by any of the briefs of the defendant in error filed in the appellate court, the cross assignment will not be considered. *Farris v. Gilder* (Civ. App.), 115 S. W. 645.

Assignments of error insisted on by appellee in his brief can not be considered where the record does not show that they were filed in the district court, and there is no indorsement on appellee's brief showing that a copy thereof had been filed in the district court. *Patterson v. Seeton*, 19 Tex. Civ. App. 430, 47 S. W. 732, affirmed in 93 Tex. 716, no op.; *Morrow v. Terrell*, 21 Tex. Civ. App. 28, 50 S. W. 734, affirmed in 93 Tex. 715, no op.

An appellee who files cross assignments of error in the office of the district clerk, but who fails to present such cross assignments in his brief in the court of civil appeals, as required by district court rule No. 101, waives such cross assignments. *Lauchheimer & Sons v. Coop*, 99 Tex. 386, 89 S. W. 1061, 90 S. W. 1098, reversing 86 S. W. 57.

In *Meyers v. Maverick* (Civ. App.), 28 S. W. 716, the court of civil appeals inclined to the belief that an opinion on a certain point might well have been pretermitted, as there was no cross assignment copied into the brief,

as provided for by rule 101 for district and county courts. The court, in this case, held that: "If there be any reason for requiring the copying of assignments of errors into briefs, it would evidently apply with as much force to appellees as to appellant."

On an appeal from a justice court, a cross assignment of error incorporated in appellee's brief, shown to have been filed in the district court by the clerk's certificate thereon, may be considered in the court of civil appeals, though the cross assignment is not separately filed in such court. *Galveston, etc., R. Co. v. Geyer* (Civ. App.), 49 S. W. 251.

**Counter Statement of Matters in Record.**—If the statement is contradicted by the appellee, he must make his counter statement of matters in the record in reference to the same point. *Haley v. Davidson*, 48 Tex. 615, 619.

Where appellee objected that appellant's statement of facts was imperfect or erroneous, the proper practice is to set forth the objections to the statement in the brief of appellee, and upon a submission of the case the statement of facts will be investigated to ascertain whether or not the objections are well founded. *Denecamp v. Townsend* (Civ. App.), 33 S. W. 254, 255.

In *Wetzel v. Satterwhite* (Civ. App.), 125 S. W. 93, it was held that there being no briefs on file for appellee, the appellate court was required to take as true the statement from the record in appellant's brief as to the evidence, and that it constituted all the evidence in support of the verdict. If appellee was not satisfied with the correctness of this statement, he should have filed a brief denying its correctness and setting such evidence, if there was any in the record.

## VII. Procedure Where Brief or Briefs Found Insufficient.

**Under Former Practice of Supreme Court.**—In *McManus v. Wallis*, 52

Tex. 534, it was held that when the brief of appellant fails to subjoin to each assignment of error or proposition relied upon for reversal of the judgment a brief statement, in substance, of such proceedings contained in the record as were necessary to explain and support such assignments and propositions, the supreme court might, in its discretion, dismiss the appeal, or refer the case back to counsel to file another brief in conformity with the rules.

In *Gant v. Timmons*, 78 Tex. 11, 14 S. W. 236, 264, a motion to strike out the brief of appellant was sustained at Austin term, 1888, and time was extended for filing briefs. At Austin term, 1890, no briefs were on file. Held, that the appeal was not prosecuted and case was dismissed for want of prosecution.

**Under Former Rules of Courts of Civil Appeals.**—Under rule 30 of the rules for courts of civil appeals, as they formerly stood, it was provided that in the event that either party in the brief submitted by him should fail to comply with any of the requirements prescribed by the rules, it should be the duty of the court, of its own motion, either to strike out the brief and to require a proper brief to be filed, or to require it to be amended, as in the discretion of the court might be deemed best. *Cooper v. Hiner*, 91 Tex. 658, 45 S. W. 554; *Meston v. Davies* (Civ. App.), 36 S. W. 805; *Comanche v. Zettlemoyer* (Civ. App.), 40 S. W. 178; *Missouri, etc., R. Co. v. Jahn* (Civ. App.), 42 S. W. 1042; *Walker v. Texas, etc., R. Co.* (Civ. App.), 75 S. W. 47; *Denecamp v. Townsend* (Civ. App.), 33 S. W. 254; *Arnold v. Chamberlin* (Civ. App.), 33 S. W. 767; *Heart v. Hall* (Civ. App.), 27 S. W. 160.

Upon failure of the party to comply with the order of the court requiring a new brief to be filed or an amendment to be made, it was provided that the court should, if the plaintiff in er-

ror, or appellant, be at fault, dismiss the cause, and if the fault be on the part of defendant in error or appellee, should disregard his brief. *Comanche v. Zettlemoyer* (Civ. App.), 40 S. W. 178; *Meston v. Davies* (Civ. App.), 36 S. W. 805, affirmed in 93 Tex. 646, no op.; *Arnold v. Chamberlin* (Civ. App.), 33 S. W. 767; *Cooper v. Hiner*, 91 Tex. 658, 45 S. W. 554.

Under rule 30 it is true that authority is given the court to strike out briefs that do not comply with the rules, but it does not contemplate the striking out of a brief on account of an imperfect or erroneous statement of the facts, upon the motion of the appellee or defendant in error. The proper practice would be to set forth the objections to the statement in the brief of appellee, and upon a submission of the case the statement of facts will be investigated to ascertain whether or not the objections are well founded. In the case of flagrant violations of the rules in regard to the statement of the facts, or in any other particular, the court will of its own motion take such action as may be necessary. *Denecamp v. Townsend* (Civ. App.), 33 S. W. 254, 255.

Where there are no assignments of error copied in the brief, and appellant refuses to remedy the defect, after appellee had objected thereto, held, that if the defect referred to was one which might have been cured, appellant having manifested no disposition to cure it, he was not entitled to further indulgence and the appeal will be dismissed. *Bowman v. Hoffman* (Civ. App.), 74 S. W. 340, 341.

Where there are no assignments of error in the record, and necessarily none copied in the briefs, a motion to strike out the briefs must prevail unless the errors complained of therein are fundamental. *Hollywood v. Wellhausen*, 28 Tex. Civ. App. 541, 68 S. W. 329, affirmed in 95 Tex. 679, no op.

Under rule 30 for the courts of civil appeals (87 Tex. xl) appellant's brief

must follow up the statement of the nature and result of the suit with a statement of the material facts proved upon the trial, and it is made the duty of the courts of civil appeals to compel parties to comply therewith, and for a noncompliance the brief will be stricken out. *Missouri, etc., R. Co. v. Jahn* (Civ. App.), 42 S. W. 1042. In this case a brief was stricken out for this defect, and the appellant was allowed a specified time in which to file a brief in conformity with the rule.

Brief stricken out on motion and case ordered to be dismissed, unless brief in accordance with rules filed within 60 days. *Houston, etc., R. Co. v. Guisar* (Civ. App.), 27 S. W. 1045; *Houston, etc., R. Co. v. Poras* (Civ. App.), 27 S. W. 1046.

Under rule 45 of the present rules for the courts of civil appeals, it is provided that, "in all cases where the brief or briefs are found insufficient, either in a proper presentation of the facts or proceedings in the case, or in the reference to the authorities, so as to enable the court to decide the case, the court may set aside the submission and refer it back, with such orders for postponement, filing of briefs, reference to authorities, by one or both parties, and reargument, written or oral, as may be deemed proper. If, however, one party has fully complied with the rules, and has filed a satisfactory brief that will enable the court to decide the case, and the other party is in default, and has not filed a satisfactory brief in accordance with the rules, the court may, in its discretion, disregard the latter party's brief as if not filed in the case, and act upon that alone which has been filed in accordance with the rules." *Birmingham Iron, etc., Co. v. Boyd*, 3 Tex. Civ. App. 102, 22 S. W. 240.

In *Birmingham Iron, etc., Co. v. Boyd*, 3 Tex. Civ. App. 102, 22 S. W. 240, the brief contained five assignments of error, but no statement fol-

lowing any one of the propositions submitted. The court, under the discretion given them under rule 45, disregarded appellant's brief and considered the case as presented by the brief of appellee, and, a majority of the court being of the opinion that the judgment should be affirmed, it was so ordered.

In *Kean v. Zundelowitz*, 9 Tex. Civ. App. 350, 29 S. W. 930, affirmed in 93 Tex. 665, no op., the court held that the method of briefing the case was so violative of rules 30 and 31, prescribed for practice in the court of civil appeals, that they would, under rule 45, decline to consider the assignments referred to.

### VIII. Supplemental Briefs.

A defendant is entitled to have his cause submitted in its regular order and to 20 days after the filing of plaintiff's brief in which to prepare an answer thereto; and where, in an action to try title to land, plaintiffs were granted leave to file a written argu-

ment in answer to an argument by defendants, a supplemental brief, filed under such leave after the submission of the case, presenting for the first time an assignment of error, will be stricken out. *Webb v. Kirby Lumber Co.*, 48 Tex. Civ. App. 543, 107 S. W. 581.

A transcript on appeal was filed March 26th, but counsel for appellees agreed to give appellants until fall to prepare and file briefs, which they filed on November 6th, and appellees filed their brief November 8th, the cause being set down for submission November 10th. On November 8th, appellants filed supplemental briefs presenting additional assignments of error. Held, that, appellants not having shown a sufficient excuse for not embracing the assignments in the original brief, the supplemental briefs would be stricken. *Groesbeck, etc., Co. v. Oliver*, 44 Tex. Civ. App. 303, 97 S. W. 1092, affirmed in 102 Tex. 584, no op. See, also, *Sullivan v. Fant* (Civ. App.), 110 S. W. 507.

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### CROSS REFERENCES.

See the titles BANKS AND BANKING, vol. 2, p. 690; BILLS, NOTES AND CHECKS, vol. 2, p. 839; BONDS, ante, p. 1; CONTRACTS; EXCHANGE OF PROPERTY; FACTORS AND COMMISSION MERCHANTS; FRAUDS, STATUTE OF; GAMBLING CONTRACTS; ILLEGAL CONTRACTS; IMPLIED CONTRACTS; INSURANCE; LANDLORD AND TENANT; LICENSES; LIENS; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; PARTNERSHIP; POWERS; PRINCIPAL AND AGENT; SALES; TRUSTS AND TRUSTEES; USAGES AND CUSTOMS; VENDOR AND PURCHASER; WARRANTY.

As to the liability of a firm of real estate and loan brokers for the conversion by one of a customer's money placed with them to loan, see the title PARTNERSHIP. As to whether a petition seeking recovery sets up a new cause of action by its amendment, see the title AMENDMENTS, vol. 1, p. 203. As to whether commissioners' court may sell school lands by employing agents to do so, see the title PUBLIC LANDS. As to the nature of the relation between a person receiving money in accordance with a contract for the sale of real estate and the person requiring him to pay it over, see the title TRUSTS AND TRUSTEES. As to validity of delivery of a deed placed in real estate agent's hands, see the title DEEDS.

### I. Definition.

"A broker as a 'middleman' or 'go between' to perfect an understanding between the contracting parties; and he is not necessarily the agent of either party. When employed by a party to do a particular thing he is primarily that party's agent, and ordinarily the party with whom he deals must take notice of the authority given him by his principal. 4 Am. and Eng. Enc. of Law, 2 Ed. 966; 1 Lawson's Rights and Rem., § 225; Mech. on Agency, § 939; Story on Agency, §§ 28-31." Jackson & Bro. v. Butler, 21 Tex. Civ. App. 379, 381, 51 S. W. 1095. See, generally, the title PRINCIPAL AND AGENT.

### II. Employment.

See post, "Necessity for Employment and Agreement to Pay Commissions," VI, A, 2; "Employment of Several Brokers," VI, B, 1; "Employ-

ment of Subbroker by Broker," VI, B, 2. And see, generally, the title PRINCIPAL AND AGENT.

#### What Amounts to Employment.—

The mere fact that the owner of lands gave a land agent a list of the lands, with the net price per acre of the same, would not constitute an agency by the owner authorizing the land agent to sell, etc. *White v. Templeton & Co.*, 79 Tex. 454, 15 S. W. 483.

In *Cohn v. Sherman Ref. Co.*, 39 Tex. Civ. App. 296, 297, 298, 87 S. W. 1170, where an agent brought an action for breach of contract in making sales for defendants which they failed to complete, and he put in evidence certain letters as tending to support the contention that the defendants had authorized and consented to the character of the sales made by him, which letters were not in accordance with the contract under which he was em-

ployed, it was held, there being some phrases tending to establish the contract, but others tending otherwise, thereby leaving the matter in uncertainty and doubt, that it was not error not to treat the letters as embodying a written contract and not to instruct the jury as to the purport and meaning thereof. See post, "Amount of Compensation," VI, D. And see, generally, the title INSTRUCTIONS.

**Right to Employ Any Number of Brokers.**—The owner of real estate, by the general employment of a real estate agent or broker to effect a sale, does not thereby preclude himself from employing other agents for the same purpose. *Duval v. Moody*, 24 Tex. Civ. App. 627, 629, 60 S. W. 269; *Edwards v. Pike*, 49 Tex. Civ. App. 30, 33, 107 S. W. 586.

### III. Authority, Powers and Duties.

#### A. WHEN BROKER'S DUTY PERFORMED.

A broker's duty is performed when he has "found" a purchaser who is ready, willing and able to purchase upon terms specified, or, if no particular terms were agreed upon, when he has produced a purchaser to whom the principal sells, regardless of whether the sale is ever actually consummated or not, provided that such failure is not due to some fault of the broker. *Gibson v. Gray*, 17 Tex. Civ. App. 646, 653, 43 S. W. 922; *Smye v. Groesbeck* (Civ. App.), 73 S. W. 972; *Ross v. Moskowitz* (Civ. App.), 95 S. W. 86, affirmed in 100 Tex. 434, 100 S. W. 768; *Burns v. Hill*, 2 App. Civ. Cases, § 523; *Kennedy v. Clark*, 1 App. Civ. Cases, § 843. See post, "General Rule," VI, A, 1; "Services Sufficient for Reward," VI, A, 5.

#### B. INSTANCES OF BROKER'S AUTHORITY, RATIFICATION, ETC.

**Power to Convey, etc.**—The employ-

ment of a broker to sell property does not give him the power to sell, convey title and receive the purchase price from the purchaser. *Burns v. Hill*, 2 App. Civ. Cases, § 523; *Kennedy v. Clark*, 1 App. Civ. Cases, § 843. See, generally, the title VENDOR AND PURCHASER.

A power of attorney empowering the agent "to sell, transfer and convey" the lands of the principal, and "generally to do and perform all acts and deeds for me in my name concerning any and all property," etc., does not authorize the agent to barter or exchange the land of his principal for other property. *Reese v. Medlock*, 27 Tex. 120, 124.

Evidence that it was the custom of land agents in this state to barter or exchange for other property the land of their principals, when empowered to sell the same by power of attorney of the character above indicated, held to be inadmissible as contravening the legal import of the power of attorney. *Reese v. Medlock*, 27 Tex. 120. See, generally, the title USAGES AND CUSTOMS.

**Right to Act for Principal's Competitor.**—It was held in *Bender & Son v. Peyton*, 4 Tex. Civ. App. 57, 64, 23 S. W. 222, affirmed in 93 Tex. 635, no op., that where plaintiff contracted to furnish money, feed, and merchandise to defendants who were to ship to him all lumber manufactured by them at their mill, and plaintiff was to exert himself to make sales of said lumber, obtain the best possible price, etc., and thereafter that plaintiff bought one-third interest in another lumber mill, and entered into partnership with the owner, and agreed to give said partnership business his attention and general control and supervision, and to sell lumber, pay bills, etc., that subsequent contract of partnership was not a violation of his contract with defendants, neither the contract with appellants nor the con-

tract of partnership calling for the entire service of appellee. See post, "Admissibility," VI, G, 5, b. See generally, the title PARTNERSHIP.

**Authority to Execute Contract of Sale.**—Where the owner of lots wrote real estate agents, who had previously been authorized to sell the property: "I will sell the lots for \$19,000, and pay you 5 per cent commission plus \$50, or \$1,000 com. in all for making the sale. In other words I want \$18,000 net for my lots. Terms \$3,000 cash, bal. long time"—the agents had authority to execute a contract of sale. *Colvin v. Blanchard*, 101 Tex. 231, 106 S. W. 323, affirming 103 S. W. 1113, distinguishing *Watkins Land Mortg. Co. v. Campbell*, 101 Tex. 542, 101 S. W. 1078, reversed in 98 S. W. 227.

In an action for the breach of a contract for the sale of land alleged to have been made by defendant's agents, evidence held to show no authority on their part to make the contract. *Watkins Land Mortg. Co. v. Campbell*, 100 Tex. 542, 101 S. W. 1078, reversed in 98 S. W. 227.

A letter from an owner of land to real estate agents, stating, "I will sell the lots for \$19,000 and pay you 5 per cent com. plus \$50, or \$1,000 com. in all for making the sale," which in connection with the fact that the agents had been previously authorized to sell the same property, is sufficiently clear in meaning to show that the writer gave to the agents the authority to make the sale, provided they, in making the sale, observed the limitation of their authority expressly stated in the letter which conferred the power, but it gave them no authority to make any other contract of sale. *Colvin v. Blanchard*, 101 Tex. 231, 234, 235, 106 S. W. 323, affirming 103 S. W. 1113. See post, "Amount of Compensation," VI, D.

Proof that the owner of a tract of land made and signed a written description of the land, with a price, and

handed the memorandum to an agent, is not sufficient to show authority in the agent to bind the owner by executing a written contract of sale. *Donnan v. Adams*, 30 Tex. Civ. App. 615, 71 S. W. 580, affirmed in 97 Tex. 630, no op.

**Agreement to Pay Liquidated Damages—Lien.**—The authority of agents to make a contract to sell land does not carry, as an incidental right, the power to bind their principal to pay a sum of money each day as liquidated damages for the nonperformance of the contract, nor to give a lien upon the land as a security for the payment of such damages. *Hagler v. Ferguson*, 50 Tex. Civ. App. 191, 111 S. W. 673, 674, affirmed in 102 Tex. 432, 118 S. W. 133, 134.

**Reservation of Right to Accept.**—In *Watkins Land Mortg. Co. v. Campbell*, 100 Tex. 542, 543, 545, 101 S. W. 1078, reversed in 98 S. W. 227, where real estate agents were made an offer on property and submitted it to the owners who, replying to the offer, changed their terms in the price, it was held that such offer did not authorize the agents "to close the deal," but distinctly reserved to the company the right to accept, where it stated, "If you could not get the amount of your cash payment increased to \$600, we would be willing to accept the offer," which increase agents did not secure.

**Ratification of Unauthorized Contract.**—In *Edwards v. Davidson* (Civ. App.), 79 S. W. 48, 49, where a deed to land was made by the owner under the belief that a sale had been concluded according to the instructions given to the broker and in utter ignorance of the contract made with the purchasers, it was held that the deed did not ratify the contract.

In *Reddell v. Watkins Land Mortg. Co.* (Civ. App.), 37 S. W. 608, 609, where a local agent of the corporation negotiated a sale of land to plaintiff, and then submitted the whole transaction to defendant's general manager

for acceptance or rejection, asking for instructions by writing, which were sent in a letter setting forth the terms upon which to carry out the sale, it was held that the facts showed authority, in the agent to make the contract of sale. See post, "Actions between Principal or Broker and Third Person," V, E, 3; "Trade Concluded by Broker," VI, A, 5, e, (1); "Persons Liable for Commissions," VI, C. And see, generally, the title CORPORATIONS.

After executing a deed and sending it to her agent for delivery, the grantor changed her mind, and instructed her agent not to deliver it, of which the grantee had notice, but the deed was delivered, and the grantor received the purchase price, and gave the grantee no notice of her intention to seek cancellation for nearly a month, and, while in a suit for cancellation, her petition offered to refund the money she retained it for four years until she paid it into the court. Held, that she was not entitled to a cancellation. *Burke-Mobray v. Ellis*, 44 Tex. Civ. App. 21, 97 S. W. 321. See, generally, the title RESCISON, CANCELLATION AND REFORMATION.

**Implied Authority from General Authority to Sell.**—In *Taylor v. Cox* (Sup.), 7 S. W. 69, 72, where plaintiff's petition charged that it was agreed that plaintiff should sell the land for enough cash to confirm the sale, which meant such amount of cash as would make the land good for the deferred payments, or as would likely cause the purchaser to meet the deferred payments as they became due, it was held that it was not error to overrule the exceptions to the petition that it was not a matter of law what amount of cash would confirm a sale, because the right to use discretion in making such a sale would, in the absence of some restriction, confer the power to determine the amount of cash pay-

ment. See, generally, the title JUDICIAL SALES.

It was held in *Edwards v. Davidson* (Civ. App.), 79 S. W. 48, 49, where a broker had no authority from the owner to sell certain land, except for so much in cash, that the power to sell land did not of itself imply an authority to sell on credit, and that the presumption was that the sale was for cash. *Mechem Agency*, § 325. See, generally, the title PRINCIPAL AND AGENT.

It was held in *Sherman Oil, etc., Co. v. Dallas Oil, etc., Co.* (Civ. App.), 77 S. W. 691, 692, where the plaintiff authorized certain brokers to make a sale of oil, that it was not essential that plaintiff should have expressly authorized them to stipulate the amount that the tanks should contain, for implied authority would result from the general authority to sell the number of tanks of oil.

It was held in *Edwards v. Davidson* (Civ. App.), 79 S. W. 48, 50, that even if a broker had been authorized to accept a certain sum as earnest money, he had no authority to accept Mexican money in any sum.

In *Brown v. Dennis* (Civ. App.), 30 S. W. 272, 273, 274, where a loan broker negotiated a loan secured by a deed in trust upon land on which there was a judgment and acted in some respects for both parties, attended to getting up abstracts and having the land valued, and received the money sent to him by defendant to be paid plaintiff, defendant trusting to him to see to its proper application and to have the judgment either released by the owner or transferred to defendant, and the owner being absent the broker first took the transfer from a person, who held the judgment as a collateral security, to the defendant, and afterwards obtained a release from the owner of the judgment, which he forwarded to defendant, and subsequently and in good faith to defendant, at the

request of plaintiff, and without the knowledge of defendant, entered a receipt upon the margin of the judgment, and forwarded a certified copy thereof to the defendant, it was held that the evidence was not sufficient to authorize the submission of the question of authority on the part of the broker to release the judgment. See, generally, the title JUDGMENTS AND DECREES.

**A broker having authority under two instruments may act under either.** The question as to which was exercised is immaterial. *Douglas v. Baker*, 79 Tex. 499, 506, 15 S. W. 801. See, generally, the title PRINCIPAL AND AGENT.

**The general principal that an agent to sell can not buy for himself** must be understood to mean that an agent, authorized to sell the property of his principal, can not become the purchaser of it through the instrumentality of his agency, either directly or indirectly. *Pridgen v. Adkins*, 25 Tex. 389, 390, 394. See post, "Fraudulent and Double Dealing on Part of Broker," VI, A, 6. And see, generally, the title PRINCIPAL AND AGENT.

**Dealing with Broker as Purchaser.**—It is not always the case that a broker may not purchase for himself. If it is apparent that in making the purchase his object is to acquire title for himself, and the seller contracts with him with a knowledge of this fact; or the facts connected with his purchase are of such a character from which notice could be implied that he was dealing with the broker as purchaser, and not as his broker, there is no reason, in such a case, for the application of the rule that an agent will not be permitted to his own advantage, to deal with the property of his principal. *Texas Brokerage Co. v. Barkley & Co.*, 49 Tex. Civ. App. 632, 635, 109 S. W. 1001. See post, "Fraudulent and Double Dealing on Part of Broker," VI, A, 6.

**Ratification by Principal.**—Although a land agent empowered to sell may

purchase in violation of his duty to his principal, the purchase by such agent is not absolutely void, but may be effectual and valid, either by the express ratification of the principal with a knowledge of all the facts, or by the principal's acquiescence for a great length of time, with a like knowledge of the facts. *Pridgen v. Adkins*, 25 Tex. 389, 395. See post "Trade Concluded by Broker," VI, A, 5, e, (1); "Fraudulent and Double Dealing on Part of Broker," VI, A, 6; "Persons Liable for Commissions," VI, C. And see, generally, the title PRINCIPAL AND AGENT.

**Representing Both Parties without Principal's Consent.**—A broker who is relied upon to exercise, in behalf of his principal, his skill, knowledge, or influence, will not be permitted, without his principal's knowledge and consent, to undertake to represent the other party to the transaction. And it makes no difference that the principal was not in fact injured, or that the broker intended no wrong, or that the other party acted in good faith. The double agency is a fraud upon the principal in such case, contravenes public policy, and the courts will refuse to enforce a contract growing out of such agency or award damages for its breach. *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268; *Bass v. Tolbert*, 112 S. W. 1077, 1079. See, generally, the title FRAUD AND DECEIT.

In *Shropshire v. Adams*, 40 Tex. Civ. App. 339, 89 S. W. 448, 449, in an action by plaintiff, a broker, for breach of contract which was made in consideration of plaintiff securing a purchaser for certain real estate of the defendant, where plaintiff averred that he undertook the sale of the land for defendant and thereafter reported to him that a certain person wished to purchase it and had offered plaintiff \$5,000 in cash in case plaintiff would bring about the purchase, and further alleged that defendant assented to

plaintiff's acceptance of the joint employment by the purchaser, and said he would be willing to see the plaintiff make the sum, and that his acceptance of it would in no wise interfere with plaintiff's contract with defendant, it was held that a general demurrer could not be sustained to the petition because, while it was generally true that the double agency of a real estate broker, undertaking to represent the vendor and vendee, would not be countenanced, yet the objections to such agency disappeared when each party knew of and assented to the double employment. See post, "Fraudulent and Double Dealing on Part of Broker," VI, A, 6.

**Implied Authority to Employ Subbroker.**—While it is a general rule of the law that in the absence of any authority, express or implied, an agent has no authority to employ a subagent, the trust committed to him being personal, and he can not delegate it to another so as to affect the rights of the principal, yet it is otherwise where at the time of the employment of the agent to sell certain land he was a resident of California and the land is situated in Texas; and it is a fair presumption growing out of the exigencies of the transaction that it was contemplated that a purchaser should be obtained through a subagent. *Eastland v. Maney*, 36 Tex. Civ. App. 147, 148, 81 S. W. 574. See, generally, the title PRINCIPAL AND AGENT.

Where a subbroker made a sale of land, the fact that the owner of the land sold, who had placed it in the hands of an agency for sale, accepted it and claimed the benefits thereunder would preclude the setting up on the owner's part of the want of authority of the agency's representative to employ said broker to make the sale. *Watkins Land Mortg. Co. v. Thetford*, 43 Tex. Civ. App. 536, 539, 96 S. W. 72. See post, "Amount of Compensation," VI, D.

**Right to Divide Commissions with Purchaser.**—See post, "Fraudulent and Double Dealing on Part of Broker," VI, A, 6.

**Strict Compliance between Terms of Sale and of Contract.**—Where the owner of lots wrote real estate agents that he would sell the lots for a given price, so much cash and the balance on long time, the agents were not authorized to sell on terms whereby notes given by the purchaser for the balance were payable "on or before certain dates." *Colvin v. Blanchard*, 101 Tex. 231, 106 S. W. 323, affirming 103 S. W. 1118. See, generally, the titles BILLS, NOTES AND CHECKS, vol. 2, p. 839; PRINCIPAL AND AGENT.

Because where the delegation of authority is express and special, and the other party dealing with the agent can not fall back on any larger implied powers, the limitation may relate to the manner and form of executing the contract, as well as the substantial terms which it shall contain; and in such a case the agent must keep within the restricted authority conferred upon him and strictly pursue the method prescribed by his instructions. (*Pomperoy, Specific Performance*, 114, § 77.) *Colvin v. Blanchard*, 101 Tex. 231, 235, 106 S. W. 323, affirming 103 S. W. 1118. See, generally, the title PRINCIPAL AND AGENT.

**Ratifying Sale on Unauthorized Terms.**—The owner of land did not ratify the acts of his agents in making an unauthorized sale of his land by remaining silent and ignoring the transaction. *Colvin v. Blanchard*, 101 Tex. 231, 106 S. W. 323, affirming 103 S. W. 1118. See post, "Trade Concluded by Broker," VI, A, 5, e, (1); "Fraudulent and Double Dealing on Part of Broker," VI, A, 6; "Persons Liable for Commissions," VI, C.

**It is not part of the employment of a broker to prepare a contract of purchase to be signed by the purchaser.** The broker is not a conveyancer, but a

maker of bargains. *Brackenridge v. Claridge* (Civ. App.), 42 S. W. 1005, 1007, reversed in 91 Tex. 527, 44 S. W. 519.

**Broker Maintaining Action to Clear Title.**—Under a power of attorney to sell lands, and to pay debts, and to do all and singular such acts as his principal could do and perform in person, an agent can not maintain an action in his own name, to disembarass the title of his principal of clouds or incumbrances which may have supervened to impair their value or prevent their sale. *Robson v. Tait*, 13 Tex. 272. See the title QUIETING TITLE.

#### IV. Duration and Termination of Broker's Authority.

##### A. BY CONTRACT.

The limitation of a broker's agency to sell to a specified time is a revocation of the agency from and after such time. *Neal v. Lehman*, 14 Tex. Civ. App. 461, 462, 34 S. W. 153. See, generally, the title PRINCIPAL AND AGENT.

##### B. RIGHT TO REVOKE.

See post, "Revocation of Broker's Authority," VI, A, 8.

**General Rule.**—The owner who employs a broker to sell his land, has the right to withdraw the land from sale at any time before a purchaser is found, where the arrangement is that the broker is to procure a purchaser for the land, but the contract is silent as to the duration of the contract. *Mechem on Agency*, § 968. *Evans v. Gay* (Civ. App.), 74 S. W. 575, 576. See, generally, the title PRINCIPAL AND AGENT.

Where no time has been agreed upon in which the sale is to be made, the agency may be revoked after a reasonable time, provided it is done in good faith, and not for the purpose of evading the payment of commissions. *Newton v. Conness* (Civ. App.), 106 S. W. 892, 894. See, generally, the title PRINCIPAL AND AGENT.

A contract by a county employing an agent for the sale of school land, requiring him to survey the land, and allowing him a commission on sales made by him, but not specifying any time for the duration of the employment, entitles the agent at most to a reasonable opportunity to sell the lands and obtain compensation for his labor and expenses, but does not give him an irrevocable power to sell coupled with an interest. *Hollingsworth v. Young County*, 40 Tex. Civ. App. 590, 91 S. W. 1094, affirmed in 101 Tex. 641, no op.

**A sale of land by the principal** is a revocation of the agent's special authority to sell. *Donnan v. Adams*, 30 Tex. Civ. App. 615, 71 S. W. 580, affirmed in 97 Tex. 630, no op.

**Power to Revoke.**—The authority of an agent to sell land may ordinarily be revoked at any time, and his interest in the commission to be earned by a sale is not sufficient to prevent such revocation. *Neal v. Lehman*, 11 Tex. Civ. App. 461, 462, 34 S. W. 153. See, generally, the title PRINCIPAL AND AGENT.

**Revoking after Purchaser Procured.**—Where a broker has a reasonable time within which to sell land, and has found a purchaser able, ready, and willing to buy, and who had in fact accepted the terms offered by plaintiff, the seller has no right to revoke the agent's authority. *Burns v. Hill*, 2 App. Civ. Cases, § 523. See post, "Procuring Purchaser Willing, Ready, and Able to Buy," VI, A, 5, b. See, generally, the title PRINCIPAL AND AGENT.

**Revoking during Negotiations.**—That the contract between an owner of land and a broker in an action by the broker against the owner provided that the owner might himself sell all or any part of the land without compensation to plaintiffs, and that it was possible for defendant to have sold the land during the time limit of the contract, did not authorize him to abrogate the



contract before the date of its limit and after plaintiff's efforts had excited an active demand for the lands. *McLane v. Maurer*, 28 Tex. Civ. App. 75, 79, 66 S. W. 1108, 66 S. W. 693, affirmed in 95 Tex. 682, no op.

**Can Not Revoke When Broker Fails to Act beyond Duty.**—In an action for breach of contract by real estate brokers against a landowner between the landowner and real estate brokers for sale of land where the contract, when properly construed, did not contemplate that the land should all be surveyed and subdivided before sales were made, the fact that it had not all been so surveyed did not authorize defendant to revoke the contract. *McLane v. Maurer*, 28 Tex. Civ. App. 75, 82, 66 S. W. 1108, 66 S. W. 693, affirmed in 95 Tex. 682, no op. See post, "Principal to Broker and Third Person," V, D; "Evidence," V, E, 2, d.

### V. Liability.

See post, "Persons Liable for Commissions," VI, C. And see, generally, the title PRINCIPAL AND AGENT.

#### A. BROKER TO PRINCIPAL.

**Must Exercise Reasonable Degree of Care, etc.**—The broker carries on an independent calling requiring not only a knowledge of the rules of law and usage which govern his transaction, but also the exercise of judgment, discretion, and diligence. Important interests are intrusted to his care, and constant demands are made upon him for prudence, watchfulness, and sagacity. He holds himself out to the public as qualified to perform the duties of his office, and, while he does not warrant the success of his undertakings, the law requires of him, as of other persons pursuing similar avocations, that he shall possess and exercise a reasonable degree of skill and knowledge, and that he will perform his undertakings with reasonable dili-

gence and care. If he fails to satisfy this requirement, and as an ordinarily prudent person would use in performing the duties and obligations he undertakes because the transaction is for the mutual benefit of both parties, and his principal suffer loss thereby, he will be held responsible for it. In this respect his liability is similar to that of the attorney. *Mechem Ag.*, §§ 951, 927, 928; *Story, Bailments*, § 23; *Caruthers v. Ross* (Civ. App.), 63 S. W. 911, 912, *McLane v. Maurer*, 28 Tex. Civ. App. 75, 79, 66 S. W. 693, 1108, affirmed in 95 Tex. 682, no op.; *Murrah v. Brichta* (Sup.), 9 S. W. 185, 186. See, generally, the title ATTORNEY AND CLIENT, vol. 2, p. 567.

Where the contract, in an action by plaintiffs for its breach, stipulated that they should "devote their business energies, time and attention," to selling defendants land, such contract did not require that the whole of the time and attention of plaintiffs should be devoted to the sale of the land and it was not erroneous to instruct the jury that reasonable diligence in procuring purchasers met the terms of the contract. *McLane v. Maurer*, 28 Tex. Civ. App. 75, 79, 66 S. W. 693, 1108, affirmed in 95 Tex. 682, no op.

**Broker Accepting Wrong Goods.**—In *Killough v. Cleveland* (Civ. App.), 33 S. W. 1040, 1041, where goods were purchased through plaintiff's broker, who examined them before shipment and accepted them for plaintiff as the right kind and quality and agreed upon their price, it was held that whatever may have been their kind or quality, they were the goods purchased by plaintiff through his broker, and that not to the defendant, the shipper, but to the broker, he must look for damages.

**Local Custom Giving Broker's Forfeit Money Not Binding on Principal.**—In *Chambers & Co. v. Herring* (Civ. App.) 88 S. W. 371, in an action by a landowner to recover from his broker

money forfeited to them by their prospective purchaser in not taking the land sold to him, it was held that, since it was not shown that the landowner had contracted in view of any custom, his rights could not be determined by a local custom which allowed brokers to take forfeit money to protect them in their fees. See, generally, the title **USAGES AND CUSTOMS**.

**Broker Liable for Tainted Money Received from Third Person.**—While the law will not aid in the enforcement of illegal contracts, such as dealing in futures, yet where an agent has received money from a third person, belonging to his principal, although coming from the prosecution of the illegal enterprise, he will be held liable to his principal for the money so received. *Lovejoy v. Kaufman*, 16 Tex. Civ. App. 377, 378, 41 S. W. 507; *Floyd v. Patterson*, 72 Tex. 202, 205, 10 S. W. 525. See, generally, the titles **GAMBLING CONTRACTS**; **ILLEGAL CONTRACTS**; **PRINCIPAL AND AGENT**.

**Tainted Money Recoverable Only When Broker Acts as Agent.**—One who contracts with a broker for the future delivery of stocks or produce when no actual delivery is contemplated but only the payment of the difference between the contract price and the value of the article at some future period, can only recover by showing that the money claimed under the contract was paid to the broker for his use. If the money was paid under the contract to the broker, not as an intermediary or agent for the plaintiff but in his own right, no recovery can be had. *Floyd v. Patterson*, 72 Tex. 202, 205, 10 S. W. 526. See post, "Negotiating Illegal Contracts," VI, A, 7. And see, generally, the titles **ILLEGAL CONTRACTS**; **PRINCIPAL AND AGENT**.

### **B. THIRD PERSON TO PRINCIPAL.**

**Sale by Broker on Other Terms than Those Confirmed.**—Where a

broker, having only authority to make sales subject to confirmation by plaintiffs, took an order for goods from defendants at a certain price, but reported the sale to plaintiffs at a different price, and it was confirmed and the goods shipped, there was no sale, as there was no meeting of the minds of the parties on a sale at the price given by the broker, and plaintiff was entitled to recover the goods from the defendant, or their value. *Frye & Co. v. Keller*, 31 Tex. Civ. App. 165, 72 S. W. 228. See, generally, the title **SALES**.

**Broker without Authority Allowing Rebate.**—A purchaser of a carload of produce from a broker who, without authority from the seller, agrees to allow a specified rebate, is not bound to receive the shipment after the refusal of the seller to allow such rebate. *Jackson & Bro. v. Butler*, 21 Tex. Civ. App. 379, 381, 382, 51 S. W. 1095. See, generally, the titles **SALES**; **VENDOR AND PURCHASER**.

### **C. THIRD PERSON TO BROKER.**

**Proposed Purchaser Refusing to Comply with Contract.**—A mere selling agent or broker has no such interest in a contract to purchase land secured by him as authorizes a recovery of damages in the way of lost commissions from the proposed purchaser who has refused to comply with the contract, nor does the purchaser incur a principal's liability thereby, in the absence of contract. *Tinsley v. Dowell*, 87 Tex. 23, 29, 26 S. W. 946, reversing 24 S. W. 928; *Tinsley v. Anderson* (Civ. App.), 33 S. W. 266, 267. See post, "Failure or Refusal of Purchaser," VI, A, 5, f, (2). And see, generally, the titles **LIENS**; **PRINCIPAL AND AGENT**.

The prospective commission of agents selling machinery on commission is a sufficient consideration for their personal agreement with one, as an inducement for him to buy, that they will keep extras on hand for repairs. *Tyson v. Jackson Bros.*, 41 Tex.

Civ. App. 128, 90 S. W. 930. See, generally, the title **CONTRACTS**.

#### **D. PRINCIPAL TO BROKER AND THIRD PERSON.**

##### **Contract Not Binding on Principal.**

—Defendant land company wrote its local agent that it would sell plaintiff certain land; part cash, balance on time. The agent, who had no authority to bind the company, replied by telegraph that plaintiff would take land on proposed terms, and referred to letter, by mail, repeating the substance of the telegram, but saying that plaintiff wanted a sketch of the land to be attached to the contract, and that her first payment would be made after she had had time to satisfy herself about the title. Defendant also proposed to have a survey made before closing the contract. Held, not to show a completed contract, binding on defendant. *Foster v. New York, etc., Land Co.*, 2 Tex. Civ. App. 505, 22 S. W. 260, affirmed in 93 Tex. 639, no op.

Plaintiff offered to show that defendant, with knowledge of its principal officers, permitted plaintiff to sell portions of the land as belonging to her under the contract, but without stating any particular act of defendant; that defendant ordered a survey to ascertain the number of acres embraced in the contract; and that, until completion of the survey, plaintiff was allowed to believe she was to have the land. Defendant's agent testified that plaintiff accepted defendant's offer unconditionally, and that nothing was said as to when the first payment would be made. Held, not to add anything to the effect of the letters and telegram. *Foster v. New York, etc., Land Co.*, 2 Tex. Civ. App. 505, 22 S. W. 260, affirmed in 93 Tex. 639, no op. See, generally, the title **COUNTIES**.

**Notice of Revocation.**—Under Sayles' Civ. Stat., art. 4652, providing that the record of a deed shall be notice to all persons of its existence, the record of a deed executed by the owner of a

tract of land is notice to an agent and all persons dealing with him of the revocation of the authority of the agent to sell the land. *Donnan v. Adams*, 30 Tex. Civ. App. 615, 71 S. W. 580, affirmed in 97 Tex. 630, no op.

Where the grantor sent her deed to her agent for delivery, but the grantee, before delivery to him and before payment of the purchase price, had notice that, since its execution, the grantor had changed her mind, and directed her agent not to deliver the deed, the delivery did not execute the sale. *Burke-Mobray v. Ellis*, 44 Tex. Civ. App. 21, 97 S. W. 321. See ante, "Right to Revoke," IV, B.

#### **E. ACTIONS BETWEEN PRINCIPAL, BROKER AND THIRD PERSONS.**

See post, "Actions by Brokers for Compensation," VI, G.

##### **1. Actions by Principal against Broker.**

**Accrual.**—In *Chambers & Co. v. Herring* (Civ. App.), 88 S. W. 371, in an action by a landowner to recover from his brokers money forfeited to them by their prospective purchaser in not taking the land sold to him, it was held that the landowner's cause of action had arisen, even though the suit was brought before the time named in the contract, within which the purchaser had to decide whether he could take the land or not, was up, for the reasons that the purchaser had waived the time, had paid the money, and it had been converted by the brokers. See, generally, the title **ACTIONS**, vol. 1, p. 113.

**Proper Parties.**—It was held in *Chambers & Co. v. Herring* (Civ. App.), 88 S. W. 371, in an action by a landowner to recover from his brokers money forfeited by a prospective purchaser in not taking land sold by them to him, that such purchaser was not a necessary or proper party to the suit. See post, "Proper Parties," VI, G. 1. And see, generally, the title **ACTIONS**, vol. 1, p. 113.

**Burden of Proof.**—In *Phelps, etc., Co. v. Miller* (Civ. App.), 83 S. W. 218, 219, where plaintiffs sued to recover money paid as commissions under the mistake of not having paid defendants before for their services, alleging want of consideration, and defendants answered that the latter sum was for services rendered otherwise, and that the plaintiffs agent knew of, and expressly allowed them commissions, collected by them, and included in the deeds of conveyance to plaintiffs, and that thereafter he allowed them the sum, sued on, for other services specified in a receipt dictated by the agent himself, and in no way connected with the commissions, it was held that the fact of defendants having admitted that they had collected their commissions for 5 per cent and they had afterwards signed a written receipt for three per cent collected by them, did not shift the burden of proof upon the defendants to establish the matter pleaded in their answer. See post. "Burden of Proof," VI, G, 5, a. And see, generally, the title EVIDENCE.

**Wife's Property Customary Security for Business Men's Notes.**—In *Murrah v. Brichta* (Sup.), 9 S. W. 185, 187, where a broker, relying upon the name of a wife, loaned his principal's money, it was held that the testimony to prove that careful business men in handling their own money frequently made loans on notes signed by husband and wife, relying on the wife's property as security, and that it was generally understood among business men outside of lawyers, that a married woman might bind her property by a simple note of hand, was irrelevant and immaterial. See, generally, the titles HUSBAND AND WIFE; USAGES AND CUSTOMS.

## 2. Actions by Broker against Principal for Breach of Contract.

### a. Defenses.

See post. "Right of Action and Defenses," VI, G, 2.

Defendant county in 1890 employed plaintiff as agent to survey and sell lands for the county at a stated commission on the lands sold. In 1892 the commissioners' court of the county took the lands off the market and leased them for eleven years. In 1903 all previous appointments of agents to sell school lands were canceled by the county, and the lands were conveyed to a purchaser thereof by the county judge. Held, that plaintiff's employment was terminated by the order of the commissioners' court made in 1892, and, if such termination was wrongful, an action therefor, brought in 1904, was barred by limitations. *Hollingsworth v. Young County*. 40 Tex. Civ. App. 590, 91 S. W. 1094, affirmed in 101 Tex. 641, no op. See, generally, the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

### b. Damages.

See post, "Damages," VI, G, 3. And see, generally, the title DAMAGES.

**Basis of Calculation.**—In *McLane v. Maurer*, 28 Tex. Civ. App. 75, 82, 66 S. W. 693, 1108, affirmed in 95 Tex. 682, no op., in an action by plaintiffs for breach of a contract authorizing them to sell defendant's land, where the testimony made it reasonably certain that the remaining land would have been sold but for its breach, it was held that the basis of calculating their measure of damages should be one-half of the difference between what the remaining land would have brought at the average price of that already sold and the minimum sum for selling stipulated in the contract added to the unpaid commission on the land sold, but not including a certain number of acres with improvements, and with the expenses for selling deducted therefrom.

In an action by real estate brokers against the principal for breach of his contract, where there was no evidence that the remaining lands would have

been sold by plaintiffs at a higher average price than that obtained for the lands they did sell, such average must form the basis of calculation as to the remaining land, and an estimate on a higher basis is error requiring a remittitur in the case. *McLane v. Maurer*, 28 Tex. Civ. App. 75, 80, 66 S. W. 1108, 66 S. W. 693, affirmed in 95 Tex. 682, no op. See, generally, the title **REMITTITUR**.

Where plaintiffs were to have for their services in selling lands one-half the price received in excess of a certain sum, and the petition alleges what they would have realized from the sale, this afforded a sufficient basis for the recovery of damages. *McLane v. Maurer*, 28 Tex. Civ. App. 75, 77, 66 S. W. 1108, 66 S. W. 693, affirmed in 95 Tex. 682, no op.

**A broker can not recover exemplary damages** for breach of a contract authorizing him to sell property, except under special circumstances, which must be alleged. *Burnett v. Edling*, 19 Tex. Civ. App. 711, 713, 48 S. W. 775, affirmed in 93 Tex. 636, no op. See, generally, the title **EXEMPLARY DAMAGES**.

#### c. Petition.

See post, "Petition," VI, G, 4, b. And see, generally, the title **PLEADING**.

#### Declaring on Both Contracts.—

Where a contract authorizing plaintiffs to sell land within certain time is extended with slight changes, by indorsement thereon, in an action for the breach before the extended time has expired it is proper to declare on both contracts. *McLane v. Maurer*, 66 S. W. 693, 1108, 28 Tex. Civ. App. 75.

**Insufficiency.**—The petition in an action by real estate agents for damages for loss of commissions because of defendant's breach of contract in refusing to execute deed to the lands sold is insufficient, as against special exceptions, where it fails to give the names and residences of the proposed

purchasers, the quantity of land sold to each, the price, and the term of sale. *Burnett v. Edling*, 19 Tex. Civ. App. 711, 713, 48 S. W. 775, affirmed in 93 Tex. 636, no op.

**Sufficiency.**—Where a contract authorizing plaintiffs to sell defendants' lands fixed a minimum price for the lands and provided that an asking price for the several tracts should be agreed on, and plaintiff's petition in an action for breach of the contract alleged that such price was agreed on, this made certain any uncertainty in the contract as to the price to be demanded. *McLane v. Maurer*, 28 Tex. Civ. App. 75, 76, 66 S. W. 1108, 66 S. W. 693, affirmed in 95 Tex. 682, no op.

**Amendment.**—In an action by land agents against their constituents who had discharged them in violation of the contract of employment if a special exception is sustained to the allegation in the petition, that plaintiffs' profit "upon the lands which they had contracted to sell would have amounted to the sum of \$2,000 had they been permitted to perfect the sale thereof," the plaintiffs would be allowed to amend by setting forth the particular transactions from which the damages resulted. *Johnson v. Cherokee Land, etc., Co.*, 82 Tex. 338, 18 S. W. 476.

#### d. Evidence.

See post, "Evidence," VI, G, 5. And see, generally, the title **EVIDENCE**.

**Broker Must Show Wrongful Revocation.**—In an action against a county for breach of a contract which employed plaintiff to survey and sell lands but did not specify any definite term for the continuance of the employment, the burden was on plaintiff to show that the county acted unfairly in terminating his employment without giving him a reasonable opportunity to earn compensation for what he had done under the employment. *Hollingsworth v. Young County*, 40 Tex. Civ. App. 590, 91 S. W. 1094, affirmed in 101 Tex. 641, no op. See ante, "Right to Revoke," IV, B.

**Evidence Not Prejudicial.**—In an action by a broker against his principal for breach of a contract which had been renewed and extended in time, evidence of plaintiff's activity under the original contract could not have been to defendant's injury. *McLane v. Maurer*, 28 Tex. Civ. App. 75, 78, 66 S. W. 1108, 66 S. W. 693, affirmed in 95 Tex. 682, no op. See post, "Appellate Practice," VI, G, 9. And see, generally, the title **APPEAL AND ERROR**, vol. 1, p. 313.

**Evidence Admissible.**—Plaintiffs in an action for breach of contract are entitled to show by their witnesses what was the demand for the land during the time of the contract and negotiations to purchase them, as tending to establish that they would have been sold by them but for defendant's breach of the contract. *McLane v. Maurer*, 28 Tex. Civ. App. 75, 79, 66 S. W. 1108, 66 S. W. 693, affirmed in 95 Tex. 682, no op.

In an action by real estate agents for damages for loss of commissions because of a breach of contract by the owner of the land sold, evidence that another agent sold a part of the lands with the approval of defendant, to persons whom plaintiffs induced to look at them, is admissible. *Burnett v. Edling*, 19 Tex. Civ. App. 711, 712, 714, 48 S. W. 775, affirmed in 93 Tex. 636, no op.

In an action for breach of contract for sale of land by real estate broker against a landowner, testimony that one H. had said to third parties that he was also an agent of defendant to sell the lands in question was hearsay, but plaintiffs were entitled to show that defendant, knowing that H. was in their employ, without their knowledge employed him at the same time to sell for himself, thereby interfering with plaintiffs' sales. *McLane v. Maurer*, 28 Tex. Civ. App. 75, 78, 66 S. W. 1108, 66 S. W. 693, affirmed in 95 Tex. 682, no op. See, generally, the title **HEARSAY EVIDENCE**.

**Evidence Inadmissible.**—In an action by real estate agents for damages for loss of commissions on sales of land for which the owner refused to execute deeds, evidence is not admissible to prove sales to persons whose names and residences are not given nor otherwise identified. *Burnett v. Edling*, 19 Tex. Civ. App. 711, 713, 48 S. W. 775, affirmed in 93 Tex. 636, no op.

In an action by real estate agents for damages for loss of commissions because of defendant's breach of contract, a letter of defendant offering to sell another portion of the land is not admissible in evidence, where defendant reserved the right, in the contract between him and plaintiff, to sell the land himself. *Burnett v. Edling*, 19 Tex. Civ. App. 711, 712, 714, 48 S. W. 775, affirmed in 93 Tex. 636, no op.

In an action by real estate agents for damages for loss of commissions because of defendant's breach of contract, a contract between defendant and another for the sale of lands is not admissible in evidence where it does not appear from the contract, or from evidence aliundi, that the lands were the same or any portion of the lands embraced in the contract between plaintiff and defendant. *Burnett v. Edling*, 19 Tex. Civ. App. 711, 712, 715, 48 S. W. 775, affirmed in 93 Tex. 636, no op.

### 3. Actions between Principal or Broker and Third Person.

**Broker's Right to Sue Third Person for Breach of Contract.**—In *Neal v. Andrews* (Civ. App.), 60 S. W. 459, 460, where defendant's agents sold plaintiff notes on an 8 per cent basis and agreed that defendant would indorse them, but defendant refused to deliver them unless the plaintiff would take them indorsed without recourse, which the plaintiff would not do and the trade fell through, and it seemed that the plaintiff, in the meantime, had resold the notes to another purchaser on a 6 1-2 per cent basis, and the

agents knew he was buying with the intention of reselling but did not know to whom the plaintiff expected to sell, and, thereupon, the plaintiff brought a suit to recover the profits he would have made on the resale of the notes and interest on the money he had provided to pay for the notes during the time it was held, for that purpose, it was held that the giving of the charge that, if plaintiff in the transaction was acting as a broker, and did not buy for his own account the notes in question, the finding should be for the defendant, because it was indisputedly shown that the plaintiff had never been employed by the defendant or under his authority to make such sale, was error, since the fact that he was not employed by defendant could not defeat his right to recover damages for the breach of the contract made with defendant through the latter's agents. See post, "Appellate Practice," VI, G, 9. And see, generally, the title APPEAL AND ERROR, vol. 1, p. 313.

And was also error since from the establishment of the fact of plaintiff's acting as a broker, it did not follow that plaintiff, having contracted in his own name for an undisclosed principal, could not maintain the suit to recover damages for defendant's breach of contract, even if he were the agent of the purchaser, the damages he claimed not being for ordinary commissions, nor having any contract with the purchaser to pay him commissions. *Neal v. Andrews* (Civ. App.), 60 S. W. 459, 460.

**Letters between Broker and Another Admissible to Prove Agency.**—In *Jesson v. Texas Land, etc., Co.*, 3 Tex. Civ. App. 25, 32, 21 S. W. 624, where defendants attempted to prove that a loan broker was the agent of plaintiff in negotiating a loan from plaintiff to them, which was denied by the plaintiff, it was held that letters and dealings between the broker and plaintiff's manager in other like transactions be-

fore and after, and the letters and declarations of the broker touching other like transactions, were admissible to prove such agency and that the question ought to be determined by the jury. See, generally, the title DOCUMENTARY EVIDENCE.

**Evidence Insufficient to Support Verdict.**—Plaintiff sued L. and F. & Co., for margins on a sale of produce alleging that, while a certain L. was nominally agent for F. & Co., in making an illegal contract, he was in fact a partner and that they were brokers for the real party to the transaction. The evidence of defendants was that they were not partners, and that F. & Co. dealt as principals, though there was sufficient proof that they allowed L. to represent them to the brokers. There was no evidence that any other person was connected with the transaction, or that defendants had received any sum representing the profits of the deal from any one. Held, that a verdict for plaintiff against all the defendants should be set aside for insufficient evidence to charge F. & Co. as brokers. *Floyd v. Patterson*, 72 Tex. 202, 10 S. W. 526. See, generally, the title EVIDENCE.

**Purchaser Recovering Money Paid to Agent with Authority Revoked.**—Where land is sold by attorney whose power has been revoked by death of his principal, and part of the purchase money paid and notes given for the balance, payable to the attorney himself, in a suit by the payee of the notes, the vendee may plead fraud and failure of title in reconvention, and recover back the purchase money paid. *Stewart v. Insall*, 9 Tex. 597. See, generally, the title POWERS.

**Who Must Show Ratification.**—It was held in *Edwards v. Davidson* (Civ. App.), 79 S. W. 48, 50, where plaintiff brought an action on behalf of purchaser of land, who had paid a certain sum as earnest money to the

owner's agent, against the owner to recover the sum, and the agent had not been authorized to make the contract of sale as he made it, that the burden of proving ratification on the part of the owner rested on the plaintiff. See ante, "Instances of Broker's Authority, Ratification, etc.," III, B; "Evidence," V, E, 2, d; post, "Trade Concluded by Broker," VI, A, 5, e, (1). And see, generally, the titles PRESUMPTIONS AND BURDEN OF PROOF; PRINCIPAL AND AGENT.

## VI. Compensation.

### A. RIGHT TO COMMISSIONS.

See post, "Right to Compensation Other than Commissions," VI, F.

#### 1. General Rule.

The general rule is that a real estate agent, having a contract authorizing him to affect a sale, is entitled to the commissions agreed upon where he procures a buyer who consummates the purchase of the property on terms satisfactory to the owner, and, ordinarily, when it is shown that the agent was instrumental in bringing the buyer and seller together, the fact that the agent was the procuring cause of the sale afterwards consummated is sufficiently established. *Edwards v. Pike*, 49 Tex. Civ. App. 30, 33, 107 S. W. 586; *Burch v. Hester* (Civ. App.), 109 S. W. 399, 400; *Clark v. Skyles on Agency*, § 771; *Davidson v. Wills* (Civ. App.), 96 S. W. 634; *Kennedy v. Clark*, 1 App. Civ. Cases, § 843; *Watkins Land Mortg. Co. v. Thetford*, 43 Tex. Civ. App. 536, 539, 56 S. W. 72; *Painter v. Kilgore* (Civ. App.), 101 S. W. 809, 811; *Graves v. Bains*, 78 Tex. 92, 14 S. W. 256; *Bowser v. Field* (Sup.), 17 S. W. 45, 46; *Thornton v. Stevenson* (Civ. App.), 31 S. W. 232, 233; *Conkling v. Krakauer*, 70 Tex. 735, 739, 11 S. W. 117; *Newton v. Conness* (Civ. App.), 106 S. W. 892, 894; *Wilson v. Weber* (Civ. App.), 68 S. W. 800. See post, "Employment of Several Brokers,"

VI, B, 1; "Admissibility," VI, G, 5, b; "Instructions," VI, G, 6.

**Commissions Dependent upon Success.**—In the absence of any usage or contract, express or implied, or conduct of the seller preventing the completion of the bargain by the broker, an action by the broker for his commission will not lie until it is shown that he has effected or procured a sale of the property, and it is not enough that the broker has devoted his time, labor, or money in the interest of his employer, as unsuccessful efforts, however meritorious, offer no ground of action, and where his acts effect no agreement or contract between his employer and the purchaser, the loss must be his own. In such cases he loses his labor and efforts which he staked upon success, and if there is no contract there is no reward, as his commissions are based upon the contract of sale. *Duval v. Moody*, 24 Tex. Civ. App. 627, 628, 60 S. W. 269; *Newton v. Conness* (Civ. App.), 106 S. W. 892; *Burch v. Hester* (Civ. App.), 109 S. W. 399, 400; *Wilson v. Ellis* (Civ. App.), 106 S. W. 1152.

#### 2. Necessity for Employment and Agreement to Pay Commissions.

See ante, "Employment," II; post, "Employment of Several Brokers," VI, B, 1; "Employment of Subbroker by Broker," VI, B, 2.

##### a. In General.

If the broker renders services as a mere volunteer, without authority, express or implied, the owner of the property is not bound to pay him anything for such services. *Pipkin v. Horne* (Civ. App.), 68 S. W. 1000; *Ehrenworth v. Putnam* (Civ. App.), 55 S. W. 190; *Dunn v. Price*, 87 Tex. 318, 319, 28 S. W. 681, reversing 28 S. W. 681. See post, "Proper Parties," VI, G, 1; "Admissibility," VI, G, 5, b; "Sufficiency," VI, G, 5, c.

In an action by a broker upon an implied contract for commissions, it is only necessary to show acts performed



by the broker for the principal as an agent or broker, and that the principal accepted his agency and adopted his acts. *Ross v. Moskowitz* (Civ. App.), 95 S. W. 86, 89, affirmed in 100 Tex. 434, 100 S. W. 768. See, generally, the title IMPLIED CONTRACTS.

**Evidence Not Showing Agreement to Pay Commissions.**—In *Meston v. Davies* (Civ. App.), 36 S. W. 805, 807, affirmed in 93 Tex. 646, no op., where plaintiffs, real estate agents, known as such to defendants, made repeated efforts to get control of defendant's land, but without success, for the defendant never intrusted it to them as his agent to sell, nor replied at all to their letter stating that if they sold the property they would expect the usual commission of 5 per cent, and more than a month afterwards they telegraphed asking defendant's lowest price, which was given in reply by telegram, and followed by a letter confirming it, stating that if plaintiffs had a definite proposition to make, it must be done at once by wire, and plaintiffs telegraphed an offer which defendant accepted, it was held that the evidence did not support a promise either express or implied on the part of defendant, to pay plaintiffs any commission for finding a purchaser for the land, but rather that the request for the lowest price was consistent with the idea that plaintiffs were representing the customer and were looking to them for commissions. See post, "Sufficiency," VI, G, 5, c; "Burden of Proof," VI, G, 5, a. See, generally, the title EVIDENCE.

**Ratification Must Be Made with Full Knowledge of Acts Ratified.**—In *Sterling v. DeLaune*, 47 Tex. Civ. App. 470, 476, 477, 105 S. W. 1169, affirmed in 102 Tex. 593, no op., where plaintiff brought an action to recover commissions for the sale of land made by his firm as subbrokers and the question arose as to whether the terms of the contract with the purchasers were authorized

by defendant, it was held that before a verdict could be rendered against the defendant on the ground of ratification it must be found that he had ratified the contract with a full knowledge of the facts and its terms.

**Evidence Showing Employment.**—It was held in *Bluestein v. Collins* (Civ. App.), 103 S. W. 687, 688, in an action by a broker to recover commissions, that upon consideration of plaintiff's testimony, which was credited by the jury, notwithstanding the conflict between plaintiff's and defendant's testimony as to his employment, the evidence was amply sufficient to sustain a verdict for him. See post, "Sufficiency," VI, G, 5, c.

**Construction of Contract of Employment.**—In *Boddy v. Brummett*, 50 Tex. Civ. App. 199, 110 S. W. 532, 533, where a firm of broker's agreed by written contract to make "all reasonable efforts" to find purchasers for the principal's lands and to sell the same during their agency, which was exclusive, and the principal agreed to assist them or to furnish some person who would do so, and it stated further that the principal should pay a commission of 5 per cent for selling the lands, two-thirds of the commission to go to the brokers and one-third to the principal regardless of which party might make the sale, whereupon the brokers sold various tracts and recovered two-thirds of 5 per cent of the contract price of the lands so sold, it was held that, notwithstanding the principal had failed and refused to assist them in their efforts to sell the lands, having received full compensation according to contract, the brokers could neither perform any greater service than the contract required them to perform, nor could recover on the contract any greater commissions, and that if the principal had failed, and refused to assist them they could only hold him liable for breach of contract. See, generally, the title CONTRACTS.

In *Callaway v. Borroughs* (Sup.), 19 S. W. 611, 612, 613, where a traveling salesman contracted to sell tobacco and to receive commissions therefor, which under the original agreement, was to be 65 per cent of the profits, or in case they should not amount to \$275 per month then an amount to be added thereto sufficient to make up the sum of \$275, but the commission for selling cigars was to be 10 per cent of the profits by a second agreement, and during the time of work the percentage of profits not having amounted to his guaranteed commission, he brought an action to recover a balance which had not been paid him and commissions on the sales of cigars and cheroots, in addition to the amount guaranteed to him under the original contract, but in his petition did not allege that the defendant, in the letter in which he made the proposition on the cigars, promised that these commissions should be allowed him as an addition to the salary formerly agreed upon, it was held that the plaintiff was not entitled to the commissions on the cigars in addition to his fixed salary. See post, "Amount of Compensation," VI, D. And see, generally, the title **CONTRACTS**.

**Contract to Pay Commissions on Sufficient Consideration.**—Plaintiff was employed by defendant B. to sell 640 acres of land for \$15 an acre, cash to B., and as much to plaintiff as he could get. Plaintiff induced defendant M. to purchase for \$19.50 per acre and to deposit such amount subject to a tender of title. It was thereafter discovered that B. could only convey 338 acres, whereupon in order to consummate the deal, it was arranged that a sale of this amount should be made, at \$15 an acre, and that the purchaser should pay plaintiff \$300, and that B. should pay plaintiff \$600, to which plaintiff agreed. It was subsequently discovered that B.'s title was good only to 338 acres, which was conveyed. Held, that the agreement of

both the owner and the purchaser to pay such amounts to plaintiff was based on sufficient consideration, and that plaintiff was entitled to recover on such contract, and not on quantum meruit. *Brunson v. Blair*, 44 Tex. Civ. App. 43, 97 S. W. 337. See, generally, the title **CONTRACTS**.

**Commissions on Resale to Principal.**—In *Fordtran v. South End Land Co.*, 47 Tex. Civ. App. 322, 323, 105 S. W. 323, affirmed in 102 Tex. 582, no op., where a broker was paid commissions for selling a lot in a certain block of a city and the defendant sold other lots in another block to a purchaser and he sold the same to a second purchaser who paid plaintiff a commission therefor, and the property was conveyed back to the defendant, the original owner, who conveyed it to the second purchaser, it was held that the plaintiff was not entitled to recover anything as commission on such sales.

#### b. Necessity for Writing.

**Oral Agreement Sufficient.**—An agreement to pay commissions to a real estate agent to procure a purchaser for land upon terms given need not be in writing to bind the owner of the land, when the agent procures a person who is ready, willing and able to make the purchase upon the terms proposed, though no sale is affected. *Conklin v. Krakauer*, 70 Tex. 735, 11 S. W. 117; *Brackenridge v. Claridge*, 91 Tex. 527, 530, 44 S. W. 819, reversing 42 S. W. 1005; *Wilson v. Clark*, 35 Tex. Civ. App. 92, 94, 79 S. W. 649. See post, "Admissibility," VI, G, 5, b; "Variance," VI, G, 4, b, (2).

#### 3. Necessity for Broker's License.

See, generally, the title **LICENSES**.

**The failure of a broker to pay his occupation tax and to obtain a license** to pursue the business of real estate agent or broker does not prevent him from maintaining a suit to recover his commissions accruing to him in the pursuit thereof, because the civil stat-

utes, Sayles' Civ. Stat., arts. 46, 65, providing for the tax, and the penal statutes making it a misdemeanor to pursue the occupation without paying the tax, were enacted for the purpose of providing source of revenue for the state and the enforcement of its collection. *Watkins Land Mortg. Co. v. Thetford*, 43 Tex. Civ. App. 536, 537, 538, 96 S. W. 72; *Amato v. Dreyfus* (Civ. App.), 34 S. W. 450, 451. See generally, the titles REVENUE LAWS; TAXATION.

#### 4. Sale by Principal.

See post, "Trade Concluded by Principal," VI, A, 5, e, (2).

**Unless the principal has expressly waived his right to sell**, he is at perfect liberty to sell the property, notwithstanding he has employed a broker, and in case of such a sale he will not be liable to the broker for commissions if the broker's efforts were not, in fact, the procuring cause of the sale. *Burch v. Hester* (Civ. App.), 109 S. W. 399, 400; *Newton v. Conness* (Civ. App.), 106 S. W. 892, 894; *Evans v. Gay* (Civ. App.), 74 S. W. 575; *Burns v. Hill*, 2 App. Civ. Cases, § 523; *Brown v. Shelton* (Civ. App.), 23 S. W. 483; *Wilson v. Weber* (Civ. App.), 68 S. W. 800.

If, however, the broker is the sufficient cause of the sale, and same is made through his instrumentality, he is entitled to compensation, although the principal negotiates the sale himself. *Mechem on Agency*, § 967; *Graves v. Bains*, 78 Tex. 92, 14 S. W. 256; *West Bros. v. Thompson*, 48 Tex. Civ. App. 362, 106 S. W. 1134; *Pierce v. Nichols*, 50 Tex. Civ. App. 443, 110 S. W. 206; *Burns v. Hill*, 2 App. Civ. Cases, § 523.

**But it is not necessary that a broker should personally have conducted the negotiations between his principal and the purchaser**, or that he should have been present when the bargain was completed, or even that the principal should, at the time, have known that

the purchaser was found by the broker. It was indispensable, but is sufficient, that his efforts were the procuring cause of the sale; that through his agency the purchaser was brought into communication with the seller, although the parties then negotiated in person. *Mech. Ag.*, §§ 964, 966; *Ross v. Moskowitz* (Civ. App.), 95 S. W. 86, 88, 89, affirmed in 100 Tex. 434, 100 S. W. 768; *Burns v. Hill*, 2 App. Civ. Cases, § 523. See, generally, the title PRINCIPAL AND AGENT.

#### Principal Must Sell in Good Faith.

—It was held in *McDonald v. Cabiness* (Civ. App.), 98 S. W. 943, 946, affirmed in 100 Tex. 615, 102 S. W. 721, where an owner of standing timber employed a broker to sell it, that although the owner had this agency outstanding, he had the right to sell the property himself and thereby terminate the broker's right to compensation provided he did not do this for the purpose of defeating the broker, but for it to have such effect it must have been to some stranger he sold and not to a person already procured by the broker.

#### Where Broker's Right to Sell Exclusive.

—In *Stringfellow v. Powers*, 4 Tex. Civ. App. 199, 200, 201, 23 S. W. 313, where plaintiffs sued on a written contract, whereby defendant placed certain land in their hands for sale, and gave them the exclusive right to sell the same for eight months from the first of January, 1889, and as remuneration they were to receive all they could sell the property for, over \$1,000; and within the eight months defendant, without their knowledge or consent, sold it for \$1,200; and they alleged it was worth \$1,800; it was held that the contract being proved as laid, the consideration being the bringing about of a sale, it was valid, and that under the contract plaintiffs for eight months having had exclusive authority to sell the land, defendant could not defeat their right by a sale of the land, and

that upon such sale plaintiff were entitled to recover the excess in value over \$1,000. See *Harrell v. Zimpleman*, 66 Tex. 292, 17 S. W. 478, where brokers were entitled to reasonable compensation for their services. See, generally, the title CONTRACTS.

A petition sufficiently states a cause of action, where it alleges that plaintiff, a broker, had the exclusive right until a certain date to sell defendant's land, that he was to receive a certain commission for making such sale, and that before the expiration of his allotted time for sale the property was sold and defendant executed a deed to the purchaser, and defendant then refused to pay the commissions, but does not set out specifically the acts and things done constituting the efforts resulting in the sale of land. *Yarborough v. Creager* (Civ. App.), 77 S. W. 645, 646. See post, "Employment of Several Brokers," VI, B, 1; "Sufficiency," VI, G, 4, b, (1). And see, generally, the title PLEADING.

**In Ignorance of Broker's Services.**—Where an owner of standing timber, after employing plaintiff to sell the same, sold it himself to a purchaser procured by plaintiff, it was immaterial to plaintiff's rights to recover for his services that the owner was not guilty of fraud in relation to such sale, or that he should have had previous knowledge that the purchaser had been induced to buy through plaintiff's efforts. *McDonald v. Cabiness* (Civ. App.), 98 S. W. 943, affirmed in 100 Tex. 615, 102 S. W. 721. See post, "Persons Liable for Commissions," VI, C; "Right of Action and Defenses," VI, G, 2. And see, generally, the title FRAUD AND DECEIT.

##### 5. Services Sufficient for Reward.

###### a. In General.

A broker who had procured a purchaser for his principal on terms satisfactory to him according to contract is entitled to recover commissions, regardless of whether or not the prin-

cipal expressed his satisfaction with what the broker had done, or whether he kept the property, or sold it to another purchaser. *Orynski v. Menger*, 15 Tex. Civ. App. 448, 449, 39 S. W. 388, 389. See post, "In General," VI, A, 5, f, (1), (a); "Sufficiency," VI, G, 4, b, (1).

In *Brockenbrow v. Stafford* (Civ. App.), 76 S. W. 576, 577, where the petition alleged that defendant agreed with plaintiffs that, if they should find and send him a party to whom he could sell certain ranch property, he would pay them a commission, and that they procured a purchaser who entered into negotiations with defendant, and finally purchased the property from him, it was held that the petition was good as against a general demurrer. See post, "Sufficiency," VI, G, 4, b, (1). See, generally, the title PLEADING.

Defendant's contract to rent land for plaintiff to a good reliable tenant, who can carry himself with feed, provisions, etc., and to plant not less than 400 acres to rice, does not bind him that the land shall in any event be planted, but only to furnish a tenant able, etc., who will agree to and is able to so plant. *Barr v. Cardiff*, 75 S. W. 341, 32 Tex. Civ. App. 495.

###### Substantial Compliance Required.—

In *Bogart v. McWilliams* (Civ. App.), 31 S. W. 434, 435, where defendants placed in the hands of plaintiffs, real-estate agents, a tract of land for sale, and plaintiffs sent an employee to distant states to induce a purchaser to come thither to buy, and he induced a purchaser to come but plaintiffs, learning from the employee that the purchaser did not care to buy the whole tract, arranged with their employee to take an interest in it, and after the sale was thus arranged, in order to avoid paying the commission to plaintiffs, a deed was made by defendants to the employee who conveyed to the purchaser an interest of two-thirds, he assuming that a propor-

tion of the purchase money notes which the employee had given, it was held that, having procured a purchaser and arranged a sale of defendants' land, which was made substantially as arranged by plaintiffs and authorized by defendants, plaintiffs were entitled to their commission. See post, "Trade Concluded by Broker," VI, A, 5, e, (1). And see, generally, the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**.

In *Smith v. Patrick* (Civ. App.), 43 S. W. 535, affirmed in 93 Tex. 720, no op., where plaintiff, a broker, was employed by defendant to sell certain lands for him, the only condition of the sale being that the land should pay off the debt, interests, costs, taxes and expenses, the first two items amounting to \$26,000, and plaintiff reported to him sales made of about half of the land for \$21,000, the best part of the land remaining unsold, it was held that the plaintiff, having procured purchasers who were ready, able, and willing to purchase the land, satisfactory to defendant, had earned the commissions for which he had sued. See post, "Procuring Purchaser Willing, Ready and Able to Buy," VI, A, 5, b. And see, generally, the title **CONTRACTS**.

In *Gray v. Carroll* (Civ. App.), 105 S. W. 214, where the parties to whom the owner of land sold her farm were introduced and procured by a broker who complied with the terms of his contract, except in selling to such parties he procured for a price greater than that she had stated to the broker she was willing to take, it was held that the broker had earned his commissions under the contract between him and the owner to procure and furnish a purchaser for her farm. See post, "Trade Concluded by Broker," VI, 5, e, (1). And see, generally, the title **CONTRACTS**.

In *St. Louis, etc., R. Co. v. Irvine* (Civ. App.), 89 S. W. 428, 429, in an action by a broker to recover commissions for services alleged to have been

performed by him, where there was a direct conflict in the testimony as to the plaintiff being authorized to act for the defendant, and as to his performing the services for them, it was held that it was erroneous to submit a charge to find for the plaintiff, which failed to require the jury to find that the plaintiff had performed the services that he claimed he was employed to perform. See post, "Appellate Practice," VI, G, 9.

**Commissions Dependent upon "Any Trade."**—It was held in *Alexander v. Wakefield* (Civ. App.), 69 S. W. 77, 78, where the contract provided for payment of compensation on the conclusion of "any trade," between defendant and buyer, that it was not error in refusing to permit the buyer to testify that the trade as finally made between himself and defendant was separate and distinct from the one pending and contemplated between the parties at and immediately after the date of the contract sued upon, because no change or modification in the trade contemplated could defeat plaintiff's right to compensation, he having performed the services stipulated for. See, generally, the titles **CONTRACTS**; **EVIDENCE**.

In *Bowman v. Southwestern Land Co.* (Civ. App.), 107 S. W. 585, 586, where plaintiffs with defendant's consent, listed his land for sale at a certain price, and later defendant withdrew his lands from the market giving notice by publication and personal notice also to plaintiff, but told them, if they found a prospective purchaser and would first notify him of the fact, he would pay them a commission for selling the land, and plaintiffs soon afterwards found a prospective purchaser to whom defendant told plaintiffs to show the land, and told them that if anything came, of it, he would pay them the commission, and plaintiffs showed the land to the prospective purchaser, who was pleased with it, but informed them that he was not

then willing and prepared to enter into a contract to purchase it, and somewhat later entered into a correspondence with defendant and purchased the land from him, it was held that, according to the defendant's express promise, the plaintiffs were entitled to their commissions, and that the question of successful efforts on the part of plaintiff, or readiness to buy on the part of their prospective purchaser, did not appear. See post, "Where Commissions Dependent upon Receipt of Purchase Money or Consummation of Sale," VI, A, 5, d.

**b. Procuring Purchaser Willing, Ready and Able to Buy.**

A broker, who is employed to sell property at a satisfactory price to his principal, is entitled to his commissions upon the procurement of a prospective purchaser ready, willing and able to buy at a satisfactory price. *Kennedy v. Clark*, 1 App. Civ. Cases, § 843; *Graves v. Bains*, 78 Tex. 92, 14 S. W. 256; *Harrell v. Zimpleman*, 66 Tex. 292, 17 S. W. 478; *Burns v. Hill*, 2 App. Civ. Cases, § 523; *Byrd v. Frost* (Civ. App.), 29 S. W. 46; *Burch v. Hester* (Civ. App.), 109 S. W. 399, 400; *Pierce v. Nichols*, 50 Tex. Civ. App. 443, 110 S. W. 206, 209; *Smye v. Groesbeck* (Civ. App.), 73 S. W. 972; *Burnett v. Edling*, 19 Tex. Civ. App. 711, 48 S. W. 775, affirmed in 93 Tex. 636, no op.; *O'Brien v. Gilliland*, 4 Tex. Civ. App. 40, 23 S. W. 224; *McLane v. Goode* (Civ. App.), 68 S. W. 707, 708; *Newton v. Conness* (Civ. App.), 106 S. W. 892, 893. See ante, "In General," VI, A, 5, a; post, "Where Commissions Dependent upon Receipt of Purchase Money or Consummation of Sale," VI, A, 5, d; "Revocation of Broker's Authority," VI, A, 8; "Burden of Proof," VI, G, 5, a; "Admissibility," VI, G, 5, b.

**Purchaser's Acceptance Must Be Explicit and Absolute.**—Where the terms on which a broker is authorized to sell land are explicit, the purchaser's

acceptance must be equally so and leave nothing to speculation or conjecture. *O'Brien v. Gilliland*, 4 Tex. Civ. App. 40, 23 S. W. 224. See, generally, the title SALES.

To entitle a broker to commissions, he must procure a purchaser willing to contract to purchase the land absolutely. *Moss v. Wren*, 102 Tex. 567, 120 S. W. 847, reversing 113 S. W. 739, 118 S. W. 149.

A broker, employed to procure a purchaser of real estate, who procures a purchaser, who enters into a contract for the purchase of the land to forfeit the amount paid as liquidated damages in case he should not consummate the sale, which contract can not be specifically enforced, is not entitled to commissions. *Moss v. Wren*, 102 Tex. 567, 120 S. W. 847, reversing 113 S. W. 739, 118 S. W. 149.

**Financial Responsibility Need Not Be Absolute.**—But to entitle a broker to commissions it is not necessary for the prospective purchasers of land to be of such financial responsibility that their notes for the balance of the purchase price, where they have agreed to pay a third of the purchase price in cash, to be good and collectable irrespective of a vendor's lien, there being no stipulation in the owner's contract with the broker demanding such requirement. *Clark v. Wilson*, 41 Tex. Civ. App. 450, 456, 91 S. W. 627, 630. See, generally, the title VENDOR'S LIENS.

**Sale to Purchaser Dependent upon Resale at Profit.**—A broker employed to negotiate bonds has not secured such purchaser as will entitle him to commissions where the contract of the purchaser for the purchase of the bonds was made with the object of being able to negotiate the bonds at a profit to other purchasers within the time fixed by the agreement for their delivery and they failed within such period to negotiate the bonds and therefore to consummate the contract,

since they would not have taken and paid for the bonds, if they had been without defect, not having found any purchasers at a greater price. *Berg v. San Antonio St. R. Co.* (Civ. App.), 49 S. W. 921, 923, affirmed in 93 Tex. 700, no op. See, generally, the title BONDS, ante, p. 1.

**c. Bringing about Binding Contract.**

**Contract Must Be Binding.**—In an action by a broker to recover commissions, the willingness to purchase must appear by an offer to purchase, either express or implied, communicated to the principal, but may be upon condition that the title is perfect. The purchase of an option or right to take the land within a given time, binding the one to sell but not the other to purchase, is not such offer. *Brackenridge v. Claridge*, 91 Tex. 527, 533, 44 S. W. 819, reversing 42 S. W. 1005; *Winters v. Portwood*, 49 Tex. Civ. App. 297, 298, 109 S. W. 388; *Davidson v. Wills* (Civ. App.), 96 S. W. 634; *Scottish American Mortg. Co. v. Davis*, 96 Tex. 504, 506, 509, 74 S. W. 17, reversing 72 S. W. 217; *Kiam v. Turner*, 21 Tex. Civ. App. 417, 420, 421, 52 S. W. 1043, affirmed in 93 Tex. 644, no op.; *Armstrong v. O'Brien*, 83 Tex. 635, 647, 19 S. W. 268. See post, "Where Defect in Principal's Title," VI, A, 5, f, (1), (b); "Sufficiency," VI, G, 4, b, (1); "Admissibility," VI, G, 5, b. See, generally, the title CONTRACTS.

**d. Where Commissions Dependent upon Receipt of Purchase Money or Consummation of Sale.**

An agent employed to sell certain land or other things for a commission payable after the sale is completed, is entitled to recover in a suit upon the contract only upon proof that he has fully performed his part of the undertaking, and that the sale was accepted by the parties as he made it. *Eidson v. Saxon* (Civ. App.), 30 S. W. 957; *Wilson v. Ellis* (Civ. App.), 106 S. W.

1152; *Great Western Oil Co. v. Carpenter*, 43 Tex. Civ. App. 229, 232, 236, 95 S. W. 57, affirmed in 101 Tex. 638, no op.; *Pryor v. Jolly*, 91 Tex. 86, 40 S. W. 959, 962, reversing 39 S. W. 1019; *Mechem Agency* § 965; *Burch v. Hester* (Civ. App.), 109 S. W. 399; *Duval v. Moody*, 24 Tex. Civ. App. 627, 60 S. W. 269. See post, "Necessity," VI, G, 4, a; "Variance," VI, G, 4, b, (2); "Questions of Fact," VI, G, 7.

**A real estate broker can not recover commissions**, where he is only entitled to his commissions in the event that the sale of the land is actually consummated and the failure to consummate the sale is not due to the fault of his principals. *Owen v. Kuhn, etc., Co.* (Civ. App.), 72 S. W. 432, 433, affirmed in 97 Tex. 643, no op. See post, "In General," VI, A, 5, f, (1), (a).

**Where Sale Restricted to Certain Proposed Purchaser.**—In *Lyle v. University Land, etc., Co.* (Civ. App.), 30 S. W. 723, 724, 725, where a broker agreed to sell property to a certain person and to receive commissions therefor in case of sale, it was held that he could not recover commissions for having found a purchaser able and willing to take the land at a stated price, even though the failure to consummate the sale was due to the fault of either of the parties. See ante, "Procuring Purchaser Willing, Ready and Able to Buy," VI, A, 5, b; and post, "Effect of Failure or Refusal to Make or Consummate Sale," VI, A, 5, f.

**Transaction Amounting to Sale.**—Where a broker procured a purchaser for the land sold by taking another piece of land for a part of the price, and these terms were accepted by the vendor, the transaction is a sale, entitling the broker to performance of the vendor's contract to allow him all over a specified amount that he could get for the land. *Ullman v. Land*, 37 Tex. Civ. App. 522, 84 S. W. 294, af-

firmed in 101 Tex. 664, no op.; *Thorn-ton v. Moody* (Civ. App.), 24 S. W. 231, affirmed in 93 Tex. 722, no op. See post, "Amount of Compensation," VI, D. See, generally, the title SALES.

**Broker's Commissions Dependent upon Notes Collected.**—In *Gresham v. Galveston County* (Civ. App.), 36 S. W. 796, 798, where a commissioner's court passed an order appointing defendant agent for the sale of certain school lands, giving to the defendant a certain per centum of the amount that might be received from the sales of the lands, it was held that he, under the contract between himself and the county, was entitled only to commissions upon moneys collected by him and not upon notes not yet collected. See post, "Amount of Compensation," VI, D. And see, generally, the title JUDICIAL SALES.

**Commission Dependent on Sales Paying Debts.**—In *Smith v. Patrick* (Civ. App.), 36 S. W. 762, 764, reversed in 90 Tex. 267, 38 S. W. 17, where defendant agreed to make deeds to carry out the sales arranged by plaintiff upon defendant's becoming the purchaser of certain land at a trustees sale, if he found that the sale as negotiated were such as would make the land purchased by him yield his debt and expenses connected therewith, and it was shown that if he had made deeds in accordance the land would not have sold for enough to make him whole in his debt and expenses, it was held that defendant was not liable to plaintiff for commissions on the sales arranged. See, generally, the title JUDICIAL SALES.

**Commissions Dependent upon Cash Sale.**—A land agent authorized to sell only for cash, contracted a sale for half cash and the balance in four and eight months, and testified that he desired the title made to himself, and that he would have made the title to the purchasers, taking their vendor's lien notes for the unpaid purchase

money, which he could have placed in bank and gotten the cash for, with which he would have paid to the vendor the cash price fixed by him upon the land. It being further shown by his testimony he relied upon the purchasers and upon the notes to be executed by them for the means with which to realize the cash necessary, and that if they had failed to comply with their agreement there would have been no sale, held, that this was not a cash sale, and not having been consummated, that the land agent was not entitled to recover compensation for making it. *O'Brien v. Gilliland*, 4 Tex. Civ. App. 40, 44, 23 S. W. 224. See ante, "In General," VI, A, 5, a; post, "Trade Concluded by Broker," VI, A, 5, e, (1). And see, generally, the title SALES.

**Mode of Payment.**—In *Wallace v. Shapard*, 42 Tex. Civ. App. 594, 94 S. W. 151, 152, where defendants wrote plaintiff, a real estate broker, authorizing him to sell certain real estate, stating that his commission was to be 5 per cent payable out of the first moneys collected from the purchaser on his vendees, but this statement was followed by one saying that they would prefer for him to take his commission out of the purchase price in proportion to the payment and as the payments were made, and plaintiff replied that he would carry out the trade to the letter, it was held that the defendants were bound to pay plaintiff commissions out of first moneys received, and that the latter mode of payment stated in their letter was no more than the expression of a wish and did not rise to the dignity of a proposition. See post, "Amount of Compensation," VI, D; "Burden of Proof," VI, G, 5, a. And see, generally, the title PAYMENT.

**e. Effect of Trade Not Concluded According to Terms of Contract.**

**(1) Trade Concluded by Broker.**

**Where Strict Compliance Required.**

—In *Largent v. Storey* (Civ. App.), 61



S. W. 977, 978, where defendant made a contract with plaintiff, a broker, that in no event was he to receive commissions on the sale of certain property unless he sold it for \$3,000 before defendant's return from abroad, it was held that it was error to instruct that if plaintiff was the procuring cause of the sale, he was entitled to recover, when during defendant's absence plaintiff exhibited the property to the person who afterwards bought it for \$2,700.

Defendant agreed with plaintiff, who had found a purchaser for cattle which plaintiff wished to sell, that he would pay plaintiff one dollar per head commission if such purchaser took fifteen hundred head at the rate of \$17 per head, cash. The purchaser bought the cattle, paying one-third cash and the balance by note on time, with interest. Held, that by such sale plaintiff did not, by the terms of his contract, acquire a right to the commissions. *Pryor v. Jolly*, 91 Tex. 86, 90, 40 S. W. 959, reversing 39 S. W. 1019. See, generally, the title SALES.

In a suit for commissions for making a sale of land, where there was testimony that the contract of agency required sale of three tracts, and evidence showed contract to sell but two, it was held, that a charge should have been given that the plaintiff could not recover on the contract upon sale of but two of the tracts. *Armstrong v. O'Brien*, 83 Tex. 635, 648, 649, 19 S. W. 268. See, generally, the title PRINCIPAL AND AGENT.

A broker who sells land for \$17 less than he is authorized to sell it for, is not entitled to his commissions. *Howell v. Denton* (Civ. App.), 68 S. W. 1002, 1003. See ante, "In General," VI, A, 5, a.

Real estate brokers can not recover commissions on a sale, where the contract negotiated by them with the purchaser binds the owner, without authority from him to do so, to pay

\$50 a day for each day that he fails, after a time fixed to execute a deed, and makes that sum a lien on the land; and this though the purchaser may be willing to waive the forfeiture and only hold the owner to such terms of the contract as the brokers were authorized to make. *Evants v. Fuqua*, 102 Tex. 430, 118 S. W. 132, 133. See, also, *Hager v. Ferguson*, 50 Tex. Civ. App. 191, 111 S. W. 673, affirmed in 102 Tex. 432, 118 S. W. 133.

In *Evants v. Fuqua*, 50 Tex. Civ. App. 201, 111 S. W. 675, in an action by a broker for commissions for the sale of lands, where the plaintiff's right to have their case go to the jury was dependent upon whether or not their evidence tended to show that they had procured a purchaser ready, able, and willing to buy the lands of their principal at a price and on terms which they were authorized to make, and there being no evidence tending to show that plaintiffs were authorized to impose upon their principal the onerous condition of an agreement to pay the sum of \$50 per day as liquidated damages for a breach of his contract to convey, and to secure the same by a lien on the lands in controversy, nor any evidence tending to show that the proposed purchaser would have taken the lands without such condition, it was held that a peremptory instruction to find for defendants was correct.

#### **Ratification of Terms Unauthorized.**

—In *Thornton v. Moody* (Civ. App.), 24 S. W. 331, 332, 333, affirmed in 93 Tex. 722, no op., where an owner of several tracts of land placed the same in the hands of a broker at a certain price, agreeing to pay him a certain commission, and the broker finding that he could not sell on the terms, submitted to the owner other terms, which he ratified, but without modifying the commissions, except as to the source of a part of them, it was held the owner was responsible to the

broker for commissions, since ratification amounted to authority to sell as he did.

In *McDonald v. Cabiness*, 100 Tex. 615, 616, 617, 102 S. W. 721, affirming 98 S. W. 943, where in an action by a broker to recover commissions for the sale of timber, plaintiff pleaded facts which entitled him to a recovery and in the alternative prayed for a recovery of the value of his services and it was found that he had made a contract and had fulfilled it in good faith, but not in the manner nor within the time prescribed by the contract, and the other party had sanctioned the work, it was held that, since the sum recovered as a quantum meruit was greatly less than the stipulation in the contract, the defendant, having no just cause for complaint, could not be injured. See, generally, the title *APPEAL AND ERROR*, vol. 1, p. 313.

In *Evans v. Gay* (Civ. App.), 74 S. W. 575, 576, in an action by plaintiff, a broker, to recover commissions for the sale of lands where defendant had expressed himself as satisfied with such terms as the purchaser proposed, it was held that it would not have been proper to have instructed a finding for the defendant on the ground that the sale of one tract of the lands was not for cash entirely and that, therefore, under the contract defendant could not have been required to accept the purchaser. See ante, "Instances of Broker's Authority, Ratification, etc.," III, B; "Actions between Principal or Broker and Third Person," V, E, 3; "In General," VI, A, 5, a; "Where Commissions Dependent upon Receipt of Purchase Money or Consummation of Sale," VI, A, 5, d; post, "In General," VI, A, 5, f, (1), (a); "Persons Liable for Commissions," VI, C; "Amount of Compensation," VI, D; "Variance," VI, G, 4, b, (2). And see, generally, the title *INSTRUCTIONS*.

## (2) Trade Concluded by Principal.

See ante, "Sale by Principal," VI, A, 4.

Where the price or terms of the sale are fixed by the seller, in accordance with which the broker undertakes to produce a purchaser, yet if upon procurement of the broker a purchaser comes with whom the seller negotiates and thereupon voluntarily reduces the price of the thing to be sold, or the quantity, or otherwise changes the terms of sale as proposed to the broker so that the sale is consummated, on terms or conditions offered which the party proposing to buy is ready and agrees to accept, then in either such case the broker will be entitled to his commission, if not the full sum agreed upon, at least compensation for the reasonable value of his services. *Whart. on Agency*, § 329; *Graves v. Bains*, 78 Tex. 92, 94, 14 S. W. 256; *Blair v. Slosson*, 27 Tex. Civ. App. 403, 404, 66 S. W. 112, affirmed in 95 Tex. 674, no op.; *Ullman v. Land*, 37 Tex. Civ. App. 422, 423, 84 S. W. 294, 296, affirmed in 101 Tex. 664, no op.; *Byrd v. Frost* (Civ. App.), 29 S. W. 46; *Burns v. Hill*, 2 App. Civ. Cases, § 523; *McDonald v. Cabiness* (Civ. App.), 98 S. W. 943, 945, 946, affirmed in 100 Tex. 615, 102 S. W. 721; *Stringfellow v. Powers*, 4 Tex. Civ. App. 199, 23 S. W. 313; *Pierce v. Nichols*, 50 Tex. Civ. App. 443, 110 S. W. 206; *Thornton v. Stevenson* (Civ. App.), 31 S. W. 232; *Bowser v. Field* (Sup.), 17 S. W. 45; *Wilson v. Clark*, 35 Tex. Civ. App. 92, 79 S. W. 649; *Hoefling v. Hambleton*, 84 Tex. 517, 518, 19 S. W. 689; *Frey v. Klar* (Civ. App.), 69 S. W. 211. See, also, *Pryor v. Jolly*, 91 Tex. 86, 40 S. W. 959, reversing 39 S. W. 1019. See post, "Amount of Compensation," VI, D.

A petition claiming broker's commissions is not defective because it alleges that the defendant sold his land for a less amount than the plaintiff was authorized to receive, where it was only necessary for plaintiff to show that he either sold the land, or that he negotiated, induced or brought about a sale of the same to

the proposed purchaser. *Pierce v. Nichols*, 50 Tex. Civ. App. 443, 110 S. W. 206, 208. See post, "Sufficiency," VI, G, 4, b, (1). See, generally, the title PLEADING.

Evidence in an action for commissions for procuring a sale of land, where defendant, a few days after authorizing plaintiff to sell to a certain person for a certain amount, sold to him for a less amount, held sufficient to sustain his cause of action. *Pierce v. Nichols*, 50 Tex. Civ. App. 443, 110 S. W. 206; *Graves v. Bains*, 78 Tex. 92, 14 S. W. 256. See post, "Sufficiency," VI, G, 5, c.

**After Expiration of Broker's Agency.**—In *Eidson v. Saxon* (Civ. App.), 30 S. W. 957, 958, where defendant authorized plaintiff to sell his land to a certain purchaser for so much, a part of which was to be paid not later than the 1st of August, 1893, and plaintiff, contrary to defendant's instructions, agreed with the purchaser to allow him until the 20th of August, 1893, to make the cash payments, and to sell him the land in separate tracts, it was held that the plaintiff forfeited his right to any commissions in a sale made of the land by the defendant to the purchaser on the 14th of August, 1893. See ante, "Necessity for Employment and Agreement to Pay Commissions," VI, A, 2.

**When Broker's Efforts Have Failed.**—In *Thornton v. Stevenson* (Civ. App.), 31 S. W. 232, 233, 234, where a broker alleged in his petition a specific agreement under which he was employed to exchange and sell lands, it was held that he could not recover commissions on the exchange and sale of lands finally effected between the owners of the lands on different terms from those the broker was authorized to make, when they were made after the broker's efforts in making the sale and exchange had proved unsuccessful.

**Where Defect in Principal's Title.**—Where defendant, wishing to exchange

his lands, which were in three several tracts, for Texas land, agreed that if plaintiff brought about a trade he would accept, he would pay for the services, and that he could trade a part or all of his lands, and plaintiff found an owner of Texas lands willing to exchange, and brought the parties together and an exchange was consummated, plaintiff was entitled to his commissions, despite the facts that after the parties were brought together it developed that a lien existed on the Texas lands by reason of which one of defendant's tracts was not included in the exchange as finally made. *Blair v. Slosson*, 27 Tex. Civ. App. 403, 404, 66 S. W. 112, affirmed in 95 Tex. no op. See post, "Where Defect in Principal's Title," VI, A, 5, f, (1), (b).

**f. Effect of Failure or Refusal to Make or Consummate Sale.**

(1) Prevention by Principal.

(a) In General.

**Failure Must Result from Fault of Principal.**—Where a broker brings to the principal a customer ready, able and willing to purchase land upon the principal's terms, and no sale is effected, the broker is entitled to his commission, provided the failure resulted from the fault of the principal. *Brackenridge v. Claridge*, 91 Tex. 527, 532, 44 S. W. 819, reversing 42 S. W. 1005; *Clark v. Wilson*, 41 Tex. Civ. App. 450, 458, 91 S. W. 627; *Kennedy v. Clark*, 1 App. Civ. Cases, § 843; *Pierce v. Nichols*, 50 Tex. Civ. App. 443, 110 S. W. 206, 208. See ante, "Where Commissions Dependent upon Receipt of Purchase Money or Consummation of Sale," VI, A, 5, d; post, "Persons Liable for Commissions," VI, C; "Right of Action and Defenses," VI, G, 2; "Sufficiency," VI, G, 4, b, (1); "Burden of Proof," VI, G, 5, a; "Admissibility," VI, G, 5, b.

In *Clark v. Wilson*, 41 Tex. Civ. App. 450, 456, 91 S. W. 627, 630, where defendant employed plaintiff to sell

his land, who negotiated a sale with several purchasers, one of whom executed the contract of sale with defendant also paying the earnest money and no sale having been made and the purchasers not having come up with the cash payments necessary to enable them to buy, they depending entirely upon other parties with whom they had contracted to buy the property and who were to furnish the cash to make the first payment, the defendant complained to one of them of the delay and gave them a few days to consummate the sale, which not being done, the defendant canceled the contract and returned the earnest money, it was held that it was not necessary that they should have been able independently of the third person to make the cash payment, but that if they could have gotten the money from such parties, in the event the defendant made the sale as set out in his contract and if the failure to consummate the sale was the fault of the defendant, it should have been sufficient to have entitled plaintiff to his commissions.

**Principal Refusing without Sufficient Reason.**—When an agent employed to sell land complies with the contract of employment, and the owner refuses without sufficient reason to fulfill the agreement made by such agent with the party who desires to purchase, if such party be able, willing, and ready to purchase, the agent is entitled to compensation, to be regulated either by the terms of the contract, or by established usage if there be no contract fixing the terms. *DeCordova & Son v. Bahn*, 74 Tex. 643, 645, 12 S. W. 845; *Harrell v. Zimpleman*, 66 Tex. 293, 17 S. W. 478; *O'Brien v. Gilliland*, 79 Tex. 602, 604, 15 S. W. 681; S. C., 4 Tex. Civ. App. 40, 41, 42; 23 S. W. 224; *Pryor v. Jolly*, 91 Tex. 86, 90, 40 S. W. 959, reversing 39 S. W. 1019. See post, "Amount of Compensation," VI, D.

**Where a sale of land made by the principal resulted in bringing a less price than was specified in an agreement between the broker and the principal to pay her a certain per cent commission for selling such land, the broker was not entitled to the agreed commission, but to a reasonable compensation as asked for by the pleadings.** *Graves v. Bains*, 78 Tex. 92, 94, 14 S. W. 256; *Blair v. Slosson*, 27 Tex. Civ. App. 403, 404, 66 S. W. 112, affirmed in 95 Tex. 674, no op.; *Ullman v. Land*, 37 Tex. Civ. App. 422, 423, 84 S. W. 294, 296, affirmed in 101 Tex. 664, no op.; *Byrd v. Frost* (Civ. App.), 29 S. W. 46; *Burns v. Hill*, 2 App. Civ. Cases, § 523; *McDonald v. Cabiness* (Civ. App.), 98 S. W. 943, 946, affirmed in 100 Tex. 615, 102 S. W. 721. See ante, "Trade Concluded by Principal," VI, A, 5, e, (2); "In General," VI, A, 5, f, (1), (a)

**Principal's Interference Must Be in Good Faith.**—In *Taylor v. Cox* (Sup.), 7 S. W. 69, where in a suit brought by a broker to recover compensation for negotiating a sale of land, which was claimed not to have been completed because of defendant's informing the purchaser that the owner held the land at a less price, whereupon the court charged the jury that if the purchaser had agreed with plaintiff to purchase the land in controversy and that the acts or conduct of defendant induced him to forego making the purchase he had agreed to make, to find for plaintiff, it was held that there was error in so instructing, because it was too general and did not specify that such acts had to be made in bad faith towards plaintiff, to evade commissions, or wilfully. See post, "Admissibility," VI, G, 5, b.

**Failure to Comply with Terms Modified and Accepted.**—The rule seems to be well settled that where a real estate broker has contracted for a certain compensation for procuring a customer to purchase on certain terms

and conditions, and he procures a purchaser who agrees to purchase under modified terms and conditions differing from those the agent was authorized by his principal to make, and such terms, as modified, are agreed to by the owner of the property by his entering into a written contract of sale, embodying the modified terms and conditions, with the purchaser, the broker is entitled to his compensation as stipulated in his contract of agency, if, through the failure of his principal to comply with the terms and conditions he has undertaken on his part to perform and comply with, the contract of sale is not consummated. *Graves v. Bains*, 78 Tex. 92, 94, 14 S. W. 256; *Conkling v. Krakauer*, 70 Tex. 735, 739, 11 S. W. 117; *Hahl & Co. v. Wickes*, 44 Tex. Civ. App. 76, 97 S. W. 838; *McDonald v. Cabiness* (Civ. App.), 98 S. W. 943, affirmed in 100 Tex. 615, 102 S. W. 721; *West Bros. v. Thompson*, 48 Tex. Civ. App. 362, 106 S. W. 1134.

If in an action for a broker's commission, the defendant accepts new and different terms proposed by the owner and afterwards refuses to consummate the transaction, the broker will be entitled to his commission unless defendant has reserved the absolute right to approve or reject any contract for the purchase of the property that might be proposed. *Kiam v. Turner*, 21 Tex. Civ. App. 417, 421, 52 S. W. 1043, affirmed in 93 Tex. 644, no op.

In *Kiam v. Turner*, 21 Tex. Civ. App. 417, 52 S. W. 1043, 1046, affirmed in 93 Tex. 644, no op., where the contract under which the plaintiff performed his services as broker for the defendant, stipulated that plaintiff's compensation for such services should be a certain percentage on whatever deal defendant might make with a certain owner of land, provided such deal was consummated, out of the proceeds of such deal, it was held that

defendant should recover, even though the failure to consummate such deal was due entirely to defendant's willful refusal, where the defendant expressly reserved to himself the absolute right to approve or to reject any contract for the purpose of the property which might be agreed on by plaintiff and the owner of the land. See ante, "Trade Concluded by Broker," VI, A, 5, c, (1); "Where Commissions Dependent upon Receipt of Purchase Money or Consummation of Sale," VI, A, 5, d; post, "Amount of Compensation," VI, D.

**Where Principal Enjoined.**—Where a real estate broker was engaged by an assignee for the benefit of creditors to make sale of certain land belonging to the trust estate under a contract by which the assignee did not exempt himself from personal liability, and the broker procured a purchaser at a price which was acceptable to the assignee, but before the deed was executed by the assignee an injunction was issued at the instance of a creditor of the insolvent estate, on the ground of inadequacy of price, restraining the completion of the sale, and the purchaser thereupon withdrew his offer, the broker was entitled to recover his commissions, and the assignee was personally liable therefor. *Gibson v. Gray*, 17 Tex. Civ. App. 646, 43 S. W. 922. See, generally, the title INJUNCTIONS.

#### (b) Where Defect in Principal's Title.

**General Rule.**—It is settled that where the owner of the land holds himself out as having a good title, and the broker procures a purchaser of the land, and brings the seller and purchaser together, and a definite and binding contract is entered into between them to consummate the sale upon the terms and prices agreed to by the seller, if the title is good, the broker is entitled to his commissions,

although no sale be effected because of a defect in the title. *Brackenridge v. Claridge*, 91 Tex. 527, 44 S. W. 819, reversing 42 S. W. 1005, 43 L. R. A. 593; *Albritton v. First Nat. Bank*, 38 Tex. Civ. App. 614, 86 S. W. 646; *Berg v. San Antonio St. R. Co.*, 17 Tex. Civ. App. 291, 42 S. W. 647, 43 S. W. 929; *Stringfellow v. Powers*, 4 Tex. Civ. App. 199, 23 S. W. 313; *Conkling v. Krakauer*, 70 Tex. 735, 11 S. W. 117; *Sullivan v. Hampton* (Civ. App.), 32 S. W. 235; *Smye v. Groesbeck* (Civ. App.), 73 S. W. 972. See ante, "Bringing about Binding Contract," VI, A, 5, c.

**Implied Condition That Title Is Perfect.**—It is an implied condition in a contract where the broker procures purchasers of land and agree upon terms of sale to them which are satisfactory to the owner, and they are ready, willing and able to comply with the terms of sale and to take the land when the same shall be surveyed and the title shown to be satisfactory, but the owner fails and refuses to comply with the sale, that the title shall be perfect. The petition therefore, in an action by a broker for commissions, alleging such contract, shows a good cause of action. *Wilson v. Clark*, 35 Tex. Civ. App. 92, 94, 79 S. W. 649. See, generally, the title SALES.

**Purchaser's Attorney Passing on Title.**—Where the owner of land impliedly warranted the title of the land in question when it employed plaintiff to sell it, and the provision in the contract, stating "title to be passed on by the purchaser's attorney," does not materially alter the legal status of plaintiff and defendant respecting the transaction in question, plaintiff's right to compensation is not defeated. *Albritton v. First Nat. Bank*, 38 Tex. Civ. App. 614, 617, 86 S. W. 646. See, generally, the title SALES.

**Broker Knowing of Legal Defects.**—Where an agent employed to sell cor-

porate bonds, at the time he contracts or performs the work for which he asks compensation, knows of the legal defect in the bonds which ultimately defeats his effort to sell, he is not entitled to recover. *Berg v. San Antonio St. R. Co.*, 17 Tex. Civ. App. 291, 303, 42 S. W. 647, 43 S. W. 929; *S. C.* (Civ. App.), 49 S. W. 921, affirmed in 93 Tex. 700, no op. See post, "Admissibility," VI, G, 5, b. See, generally, the titles CORPORATIONS; PRINCIPAL AND AGENT.

**Title to Attorney's Satisfaction Not Recognition of Defect.**—That an agent, negotiating a sale of corporate bonds, contracted with the purchaser providing that the title should be satisfactory to the purchaser's attorney, is not a recognition of a defeat in his principal's title which would defeat a recovery for his commission, where the sale failed on account of such defeat. *Berg v. San Antonio St. R. Co.*, 17 Tex. Civ. App. 291, 302, 42 S. W. 647, 43 S. W. 929. See post, "Burden of Proof," VI, G, 5, a; "Questions of Fact," VI, G, 7.

**Knowledge of Fact Implies Knowledge of Law.**—Although a broker may not have known the legal effect of facts invalidating the bonds he was employed to negotiate, yet, when he is shown to have had knowledge of such facts, he must be conclusively held to a knowledge of the law arising from them. *Berg v. San Antonio St. R. Co.* (Civ. App.), 49 S. W. 921, 923, affirmed in 93 Tex. 700, no op. See ante, "Trade Concluded by Principal," VI, A, 5, e, (2). And see, generally, the title PRESUMPTIONS AND BURDEN OF PROOF.

## (2) Failure or Refusal of Purchaser.

**Financial Inability of Purchaser.**—After a broker has procured a purchaser acceptable to the seller and a written contract of sale has been entered into by them, whether the purchaser is able to pay for the land or

not, the broker is entitled to his commissions. *Watkins Land Mortg. Co. v. Thetford*, 43 Tex. Civ. App. 536, 538, 96 S. W. 72; *Leuschner v. Patrick* (Civ. App.), 103 S. W. 664, 665.

**Refusal after Defect Cured.**—Where the agent of a corporation employed by it to sell its bonds has no knowledge of their invalidity, and finds a purchaser, but the sale is not completed because of the invalidity of the bonds, the agent does not lose his right to his commissions, because the corporation, after the time for performing the contract of sale has expired, procures the defect to be cured within a reasonable time, with the knowledge and consent of the agent and proposed purchaser, and the latter still refuses to take and pay for the bonds. *Berg v. San Antonio St. R. Co.*, 17 Tex. Civ. App. 291, 299, 42 S. W. 647, 43 S. W. 929. See ante, "Where Defect in Principal's Title," VI, A, 5, f, (1), (b). And see, generally, the title CORPORATIONS.

**Broker's Representations Not Misleading.**—It was held in *Scottish-American Mort. Co. v. Davis* (Civ. App.), 72 S. W. 217, 219, reversed in 96 Tex. 504, 74 S. W. 17, in an action by a real estate broker to recover commissions for procuring a purchaser for land, that upon consideration of the testimony in the case the representations of the broker as to the land were not sufficiently misleading to justify the purchaser's refusal to take the land on the ground of its "ill shape," and to defeat the broker's right to commissions. See post, "Sufficiency," VI, G, 5, c. And see, generally, the title FRAUD AND DECEIT.

**Representations Must Be Made with Scientia.**—An instruction that if a broker represented to a purchaser that the owner of land held the same for more than a certain sum per acre, and the purchaser discovered this to be false, then he was justified in aban-

doning the trade and defendant would not be liable, would be improper under the evidence in the case, which showed no practice of fraud. *Taylor v. Cox* (Sup.), 16 S. W. 1063, 1064. See ante, "Third Person to Broker," V, C; "Where Commissions Dependent upon Receipt of Purchase Money or Consummation of Sale," VI, A, 5, d; post, "Instructions," VI, G, 6; "Burden of Proof," VI, G, 5, a. And see, generally, the title FRAUD AND DECEIT.

**Intervening Broker Inducing Purchaser Not to Buy.**—Plaintiff, a real estate broker, procured C. to purchase certain real estate, and C. contracted with the owner thereof, whereby money deposited by him should be forfeited if C. should not close the trade within 30 days. M., claiming to be interested as broker in the sale, demanded of plaintiff a portion of the commission, and, on this being denied, thereafter with C. induced the owner of the land to refuse to carry out the contract. After the 30 days, the owner conveyed the land to M., and the money deposited by C. was accepted by the owner as a part of the consideration. Thereafter M. conveyed to C., and plaintiff sued M. and C. on the ground that they had conspired to induce the owner of the property to break his contract, whereby plaintiff lost his commission, and that the sale and conveyance to C. was in reality the same transaction which had been originally procured by the efforts of plaintiff. Held, that, as C. was not bound by his contract to consummate the purchase negotiated, he had a right to withdraw and forfeit his deposit, and plaintiff had no cause of action against M. and C. for the alleged tort. *Roberts v. Clark* (Civ. App.), 103 S. W. 417. See the title TORTS.

#### 6. Fraudulent and Double Dealing on Part of Broker.

A broker, acting, without the knowl-

**edge of defendant**, as agent for the other party to an exchange of property, and receiving compensation from the latter, is not entitled to compensation from the defendant. *Mechem on Agency*, §§ 643, 798; *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268; *Tinsley v. Penniman*, 12 Tex. Civ. App. 591, 34 S. W. 365. See post, "Persons Liable for Commissions," VI, C.

**An agent can not secretly buy the property of his principal for himself**, either directly or indirectly, as he can not be both buyer and seller; and, upon discovery that the agent has purchased for himself, if the contract be executory, the principal may refuse to perform it, and, if it be executed, the principal may recover the property from the agent, together with any commission he may have paid the agent on such sale. *Mechem Ag.*, § 619; *Story Ag.*, §§ 333, 334; *Hahl v. Kellogg*, 42 Tex. Civ. App. 636, 94 S. W. 389, affirmed in 101 Tex. 640, no op.; *Ryan v. Kahler* (Civ. App.), 46 S. W. 71, 72; *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268; *Smith v. Tripis*, 2 Tex. Civ. App. 267, 270, 21 S. W. 722.

**Brokers Can Not Be Both Purchaser and Agent.**—Plaintiffs having, in order to procure a contract of sale of a sufficient quantity of land to entitle them to their commissions, agreed to purchase a portion of the land for themselves and having paid to defendants their portion of the earnest money required to make their agreement binding, can not, after inducing defendants to release them from their contract of purchase and return to them their earnest money, be allowed to recover of defendants commissions which were dependent upon the contract of sale. *Shinn v. Boyd*, 34 Tex. Civ. App. 151, 155, 77 S. W. 1027, 1030, affirmed in 98 Tex. 632, no op.

**Right to Rescission.**—Purchasers of land could rescind the contract where

the vendor's agent, withholding from the purchasers knowledge of his agency and that he would receive \$3,000 commission, assumed the attitude of joint purchaser with them, and induced them to buy through confidence in him as a bona fide purchaser, the purchasers acting promptly on discovering the facts. *Houts v. Scharbauer*, 46 Tex. Civ. App. 605, 103 S. W. 679.

**No Recovery between Guilty Principal and Agent.**—Where rescission of a contract for the sale of land was allowed the purchasers because it had not been disclosed that one of the purchasers was the vendor's agent in making the sale and received \$3,000 commission, the court properly refused recovery between the agent and the vendor of money paid under the contract, they being in *pari delicto*. *Houts v. Scharbauer*, 46 Tex. Civ. App. 605, 103 S. W. 679.

**Trading Behind Court's Back.**—In *Ryan v. Kahler* (Civ. App.), 46 S. W. 71, 72, where a defunct corporation placed its lands in the hands of a receiver, the defendant, who agreed to allow plaintiff all he might receive over \$20 an acre for such land, and plaintiff had entered into an agreement with another person whereby such person was to be put forward as the buyer to purchase the land from the receiver at \$20 per acre and sell it to still another person for \$30 per acre, the buyer being put forward as the ostensible purchaser for the purpose of getting the confirmation of the court, it being evident that no court would confirm a sale when it was known that the agent was receiving one-third of the purchase money, it was held that plaintiff's action in the matter was a fraud upon the court and he would not be permitted to profit by it. See, generally, the title JUDICIAL SALES.

**Dividing Commissions with Purchaser.**—That a land agent may have



agreed to share his commissions with a purchaser could work no injury to the principal. It would not be a ground for reversal of a judgment in favor of the agent for commissions. *Chase v. Veal & Co.*, 83 Tex. 333, 335, 18 S. W. 597; *Stephens v. Tomlinson* (Civ. App.), 88 S. W. 304. See ante, "Instances of Broker's Authority, Ratification, etc.," III, B.

#### 7. Negotiating Illegal Contracts.

See, generally, the title **ILLEGAL CONTRACTS**.

When a broker is privy to the unlawful design of the parties to an illegal contract and becomes an actor through whom the thing is to be done, and contracts to perform the acts necessary to its achievements, he is *particeps criminis* and can not recover for services rendered or money paid by him on behalf of either in furthering the transaction. *Seeligson v. Lewis*, 65 Tex. 215, 216, 222.

In *Street v. Houston Ice, etc., Co.* (Civ. App.), 55 S. W. 516, 517, where a broker brought an action to recover commissions for procuring a contract between two competing brewing companies to maintain a standard and unvarying price on their products, which services were rendered in direct furtherance of an illegal act under the Texas statute in reference to conspiracies against trade, it was held that the broker could not recover because *in pari delicto potior est conditio defendentis*. See ante, "Broker to Principal," V, A; post, "Right to Compensation Other than Commissions," VI, F; "Right of Action and Defenses," VI, G, 2.

**Commission and Highest Legal Interest Not Usurious.**—See the title **USURY**.

A commission paid to agents for securing a loan for which the highest legal rate of interest is paid does not make the transaction usurious, when the person to whom it is paid is the

agent of the borrower. *Stuart v. Tenison Bros., etc., Co.*, 21 Tex. Civ. App. 530, 53 S. W. 83, affirmed in 93 Tex. 739, no op.

#### 8. Revocation of Broker's Authority.

See ante, "Right to Revoke," IV, B.

**Can Not Revoke to Evade Commissions.**—If a broker procures a purchaser who is willing, able and ready to purchase on the terms fixed by the principal, he can not evade the payment of commissions by discharging the broker, and then selling the property at a lower price, if he does those things for the purpose of evading the payment of commissions. *Newton v. Conness* (Civ. App.), 106 S. W. 892, 893; *Burns v. Hill*, 2 App. Civ. Cases, § 523.

In *McLane v. Goode* (Civ. App.), 68 S. W. 707, 708, where it was alleged in a petition by a broker to recover commissions for the sale of land, that it was agreed that plaintiff should sell certain lands, according to specifications, and that all the prospective purchasers were and are financially able to buy the property and at the time of negotiations were willing, ready and able to buy upon the terms of the defendant, and that the sales to each of the parties could have been consummated had it not been for the unlawful revocation of the plaintiff's contract by the defendant, it was held that, the parties being ready, willing and able to buy the property upon defendant's terms, it was all that he could require, under the contract, and therefore the petition showed a cause of action. See ante, "Procuring Purchaser Willing, Ready and Able to Buy," VI, A, 5, b. And, generally, the title **PLEADING**.

**After Reasonable Time to Sell.**—In *Neal v. Lehman*, 11 Tex. Civ. App. 461, 462, 34 S. W. 153, where an agent to sell land found a prospective purchaser not then ready to buy, and was informed by his principal that unless a sale could be affected by a given

date, his authority would be revoked, it was held, that where such limitation of time is reasonable and made in good faith, the agent would not be entitled to commissions on a sale made by the principal after such date, and to the same prospective purchaser with whom the agent had dealt.

## B. PERSONS ENTITLED TO COMMISSIONS.

### 1. Employment of Several Brokers.

See ante, "Employment," II; "Necessity for Employment to Pay Commissions," VI, A, 2; post, "Employment of Subbroker by Broker," VI, B, 2.

Where a principal employs more than one broker, the one who first completes the sale is entitled to the commissions, unless the exertions of another broker are the procuring cause of the sale. *Duval v. Moody*, 24 Tex. Civ. App. 627, 629, 60 S. W. 269; *Land Mortg. Bank v. Hargis* (Civ. App.), 70 S. W. 352; *Edwards v. Pike*, 49 Tex. Civ. App. 30, 33, 107 S. W. 586; *Montgomery v. Biering* (Civ. App.), 30 S. W. 508; *Wilson v. Alexander* (Sup.), 18 S. W. 1058; *Hahl & Co. v. Wickes*, 44 Tex. Civ. App. 76, 79, 97 S. W. 838. See ante, "General Rule," VI, A, 1.

The practical test which ought to control in fixing the liability of the property owner where the right to commissions is contended by two brokers is: Within the knowledge of the owner at the time, was the sale consummated on terms agreed upon between the buyer and the broker who brought the parties together; or was it consummated on other terms as the result of negotiations between another broker and the buyer, and after the latter had abandoned the contract made by him with the other broker. *Edwards v. Pike*, 49 Tex. Civ. App. 30, 33, 107 S. W. 586.

Where a broker, having the exclusive right to sell, or ignorant of the

fact that another broker has a right equal to his own, brings the purchaser and the owner together, when the sale is consummated by the owner himself or by the direct agency of another broker, in such case the broker bringing the parties together is entitled to his commissions if the sale is consummated by the owner himself, because he is entitled to same by the terms of his contract; and if the sale is consummated by another broker, because his services were performed on the faith of his contract and without reference to risks of failure which a knowledge that he had a competitor would have caused him to weigh and, perhaps, provide against. *Edwards v. Pike*, 49 Tex. Civ. App. 30, 34, 107 S. W. 586.

In *Yarborough v. Creager* (Civ. App.), 77 S. W. 645, 646, where defendant intrusted his property exclusively to plaintiff, a broker, to sell for him before a certain date, and defendants made contract with other brokers, it was held that the evidence of such other contracts sought to be introduced was irrelevant and immaterial, and that plaintiff was in no way bound by such contracts, but that his right to recover commissions was to be measured and determined by the terms of his own contract.

Where a sale of land was made by brokers with the assistance of plaintiff, under an agreement with them to divide their commissions with him, and he knew that the brokers were the exclusive agents of defendant, he was not entitled to recover, anything against defendant for his services by merely procuring the purchaser, when he had nothing to do with completing the bargain. *Watkins Land Mortg. Co. v. Thetford*, 43 Tex. Civ. App. 536, 539, 96 S. W. 72. See ante, "Sale by Principal," VI, A, 4.

### 2. Employment of Subbroker by Broker.

See ante, "Employment," II; "Em-

ployment of Several Brokers," VI, B, 1; "Necessity for Employment and Agreement to Pay Commissions," VI, A, 2.

In *Blake v. Austin*, 33 Tex. Civ. App. 112, 114, 75 S. W. 571, where plaintiffs brought an action to recover a share of commission jointly earned by defendant and themselves in the sale of land, it was held upon defendant's demurrer to the petition that the facts stated sufficiently alleged an express contract between the parties as to the division and payment of the commissions. See post, "Sufficiency," VI, G, 4, b, (1). And see, generally, the title PLEADING.

**Where Subbroker Must Be Employed.**—Where an agent employed to sell land situated in this state is a resident of another state, and it is a fair presumption that a sale by a subagent is contemplated, the principal is bound for his compensation. *Eastland v. Maney*, 36 Tex. Civ. App. 147, 81 S. W. 574. See post, "Persons Liable for Commissions," VI, C. And see, generally, the title PRESUMPTIONS AND BURDEN OF PROOF.

**Subbroker's Right to Commission Not Absolute.**—In *Eastland v. Maney*, 36 Tex. Civ. App. 147, 150, 81 S. W. 574, where one of the owners of certain land employed an agent to sell the same, who employed a subagent, the agent agreeing to sell at a certain price if the owners agreed to take it, it was held that the subagent took the risk of getting his commissions for making a sale, knowing that it depended on the owners agreeing to it. See post, "Persons Liable for Commissions," VI, C.

### C. PERSONS LIABLE FOR COMMISSIONS.

See ante, "Liability," V.

**Authorized Employer of Broker.**—In *Taylor v. Cox* (Sup.), 16 S. W. 1063, 1064, where defendant claimed an interest in certain land, but was empowered by the owner to sell the

whole tract, and plaintiff and defendant entered into a contract that authorized plaintiff to sell the land, and to receive as compensation for his services all over a certain sum that the land brought, it was held that defendant was liable to the plaintiff for the amount of his commissions for having informed the buyer that the land could be purchased from the owner at something less than the plaintiff's price and thereby defeating the sale by the plaintiff. See post, "Amount of Compensation," VI, D.

**An executrix has authority to employ an agent to find a purchaser for land, and to agree to pay a commission therefor.** *Dyer v. Winston*, 33 Tex. Civ. App. 412, 77 S. W. 227.

A petition in an action to recover commission for the sale of real estate, alleging that a certain person had authority to act as agent of defendant, an executrix, and that such agent had agreed with plaintiff for the payment of a commission, and that defendant was liable to plaintiff for the commission sued for, is insufficient, as against a special exception, to show that such person had authority to agree to pay plaintiff the stipulated compensation. *Dyer v. Winston*, 33 Tex. Civ. App. 412, 77 S. W. 227.

An executrix has authority to specially authorize an agent to contract for payment of a commission for the sale of land for an amount fixed by her. *Dyer v. Winston*, 33 Tex. Civ. App. 412, 17 S. W. 227.

An executrix can not delegate to an agent, employed to find a purchaser for land, authority to agree, at his discretion, with a subagent, on the amount of commission the latter should receive. *Dyer v. Winston*, 33 Tex. Civ. App. 412, 77 S. W. 227. See ante, "Employment of Subbroker by Broker," VI, B, 2; post, "Amount of Compensation," VI, D.

An executrix can not delegate to an agent, employed to find a purchaser

for land, discretion as to the terms of sale. *Dyer v. Winston*, 33 Tex. Civ. App. 412, 77 S. W. 227.

An executrix has power to ratify and adopt as her own agreement one made by a person assuming to act for her in contracting for the payment of a commission for the sale of land. *Dyer v. Winston*, 33 Tex. Civ. App. 412, 77 S. W. 227. See the title EXECUTORS AND ADMINISTRATORS.

**Principal of Special Agent to Sell Land.**—Where a landowner instructs an agent, who is employed by the year at a specific salary, to look after certain lands, but who has no general authority to sell the lands, to sell a portion thereof, the agent can not make a contract with a broker for the sale thereof which will bind the principal to pay the broker for his services in effecting a sale. *Williams v. Moore* (Civ. App.), 58 S. W. 953. See the title PRINCIPAL AND AGENT.

**Where Employer Estopped to Deny Ownership.**—In *McDonald v. Cabiness* (Civ. App.), 98 S. W. 943, 945, affirmed in 100 Tex. 615, 102 S. W. 721, where one of the defendants dealt with plaintiff as the owner of the property, and authorized plaintiff to sell it for a price net to him, it was held that such defendant could not defeat plaintiff's claim for the services upon the ground that he did not, at the particular time, own it as he pretended, when it was shown that he practically controlled it at the time, and actually owned it when he sold it. See post, "Amount of Compensation," VI, D. And see, generally, the title ESTOPPEL.

**Purchaser Assuming Liability without Broker's Consent.**—In *Burnett v. Casteel* (Civ. App.), 36 S. W. 782, 783, affirmed in 93 Tex. 636, no op., where the seller and buyer agreed that the buyer should pay the brokers' commission, it was held that such agreement would not release seller's liability to the brokers if the facts

showed that they had not released him and agreed to look to the buyer. See, generally, the title NOVATION.

**Husband of Owner.**—In *Smith v. Tripis*, 2 Tex. Civ. App. 267, 269, 21 S. W. 722, sale of land of wife by agent under contract with husband, where the wife, she and her husband being parties defendant in a suit, by plea in reconvention sought recovery of \$1,000 paid by her husband out of the purchase money of her land, to the plaintiff in part payment of commissions claimed by him for making sale of it, and she alleged want of authority on the part of her husband to make contract with plaintiff, and nonliability on her part; that the land was her separate estate; want of knowledge of the contract, of the payment of the money by her husband; no recognition of plaintiff as her agent nor ratification of sale, and that the payment was made through the false and fraudulent representations of plaintiff and the ignorance and mistake of her husband; it was held, that the plea showed a good cause of action in the wife for the recovery of the \$1,000 paid by the husband to plaintiff. See post, "Right of Action and Defenses," VI, G, 2. And see, generally, the title HUSBAND AND WIFE.

**Agents of Disclosed Principal.**—In *Scottish-American Mortg. Co. v. Davis* (Civ. App.), 72 S. W. 217, revised in 96 Texas 504, 74 S. W. 17, where defendant authorized agents to sell certain land and the agents, fully disclosing their principal, employed a real estate broker to sell the land, it was held that no liability existed against the agents in favor of the broker's commissions. See, generally, the title PRINCIPAL AND AGENT.

A broker can not hold an agent, negotiating for the sale of land of an undisclosed principal, liable, where, before liability accrued, the agency was disclosed and the parties entered into a contract with the real owner, not

carried out through such owner's default. *Brackenridge v. Claridge*, 91 Tex. 527, 533, 44 S. W. 819, 821, reversing 42 S. W. 1005. See ante, "In General," VI, A, 5, f, (1), (a); post, "Admissibility," VI, G, 5, b. And see, generally, the title PRINCIPAL AND AGENT.

**Agent of Undisclosed Principal.—**

Where a landowner instructs her agent, who has no general authority to sell her lands, to sell a portion thereof, and the agent employs a broker, who sells the land, but it is not shown that the agent acted for the principal in employing the broker, the principal can not be held liable for the broker's compensation by selling the land to a purchaser found by the broker. *Williams v. Moore* (Civ. App.), 58 S. W. 953. See the title PRINCIPAL AND AGENT.

**Part Owner Who Ratifies Sale by Broker.—**Where an agent was authorized by a party to sell his place and he went with the purchaser, and showed the place to him and told him the terms upon which he could buy, one-half cash and the other half in one year, and the purchaser agreed to the terms provided he could get the seller to allow him an account of \$200 held by him against the vendor as part payment of the purchase price, but the agent did not know of another's interest in the land, and the purchaser then went from his residence to the seller's place of business in another town to see him, when the trade was closed, the latter agreeing to allow the account; that is, it was closed subject to the approval of the other party who was a part owner of the property, and such other party agreed and the deed was passed, it was held that both the owners were bound to pay the commissions for the sale to the agent, because an agent is entitled to compensation when he is the procuring cause even though one owner did not know the sale was made by an agent, but rat-

ified the agent's acts in signing the deed. *Graves v. Bairs*, 78 Tex. 92, 94, 14 S. W. 256. See ante, "Fraudulent and Double Dealing on Part of Broker," VI, A, 6; "Sale by Principal," VI, A, 4; "Instances of Broker's Authority, -etc.," III, B; "Trade Concluded by Broker," VI, A, 5, e, (1). And see, generally, the title PRINCIPAL AND AGENT.

**Acts Not Amounting to Ratification.**

—A landowner instructed her agent to sell certain lands, and the agent employed a broker to sell the lands, without being authorized so to do. The broker effected a sale, and the landowner signed the contract for such sale without knowing the broker's connection therewith, but was afterwards informed that the broker claimed compensation, and the purchaser offered to release the owner if she was dissatisfied with the terms of the sale, and she voluntarily executed a deed to the purchaser, but never acknowledged her liability to the broker, or promised to pay him. Held, not such a ratification of the act of the agent as would make her liable for the compensation of the broker. *Williams v. Moore* (Civ. App.), 58 S. W. 953. See the title PRINCIPAL AND AGENT.

**D. AMOUNT OF COMPENSATION.**

**Certain Sum or Reasonable Compensation According to Contract.—**Plaintiff sued for \$5,000 as commissions on a sale, and the court charged that if the jury found for plaintiffs, and they had a contract with defendants, either express or implied, for \$5,000, the jury should find the amount so expressed or implied, by the contract, but if there was no contract for a certain sum as commissions, they should find such an amount as was a reasonable compensation for the services performed. The jury found for a much less sum than \$5,000. Held, upon objection that as there could be no implied contract for a certain sum,

this was in effect a direct charge to find for plaintiffs, that the charge was not error or misleading, since both clauses were evidently addressed to the amount of damages in case the jury found for plaintiff. *Ellis v. Kirkpatrick*, 32 Tex. Civ. App. 243, 244, 74 S. W. 57, affirmed in 97 Tex. 631, no op. See ante, "Trade Concluded by Principal," VI, A, 5, e, (2); "In General," VI, A, 5, f, (1), (a); post, "Variance," VI, G, 4, b, (2); "Instructions," VI, G, 6; "Questions of Fact," VI, G, 7; "Appellate Practice," VI, G, 9. And see, generally, the titles DAMAGES; IMPLIED CONTRACTS; INSTRUCTIONS.

**Certain Percentage of Price Secured.**—If an owner of land authorizes several brokers to negotiate a sale of the same at a certain minimum sum, and if the brokers negotiate a sale for a larger sum, which is approved by the owner, the broker is entitled to 5 per cent commission on the price for which the owner contracted to sell. *Brackenridge v. Claridge* (Civ. App.), 42 S. W. 1005, 1006, reversed in 91 Tex. 527, 44 S. W. 819. See ante, "Trade Concluded by Broker," VI, A, 5, e, (1).

**Subbroker Not Entitled to Greater Commission than Broker.**—In *Sterling v. DeLaune*, 47 Tex. Civ. App. 470, 476, 105 S. W. 1169, affirmed in 102 Tex. 593, no op., where an action by plaintiff to recover commissions claimed by his firm for the sale of land, who were subbrokers, was brought against the defendant, the owner, and his agency, it was held that, unless authorized, defendant's agency could not contract with plaintiff's firm so as to bind defendant to pay a greater commission than they themselves were to receive. See ante, "Instances of Broker's Authority, Ratification, etc.," III, B. And see, generally, the title PRINCIPAL AND AGENT.

**Rate Not Changed by Refusal to Sell.**—In *Webb v. Barclay* (Civ. App.),

40 S. W. 1026, where plaintiff, a broker, agreed to sell cattle for half commission, but defendant, the owner, refused, without cause, to sell the purchaser who was ready, willing and able to buy, it was held that the measure of compensation could neither be increased nor diminished by the conduct of the defendant, if he declined, without reason, to consummate the trade. See ante, "In General," VI, A, 5, f, (1), (a).

**Rate Not Changed by Principal Selling for Less.**—In *Hoeftling v. Hambleton*, 84 Tex. 517, 19 S. W. 689, 690, where a broker had done all that he was required to do to effect the sale of defendant's land when a bona fide purchaser was procured for the land by such agent, it was held that it could not defeat the right of the agent to the commissions agreed on for the owner to sell to such buyer for a less amount than he had authorized the agent to take. *Burns v. Hill*, 2 App. Civ. Cases, § 523; See ante, "Trade Concluded by Principal," VI, A, 5, e, (2).

**Basis of Recovery.**—In *Davidson v. Wills* (Civ. App.), 96 S. W. 634, 635, in an action by a broker to recover commissions on an exchange of property, where the value of the land the broker secured for the owner of the goods by the exchange was \$12,010, and the owner testified that he had let the other party of the transaction have the stock of goods, paid money, and assumed an indebtedness upon the land that he received in the deal, it was held that, from his testimony, it appeared that the owner of the goods did not realize by the trade the value of the land, and, therefore, it would be error to render judgment so that plaintiff would recover 5 per cent of \$12,010, the basis of his recovery being the amount he realized in exchange for the goods. See, generally, the title SALES.

In *Davidson v. Wills* (Civ. App.), 96

S. W. 634, 635, where plaintiff made an exchange of land for a stock of goods for a commission of 5 per cent, it was held that he was not entitled to commissions or more than the value of the land which he had procured in exchange for the goods, regardless of the value of the goods, or of the nominal valuation of the land when it went into the trade; for in estimating the commissions, the actual, and not the market or trade or fictitious value of the property bought or sold (or exchanged) must be taken into consideration. *Clarke & Skyles on Agency*, § 768. See, generally, the title **SALES**.

**All in Excess of a Certain Price.**—

In *Evans v. Gay* (Civ. App.), 74 S. W. 575, 576, where a real estate broker brought an action to recover commission and alleged an agreement whereby he undertook to sell two tracts of defendant's land and defendant agreed to pay him whatever he obtained over \$60 per acre, that he procured a purchaser of one tract for \$60 an acre, and defendant deeded it accordingly, but refused to make conveyance to a purchaser procured by plaintiff for the other tract at \$70 per acre, it was held that the issue of reasonable value of plaintiff's services should not have been submitted to the jury, because the testimony of plaintiff himself showed that his right was to the compensation as fixed by the contract, if anything. See ante, "In General," VI, A, 5, f, (1), (a).

In *Jenkins v. Darling* (Civ. App.), 56 S. W. 931, where the plaintiff, a broker, testified that it was agreed and understood that he was to have all that certain property brought over a price fixed, and the final clause of the written agreement between plaintiff and defendant stated that defendant was to make the consideration in the deed such as plaintiff might direct, it was held that the testimony of plaintiff as to the agreement for compensation did not contradict any of the

terms of the writing, since they were not inconsistent, such understanding being fairly implied from the writing. See post, "Variance," VI, G, 4, b, (2).

In *Turnley, etc., Co. v. Michael*, 4 App. Civ. Cases, § 223, where the owner of land agreed with his brokers to take \$7,500 net to him for his property, and the brokers sold it for \$8,000 and brought an action for \$500, claiming the excess over \$7,500, it was held that the word "net" meant that the owner was to get that amount free of all expenses and deductions and not that he meant to limit the amount coming to him and to give the brokers all in excess of \$7,500. See ante, "In General," VI, A, 2, a. And see, generally, the title **CONTRACTS**.

In *Jenkins v. Darling* (Civ. App.), 56 S. W. 931, where defendant agreed with plaintiff, a broker, to allow him to sell his land for a certain amount and to allow plaintiff whatever the property brought over that sum, with the understanding also, that plaintiff might reserve for himself from the purchaser the windmill and tank upon the property, it was held that the value of the windmill and tank could not be credited on the surplus. See ante, "Where Commissions Dependent upon Receipt of Purchase Money or Consummation of Sale," VI, A, 5, d.

In an action by a broker for compensation, on an issue as to whether the contract with the principal called for a commission of a certain percentage of the proceeds of the sale or all the proceeds over a specified price, evidence as to defendant's dealings with other real estate agents and the terms under which he had listed the land with them was inadmissible. *Lloyd & Son v. Kerley* (Civ. App.), 106 S. W. 696.

**Certain Amount.**—A contract describing a tract of land, which plaintiff therein agreed to purchase from defendant for other parties, stipulated that when the sale was completed de-

fendant was to pay plaintiff \$530. Held, that such contract evidenced an agreement to pay the amount named as a commission to plaintiff. *Dyer v. Winston*, 33 Tex. Civ. App. 412, 77 S. W. 227. See ante, "Employment," II. And see the title **PRINCIPAL AND AGENT**.

**Reasonable Value of Services.**—It was held in *Stephens v. Tomlinson* (Civ. App.), 88 S. W. 304, where brokers sued their principal for commissions for the sale of land, that, the action not being on an express contract, the brokers were entitled to the reasonable value of their services, and it did not matter if defendant did not agree to pay any certain sum for their services, since after a performance of them with his consent, he was liable for their reasonable value. See ante, "In General," VI, A, 5, a; post, "Right to Lien for Commissions," VI, E. And see, generally, the title **IMPLIED CONTRACTS**.

**Acceptance of Part Commission in Full Settlement.**—See the title **COM-PROMISE AND SETTLEMENT**.

Where a broker made a valid agreement to accept one-half of the commissions alleged to be due him on a sale of land in full settlement, he could not thereafter claim full compensation. *McAfee v. Henry* (Civ. App.), 110 S. W. 143.

Where no fraud, coercion, or even persuasion was used to induce a broker to accept one-half of the commissions demanded in full settlement of his claim, it was immaterial to the validity of such agreement that he was induced to make it because of his fears that he might lose the whole of the commissions if he did not agree to take what was offered him. *McAfee v. Henry* (Civ. App.), 110 S. W. 143.

Where a broker had accepted a written agreement to receive one-half the commissions in full settlement, whether he had entirely performed his services by producing a purchaser

ready, willing, and able to pay for the land, and that the trade was not consummated because of a defect in the title, and that he would therefore have been entitled to full commissions, was immaterial. *McAfee v. Henry* (Civ. App.), 110 S. W. 143. See ante, "Persons Liable for Commissions," VI, C.

## **E. RIGHT TO LIEN FOR COMMISSIONS.**

See, generally, the title **LIENS**.

**Judgment for Compensation Giving Lien.**—In availing himself of the location of land so made by his agent, the owner of the survey is bound, both by his contract and the principles of equity, to pay the locator the stipulated compensation for his services; and the judgment of the court below, making such compensation a lien upon the land, is correct. *Breckenridge v. Neill*, 26 Tex. 101.

**Contract Giving Interest in Land.**—A contract providing that, in consideration of one's patenting and locating surveys, he shall be given a deed for one-sixth of the land so located and patented, and that he may locate it separate from the rest, vests in him an undivided one-sixth of the certificate itself, which he may locate separately, and he will not be a tenant in common with the owners of land located by virtue of the balance of the certificate. *Roller v. Ried*, 87 Tex. 69, 26 S. W. 1060, reversing 24 S. W. 655.

**Contract Stipulating against Lien.**—In *Girard v. Barnard* (Civ. App.), 47 S. W. 482, 483 (see 93 Tex. 661, no op., where plaintiff brought an action upon a contract obligating him at his own expense to clear the title to a tract of land, authorizing him to sell the land at a minimum price, and allowing him one-third the proceeds from the sales of the land, provided out of his one-third he would pay all expenses of litigation and costs of sale, but expressly stating that the interest given the plaintiff in the proceeds



should not be understood as giving him any interest of title in the land, it was held that the contract gave no sort of title to or lien on the land in controversy. See ante, "Amount of Compensation," VI, D.

**Lien upon Notes Not Collected.—**

In *Gresham v. Galveston County* (Civ. App.), 36 S. W. 796, 798, 799, where defendant had been authorized by the county to sell certain lands, and was to be given a certain commission on money actually collected therefor, it was held that defendant, under the order, was obligated to collect, if collectable, in whole or in part, notes received by him from purchasers of the lands sold by him, and that from such amounts realized he was entitled to his commission upon the sums collected on each sale, and that upon each of these notes he had at least a lien to the extent of his commissions and for that reason he could not be deprived of his rights to retain the notes so long as he was not unworthy of the trust reposed on him by the court appointing him.

**F. RIGHT TO COMPENSATION OTHER THAN COMMISSIONS.**

See ante, "Right to Commissions," VI, A.

**Brokers Expenses Procuring Abstract of Title.**—In the absence of an agreement by an agent negotiating a sale of land for the owner to pay for abstracts of title required on such sale, he may recover from the owner, in addition to his commissions, the expense incurred in procuring such abstracts. *Wilson v. Clark*, 35 Tex. Civ. App. 92, 94, 95, 79 S. W. 649.

**Must Show Right to Other Compensation.**—It was held in *Alexander v. Wakefield* (Civ. App.), 69 S. W. 77, 78, where plaintiff, a broker, undertook to assist defendant in promoting the sale of a street railway, that it was proper to instruct the jury that

for plaintiff to recover compensation for such assistance he must show that he aided and assisted in promoting the trade, since the gist of the undertaking was in promoting the trade. See post, "Burden of Proof," VI, G, 5, a. And see, generally, the title **PRESUMPTIONS AND BURDEN OF PROOF**.

**Advances Made to Further Illegal Transactions.**—

If the course of business be such that the broker is expected to make advances of money, then his employment is a request to him to do what the course of business requires, and the liability to repay him will depend, not upon whether the promise to pay was made before or after the transaction in which the advances were made, but on whether that transaction was legal or illegal. The law implies a promise to pay when one person, at the request of another, discharges for the latter a legal obligation to a third person or performs for him some lawful service; but when the request is to do some act illegal in its nature, and out of the act itself springs the claim of one of the actors, then no promise to pay can arise in favor of the actor from his compliance with the request, for in such case there is no valid consideration to support a promise, express or implied. *Seeligson v. Lewis*, 65 Tex. 215, 216, 222. See ante, "Negotiating Illegal Contracts," VI, A, 7. And see, generally, the titles **ILLEGAL CONTRACTS; IMPLIED CONTRACTS**.

**G. ACTIONS BY BROKERS FOR COMPENSATION.**

See ante, "Actions between Principal, Broker and Third Persons," V, E.

**1. Proper Parties.**

A person to whom a broker offered to pay a part of his commission is not a necessary party in a suit by the broker against the principal for commissions, where there was no privity of contract between the principal and

him nor any assignment of a part of the contract to such person by the broker. *Brackenridge v. Claridge* (Civ. App.), 42 S. W. 1005, 1006, reversed in 91 Tex. 527, 44 S. W. 819. See ante, "Actions by Principal against Broker," V, E, 1; "In General," VI, A, 2, a. And see, generally, the titles ACTIONS, vol. 1, p. 113; PARTIES.

## 2. Right of Action and Defenses.

See ante, "Defenses," V, E, 2, a.

**Principal's Acts Immaterial Where Broker Never Expected to Perform Contract.**—In *Thornton v. Stevenson* (Civ. App.), 31 S. W. 232, 234, where defendant employed plaintiff to make a sale or exchange of lands for him, and the plaintiff did not show that he did, nor had a reasonable expectation of doing, what his contract required to entitle him to the sum sued for, it was held that it was immaterial what defendant had done with his property, since it did not appear that any act of defendant was the cause of plaintiff's failure to negotiate the trade he was authorized by the contract to make. See ante, "In General," VI, A, 5, f, (1), (a); "Sale by Principal," VI, A, 4. And see, generally, the title CONTRACTS.

**Proof of Lien No Defense.**—Where a principal told her brokers that her title to the land in their hands was good, she can not evade payment of commissions by proof that there was a lien on the property. *Smye v. Groesbeck* (Civ. App.), 73 S. W. 972; *Sullivan v. Hampton* (Civ. App.), 32 S. W. 235. See post, "Admissibility," VI, G, 5, b. And see, generally, the title EVIDENCE.

**No Dereliction of Duty to Defeat Recovery.**—In the *Scottish-American Mortg. Co. v. Davis* (Civ. App.), 72 S. W. 217, 218, 219, reversed in 96 Tex. 504, 74 S. W. 17, in an action by a real estate broker to recover commissions, where he had procured a purchaser for certain land, who requested

a third person to inform the broker that he would accept the proposition on the land but at the third's persons suggestion decided to close the trade with defendant's agents the sellers, himself, though the third person did state his conversation with the buyer to the broker, who on the same day wired the fact of acceptance to the agents and followed the same with a letter, and the buyer also mailed a letter on the same day to the agents accepting their proposal of sale, but intercepted it by telegram so that it never reached the agents, and it being contended by defendants that they knew nothing of buyer's acceptance, and were not notified by the broker, and before knowing they had sold to another party, it was held that notwithstanding defendant's contention, there was no dereliction of duty on the part of the broker, which would defeat his right to commissions on the ground of negligence. See ante, "Negotiating Illegal Contracts," VI, A, 7; "Persons Liable for Commissions," VI, C; post, "Judgment," VI, G, 8. And see, generally, the title NEGLIGENCE.

## 3. Damages.

See ante, "Damages," V, E, 2, b. And see generally, the title DAMAGES.

**The expenses incurred by a broker in advertising and selling a client's land** are not an element of damages in an action to recover commissions alleged to have been lost by his client's refusal to convey to purchasers whom the broker had obtained, and hence the admission of evidence of such expenses is prejudicial error. *Burnett v. Edling*, 19 Tex. Civ. App. 711, 48 S. W. 775, affirmed in 93 Tex. 636, no op. See post, "Appellate Practice," VI, G, 9. And see, generally, the title APPEAL AND ERROR, vol. 1, p. 313.

## 4. Pleading.

See, generally, the title PLEADING.

### a. Necessity.

**Facts Amounting to General Issue Must Be So Pleading.**—In *Wilson v.*

Ellis (Civ. App.), 106 S. W. 1152, 1153, where plaintiff brought an action to recover commissions which depended upon the consummation of a sale by him, but he only showed the making of a contract of sale drawn up by the defendant with a purchaser found by the plaintiff, it was held that it was not necessary for the defendant to plead that the purchaser had not converted the contract into a sale, since defendant's general denial put in issue the fact of a sale. See ante, "Where Commissions Dependent upon Receipt of Purchase Money or Consummation of Sale," VI, A, 5, d.

**Facts Tantamount to General Denial Need Not Be Alleged.**—In *Winn v. Gilmer*, 81 Tex. 345, 348, 16 S. W. 1058, 1059, it was held that, while it is elementary that a party defendant can not avail himself of affirmative matter of defense not alleged, yet it is not true that all the facts introduced in evidence, and which may materially assist in supporting a defense or contribute to the establishment of one, are themselves affirmative matter of defense which must be set up, nor does the rule prohibit the introduction under a general denial of evidence of facts which are merely tantamount to a general denial, and that, where in an action upon a parol contract by a broker to recover commissions, the defense of general denial was interposed and the plaintiff testified to the contract as alleged, but the defendant denied, and further, in his testimony, over objection that it was not alleged, testified to an offer by him to plaintiff upon the subject matter but on different terms, it was not error to admit the testimony. See post, "Admissibility," VI, G, 5, b; "Appellate Practice," VI, G, 9.

**Facts to Be Proved Must Be Alleged.**—In *Leuschner v. Patrick* (Civ. App.), 103 S. W. 664, in an action by a broker to recover commissions, where time was the essence of the contract,

it was held that an extension of time should have been pleaded in order to admit evidence on such fact and to submit it to the jury.

Where a complaint alleged that plaintiff drew a bill of exchange against defendant on his authority for defendant's exclusive benefit, and defendant refused payment, and plaintiff thereafter paid and took up the bill for defendant's exclusive use, he may not prove services rendered in the capacity of a broker and commissions advanced for defendant's use. *Tinsley v. Penniman*, 83 Tex. 54.

#### b. Petition.

See ante, "Petition," V, E, 2, c.

#### (1) Sufficiency.

Defendant can not be heard to complain of plaintiff's failure to allege in his petition that the proposed purchaser was able, ready and willing to pay for the land, where he accepted the purchaser with whom the plaintiff was negotiating and made the sale himself. *Pierce v. Nichols*, 50 Tex. Civ. App. 443, 110 S. W. 206, 208. See ante, "Services Sufficient for Reward," VI, A, 5.

The petition in an action by a real estate broker to recover commissions earned in procuring a purchaser of lands properly set forth the agreement between the owner and the purchaser, settling the matter arising out of the owner's failure to sell as showing an insistence by the purchaser on his rights to purchase. *Wilson v. Clark*, 35 Tex. Civ. App. 92, 79 S. W. 649. See ante, "In General," VI, A, 5, f, (1), (a).

Allegations in a petition that an agent employed to sell land was a non-resident, and the subagent a resident of the county in which the land lay, were sufficient to admit proof of the authority of the agent to employ a subagent. *Eastland v. Maney*, 36 Tex. Civ. App. 147, 148, 81 S. W. 574. See ante, "Trade Concluded by Broker," VI, A, 5, e, (1); "Employment of Subbroker by Broker," VI, B, 2.

**Several Liability.**—In *McDonald v. Cabiness* (Civ. App.), 98 S. W. 943, 944, affirmed in 100 Tex. 615, 102 S. W. 721, in an action by a broker to recover commissions, where the petition alleged that plaintiff secured from defendants and each of them the price, terms and conditions upon which they were willing to sell, it was held that such an allegation charged that it was the contract of each of them, and authorized a recovery upon proof that either one of defendants contracted. See ante, "Bringing about Binding Contract," VI, A, 5, c. And see, generally, the title **CONTRACTS**.

Where plaintiff sued upon a written contract of employment to sell certain property, he was not entitled to recover upon proof showing that the contract had been revoked by defendant, and that the services were rendered under a subsequent oral contract variant in a material particular from the written one although, except as to such particular, he was to sell "under the terms" of the written contract. *Braly v. Barnett*, 34 Tex. Civ. App. 433, 78 S. W. 965. See ante, "Necessity for Writing," VI, A, 2, b.

In *Thornton v. Stevenson* (Civ. App.), 31 S. W. 232, 233, 234, where plaintiff in his petition alleged that defendant employed him to negotiate an exchange and sale between a \$40,000 tract of defendant's and a \$25,000 tract belonging to a third person, provided the third person should be willing to pay him the difference in the value of the two pieces of property, and that plaintiff found a purchaser for the property at the price of \$40,000 and effected the purchase of the property at the price of \$25,000, it was held that, the suit not being upon a quantum meruit, but upon an express contract for a certain sum, plaintiff, to be entitled to recover must show, that he succeeded in effecting the exchange and sale as alleged in the petition. See ante, "Where Commissions Dependent

upon Receipt of Purchase Money or Consummation of Sale," VI, A, 5, d.

## (2) Variance.

Where a broker sues for commissions on an express contract, he can not recover on proof of an implied contract or of any other than the one alleged. *Orynski v. Menger*, 15 Tex. Civ. App. 448, 449, 39 S. W. 388.

## Sale on Credit Instead of for Cash.

—Where plaintiff's authority was to sell according to the terms of the will, which authorized a sale for cash only, and plaintiff's petition alleged that he sold the lands to D. for cash, and it did not appear clearly from the proofs whether the sale was made for cash to D. or on credit to L., the court erred in refusing to instruct the jury that, if they found that the sale was made to L., plaintiff could not recover, such sale not being in accordance with the terms of the will, and being at variance with plaintiff's petition. *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268. See ante, "Where Commissions Dependent upon Receipt of Purchase Money or Consummation of Sale," VI, A, 5, d; "Trade Concluded by Broker," VI, A, 5, e, (1). And see, post, "Appellate Practice," VI, G, 9.

The rule that where plaintiff had pleaded an express contract he can not recover on a quantum meruit or an implied contract, has no application where the evidence shows an express contract, as where defendant, at the time of bespeaking plaintiff to sell certain land for him, stated that he had been paying 5 per cent commission for selling his land, and plaintiff made no objection. *Armstrong v. Cleveland*, 32 Tex. Civ. App. 482, 483, 74 S. W. 789. See ante, "Amount of Compensation," VI, D.

## c. Issues.

In *Baker & Co. v. DeVitt*, 49 Tex. Civ. App. 607, 608, 110 S. W. 528, in an action by plaintiffs, a real estate firm, to recover commissions for the sale of land, where the defendant in-

terposed a special answer to the effect that plaintiffs were employed upon the express understanding that any sale of property they might make would have to be subject to his wife's approval, and that she did not in fact consent to the sale made by plaintiffs, but, without any default on the part of defendant, disapproved the same and refused to sign the deed to the property, it was held that the real issue to be determined was not whether the sale actually consummated between defendant and the purchaser was subject to defendant's wife's approval, but rather whether or not plaintiff's authority to make a sale was conditioned upon the wife's approval.

#### 5. Evidence.

See ante, "Evidence," V, E, 2, d. And see, generally, the title EVIDENCE.

#### a. Burden of Proof.

See, generally, the title PRESUMPTIONS AND BURDEN OF PROOF.

**What Broker Must Show.**—Plaintiffs in an action for commissions on sales they could have made are not entitled to recover unless they show that such prospective sales were of land which, under the contract, they had the agency, and on terms defendant had agreed to and that defendant prevented said sales, and that the prospective purchasers were presented to, or their offer made known to, the defendant, and that they were ready and willing to buy and pay for the land according to the proposed contract. *Burnett v. Edling*, 19 Tex. Civ. App. 711, 715, 48 S. W. 775, affirmed in 93 Tex. 636, no op.; *Newton v. Conness* (Civ. App.), 106 S. W. 892, 894; *Mechem on Agency*, § 966. See ante, "In General," VI, A, 2, a; "Services Sufficient for Reward," VI, A, 5; "In General," VI, A, 5, f, (1), (a).

**Commissions Dependent upon Second Payment on Land.**—In an action to cover a balance of commissions due under a contract for sale of lands, pro-

viding that the brokers should receive one-half their commissions out of the first payment on the land and the other out of the second payment, it devolves on plaintiff to show either that the second payment had been made to the owner, or that it had not been collected by reason of his fault. *Burnett v. Edling*, 19 Tex. Civ. App. 711, 715, 48 S. W. 775, affirmed in 93 Tex. 636, no op. See ante, "Where Commissions Dependent upon Receipt of Purchase Money or Consummation of Sale," VI, A, 5, d.

**Purchaser's Ability Dependent on Third Persons.**—A broker to recover commissions must not only affirmatively prove the willingness and ability of the purchasers, but of the third persons, where the ability of the purchasers to buy land depends absolutely upon not only the ability, but the readiness and willingness of the such third persons to buy from them. *Clark v. Wilson*, 41 Tex. Civ. App. 450, 466, 91 S. W. 627. See ante, "Procuring Purchaser Willing, Ready and Able to Buy," VI, A, 5, b.

**Broker Must Show Defect Defeating Sale.**—It is incumbent upon a broker seeking to recover commissions for finding a purchaser for land, sale of which is defeated by defect of title, to show such defect; it is not established by the mere opinion of the attorney for the purchaser that the title was bad; such case is distinguishable from those in which the broker procures a binding contract enforceable if the title is good. *Brackenridge v. Claridge*, 91 Tex. 527, 534, 44 S. W. 819, reversing 42 S. W. 1005. See ante, "Where Defect in Principal's Title," VI, A, 5, f, (1), (b).

**Principal Must Show Broker's Misrepresentations Caused Purchaser's Refusal.**—It was held in *Scottish-American Mortg. Co. v. Davis* (Civ. App.), 72 S. W. 217, reversed in 96 Tex. 504, 74 S. W. 17, that a broker was entitled to recover

his commissions for the sale of property unless his right was defeated by the refusal of the purchaser to take the land on the ground of its "ill shape," who had testified "that the land was not the shape represented to him by the broker," and that in order to avail the sellers of such refusal, it was necessary for them to show in what particular the shape of the land varied from the representations made, if any, in order that the court might determine its immateriality. See ante, "Actions by Principal against Broker," V, E, 1; "Actions between Principal or Broker and Third Person," V, E, 3; "Failure or Refusal of Purchaser," VI, A, 5, f, (2).

#### b. Admissibility.

**In General.**—It was held in *Leuschner v. Patrick* (Civ. App.), 103 S. W. 664, in an action by a broker to recover commissions, that testimony as to what occurred between the broker and a third person with reference to drawing up the deed to the purchaser was admissible. See ante, "Necessity," VI, G, 4, a.

It was held in *Leuschner v. Patrick* (Civ. App.), 103 S. W. 664, 665, in an action by a broker for commissions for the sale of land, that testimony of a witness that the defendant, the owner of the land, applied to him to know what to do relative to the purchaser's proposition of paying for the lands in monthly installments, together with witness' statement and advice to the defendant, was not admissible.

In *Denton v. Howell* (Civ. App.), 87 S. W. 221, 113 S. W. 314, in an action by plaintiff, a broker, to recover commissions for the sale of land, where the defendant authorized plaintiff by letter to sell a tract of land of a certain number of acres, it was held that it was error to admit evidence which tended to show that there was more than the specified number of acres in the tract, in order for defendant to escape liability for commissions, inso-

much as the evidence failed to show that the defendant asserted any claim to a greater quantity of land prior to the time that the plaintiff made the sale. See, generally, the title APPEAL AND ERROR, vol. 1, p. 313.

In an action by real estate agents for loss of commissions from breach of contract, evidence that defendant's agent at the place where the land was situated refused to permit prospective purchasers of the land found by plaintiffs to occupy defendant's hotel and sheds, is not admissible. *Burnett v. Edling*, 19 Tex. Civ. App. 711, 714, 48 S. W. 775, affirmed in 93 Tex. 636, no op.

In *St. Louis, etc., Ry. Co. v. Irvine* (Civ. App.), 89 S. W. 428, 429, in an action by a broker to recover commissions for services rendered in acquiring property for defendant, where, after the completion of such services, plaintiff put up option money on other property for defendant's benefit, it was held that testimony as to such fact and as to both defendant's and his manager's failure to take such other property, and as to plaintiff's loss of that sum, the option money not being sued for, was irrelevant and should have been excluded.

In an action by a subagent against the broker and owners for commissions for the sale of land, the answer of one of the defendants stating the substance of letters written by him to the broker was properly admitted as to him, as showing his declarations, and if the other defendants desired its effects confined to him, they should have asked the court to so restrict it. *Eastland v. Maney*, 36 Tex. Civ. App. 147, 148, 81 S. W. 574.

**Collateral Facts.**—It was held, in *Ross v. Moskowitz* (Civ. App.), 95 S. W. 86, 90, affirmed in 100 Tex. 434, 100 S. W. 768, in an action by a broker to recover commissions, for the sale of stock, that the court did not err in refusing to permit the defendants

to show by witness that, after the sale of the vendee of the shares of stock, he bought an additional number of shares of the stock, and what price he paid for it, and what he sold it for on the market, because such facts, which rendered the existence or non-existence of the facts in issue probable by reason of their general resemblance thereto, and not by reason of their being connected therewith, were deemed not to be relevant to the facts in issue, and hence were *res inter alios acta*.

Nor, on the same principle, did the court err in not permitting defendants to prove by the same witness that, when the stock was sold to the vendee owned by witness and the vendor, the vendor turned over to him one-half of the money realized from the sale, and did not deduct anything for commissions. *Ross v. Moskowitz* (Civ. App.), 95 S. W. 86, 90, 91, affirmed in 100 Tex. 434, 100 S. W. 768. See post, "Appellate Practice," VI, G, 9.

**Witness' Answer in a Former Action Based on Same Transaction.**—In *Clark v. Wilson*, 41 Tex. Civ. App. 450, 459, 91 S. W. 627, where one of the witnesses had been defendant in a former action based on different circumstances of the same transaction, and he had filed certain allegations in answer to that suit, and in the present suit defendant propounded interrogatories to him attaching thereto a certified copy of this answer of witness in the suit referred to, and in one of the interrogatories he was asked to examine the said answer, and to point out any facts not correctly stated, to which he replied making a few immaterial correction and that the answer was in substance true and correct, it was held that so much of the answer as state matters of fact was both relevant and material and that the evidence should have been admitted, except the conclusion of law, since it was offered only in con-

nection with the statement of the witness that the statements were true, and since the answer or subdivision thus introduced stood on the same footing as though the witness had in his answer to the interrogatory made the statement set out in the pleading and stated by the witness to be true.

**Broker's Knowledge of Bond's Invalidity.**—In *Berg v. San Antonio St. R. Co.* (Civ. App.), 49 S. W. 921, 922, affirmed in 93 Tex. 700, no op., where a broker employed to negotiate bonds persistently denied in an action for commissions that he knew anything about the invalidity of the bonds at the time he negotiated the sale, it was held that if his testimony on cross-examination could be shown that he knew a legislator after a contract of sale had been made had been interested to procure legislation validating the bonds, such testimony would be relevant and material to the issue. See ante, "Where Defect in Principal's Title," VI, A, 5, f, (1), (b).

**What Purchasers Would Have Done in Case of Incumbrance Inadmissible.**

—It was held in *Smye v. Groesbeck* (Civ. App.), 73 S. W. 972, 973, that where the defendant had not only impliedly warranted the title to her property when she placed it in the hands of the plaintiff's real estate brokers, but had in terms told him her titles were perfect, and the evidence substantiated her assertion, it was held proper to exclude testimony as to what the intending purchaser would have done if there had been an incumbrance of several thousand dollars resting upon it, since it would have been incumbent on the brokers to procure a purchaser who would buy regardless of incumbrance. See ante, "Where Defect in Principal's Title," VI, A, 5, f, (1), (b).

**Facts Not at Issue.**—It was held in *Alexander v. Wakefield* (Civ. App.), 69 S. W. 77, 78, in an action by plaintiff to recover a certain sum for promot-

ing and closing a sale of a street railway for the defendants, the owners, that it was not error to refuse the buyer to state his opinions and conclusions as to whether or not the representations made to him by the plaintiff during the negotiations as to the earning capacity of the railway were true, since they were not at issue. See post, "Appellate Practice," VI, G, 9.

**Verbal Promise to Pay More if Lands Satisfactory.**—It was held in *Blair v. Slosson*, 27 Tex. Civ. App. 403, 405, 66 S. W. 112, affirmed in 95 Tex. 674, no op., where defendant employed plaintiff to bring about an exchange of his lands, that defendant's promise by verbal representation to pay more than \$500 if the lands proved satisfactory was an independent agreement, and could be proved by parol, although plaintiff's agreement to accept \$500 was in writing and such promise was an inducement thereto. See ante, "Necessity for Writing," VI, A, 2, b. And see, generally, the title PAROL EVIDENCE.

**Fact of Property Advertised in Newspaper.**—A real estate broker, in an action to recover commissions for the sale of land, may testify to the simple fact that he advertised the property for sale in a certain newspaper, where no effort is made to prove by such witness the terms or contents of the advertisement. *Yarborough v. Creager* (Civ. App.), 77 S. W. 645, 646. See, generally, the title PAROL EVIDENCE.

**Parol evidence is not admissible to prove that an option contract made by an agent for his principal with a prospective purchaser, who signed his name as agent of the principal, is that of the agent in order that a broker may recover commissions from him for procuring a purchaser.** *Brackenridge v. Claridge*, 91 Tex. 527, 533, 44 S. W. 819, reversing 42 S. W. 1005. See ante, "Persons Liable for Commissions," VI, C. And see, generally, the title PAROL EVIDENCE

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It is not error to admit a memorandum in evidence, which was made by a broker and his principal in an accounting together in an attempt to have a settlement, in which they checked and agreed to all differences except commissions on sales made by the principal and commissions on lumber on hand, and the principal ordered the memorandum copied in his letter book, where the jury are informed that it is not admitted as an account stated, but as bearing on the question of general indebtedness. *Bender & Son v. Peyton*, 4 Tex. Civ. App. 57, 65, 23 S. W. 222, affirmed in 93 Tex. 635, no op. See post, "Appellate Practice," VI, G, 9. And see, generally, the title DOCUMENTARY EVIDENCE.

**Principal Paying Commissions to Another.**—It was held in *Bowser v. Field* (Sup.), 17 S. W. 45, that the exclusion of testimony that the defendants had offered to pay a third party a commission for effecting a sale was not error, because it did not appear that this offer was made after the sale, and there was no evidence that such third party was the agent of defendants to sell the property and nothing to show that he was entitled to the commission. See post, "Appellate Practice," IV, G, 9.

**Principal Interfering with Brokers in Effecting Sale.**—Evidence is admissible, in an action by plaintiffs for breach of a contract under the terms of which a tract of land was placed in plaintiffs' hands by defendant for sale, to show that defendant without plaintiffs' knowledge having been informed that a certain person was employed by plaintiffs to assist in the sale, by his subsequent conduct in employing such person was endeavoring to interfere with them in executing their contract and thereby bringing about a failure on their part. *McLane v. Maurer*, 28 Tex. Civ. App. 75, 79, 66 S. W. 693, 1108, affirmed in 95 Tex. 682, no op. See ante, "In General," VI, A, 5, f, (1), (a).



**Different Classes of Lumber Custody for Sawmill to Carry in Stock.**

—In *Bender & Son v. Peyton*, 4 Tex. Civ. App. 57, 65, 23 S. W. 222, affirmed in 93 Tex. 635, no op., in an action by a broker against certain lumber manufacturers to recover certain advances and commissions, where it was stipulated in the contract with reference to the sales of lumber that plaintiff was to exert himself to sell all the lumber cut by the defendant during the time of the contract, and defendant averred that plaintiff had failed to sell all of the lumber cut by defendants, thereby damaging them in a specific sum, and alleged that he had also breached his contract by forming a partnership with another lumber manufacturer, while plaintiff stated that defendant had sold their best grades of lumber, and a stock was left from which his orders could not be filled, it was held that evidence to show what amount of different classes of lumber should be carried in stock by a sawmill to enable it to fill the usual run of orders, was pertinent to the issue as to whether or not the plaintiff was in default in failing to sell "all" of defendants' lumber, and was admissible. See ante, "Instances of Broker's Authority, Ratification, etc.," III. B. And see, generally, the title USAGES AND CUSTOMS.

**Agency by Broker's Declarations.—**

In *Ehrenworth v. Putnam* (Civ. App.), 55 S. W. 190, where plaintiff brought an action to recover commissions for negotiating an exchange of property, it was held that the testimony of another that plaintiff told him or claimed that he represented defendants intestate was inadmissible, because plaintiff's agency could not be proved by his own declarations. *Eastland v. Maney*, 36 Tex. Civ. App. 147, 149, 81 S. W. 574. See, generally, the titles DECLARATIONS AND ADMIS- SIONS; PRINCIPAL AND AGENT.

**Readiness, Willingness and Ability of Purchaser.—**It is not error to admit

evidence of the ability of third persons to carry out a trade in an action by a broker to recover commissions for procuring purchasers ready, willing and able to buy, where such readiness, etc., of the purchasers was shown to depend upon the readiness, etc., of the third persons to buy from them. *Clark v. Wilson*, 41 Tex. Civ. App. 450, 453, 91 S. W. 627, 631. See post, "Appellate Practice," VI, G, 9.

It was held in *Leuschner v. Patrick* (Civ. App.), 103 S. W. 664, in an action by a broker for commissions, that evidence as to the purchaser's arrangements with a loan company for funds, and its financial ability to furnish the same, was admissible.

It was held in *Clark v. Wilson*, 41 Tex. Civ. App. 450, 457, 91 S. W. 627, 631, in an action by a broker for commissions for the sale of lands that an instrument, executed by the purchasers to the defendant, wherein the purchasers released all their rights acquired under a certain option contract to sell land executed by defendant as vendor and discharged him from all obligation to perform the contract, was admissible in evidence for the purpose of showing that at the date of execution the purchasers were insisting upon their rights to complete the purchase, but was not admissible to show a recognition of their right to do so by the defendant, or for any other purpose. *Wilson v. Clark*, 35 Tex. Civ. App. 92, 79 S. W. 649. See ante, "Procuring Purchaser Willing, Ready and Able to Buy," VI. A. 5. h: "In General," VI, A. 5. f, (1). (a).

**Broker's Efforts Procured Sale.—**In an action by a broker to recover commissions for selling the bank stock of B., the admission of K.'s testimony to the fact that plaintiff had notified him that he and B. would come to the witness' office for the purpose of making the trade, was not admissible for the purpose of showing his authority to act for B., but there was another fact which it was important for him to es-

tablish, namely, that his efforts procured the sale; and his negotiations with K. were admissible for that purpose. *Ross v. Moskowitz*, 100 Tex. 434, 437, 100 S. W. 768, affirming 95 S. W. 86. See ante, "General Rule," VI, A, 1.

**Estoppel to Claim Commissions.**—Where a sale of stock had already been consummated through the agency of a broker, and it was not then in the power of the seller to call the trade off without the consent of the buyer, a statement made by the broker, in an interview with reference to his commissions, in which he told his principal not to call the trade off as he threatened to do because the broker claimed commissions, was inadmissible as showing estoppel against the broker to claim commissions. *Ross v. Moskowitz* (Civ. App.), 95 S. W. 86, affirmed in 100 Tex. 434, 100 S. W. 768. See ante, "Bringing about Binding Contract," VI, A, 5, c. And see, generally, the title ESTOPPEL.

**Employment of Broker.**—In *St. Louis, etc., R. Co. v. Irvine* (Civ. App.), 89 S. W. 428, 430, in an action by a broker to recover commissions, for services performed in buying property for defendant, where he claimed to have been employed by defendant's agent, it was held, that testimony of a witness that defendant's agent has solicited him to go to the home of the plaintiff and induce him to negotiate for the purchase of certain property for defendant, and that he did go and represented to the plaintiff that such agent was authorized to employ the plaintiff, for and on behalf of the defendant to negotiate such purchase, was admissible for the purpose of showing that plaintiff was employed by defendant's agent.

Where, in a suit for a commission for finding a purchaser for land, plaintiff alleged that the owner listed it with brokers, who listed it with plaintiff's firm with the owner's consent, the owner could show that shortly be-

fore the alleged listing with such brokers he gave them an option to purchase a tract including the land on account of which the commission was claimed, as tending to corroborate the owner's claim that the option contract was the only agreement between him and the brokers. *Sterling v. De Laune*, 47 Tex. Civ. App. 470, 105 S. W. 1169, affirmed in 102 Tex. 593, no op.

In an action by a subagent for commissions alleging employment by one of the defendants as agent of the owner of the land sold by him, the evidence was held insufficient to show agency and, therefore, no authority of the alleged agent to employ a subagent. *Eastland v. Maney*, 36 Tex. Civ. App. 147, 148, 81 S. W. 574. See ante, "In General," VI, A, 2, a. And see, generally, the title PRINCIPAL AND AGENT.

#### c. Sufficiency.

It was held in *Winters v. Portwood*, 49 Tex. Civ. App. 297, 298, 109 S. W. 388, that upon consideration of the evidence in the case the agents had not sufficiently established their right to recover commissions alleged to be due them for the sale of land. See ante, "Trade Concluded by Principal," VI, A, 5, e, (2); "In General," VI, A, 2, a. Instance of judgment in suit on contract for services in making sale of land held not warranted by evidence. *Stoddard v. Martin*, 3 App. Civ. Cases, § 85.

#### Sufficient to Require Special Charges.

—It was held in *Watkins Land Mortg. Co. v. Thetford*, 43 Tex. Civ. App. 536, 96 S. W. 72, 73, in an action by plaintiff to recover commissions for his services as a real estate broker in procuring a purchaser, that upon consideration of the testimony it was sufficient to require the court to give to the jury special charges submitting the question as to whether plaintiff did not assist the other brokers, under an agreement with them to divide their commissions with him, since, in such

case, the plaintiff would not be entitled to recover anything against defendant for his services.

It was held in *Clark v. Wilson*, 41 Tex. Civ. App. 450, 456, 91 S. W. 627, that upon consideration of the facts in the case, there was sufficient evidence to require the court to submit to the jury the issue of the right of plaintiff to recover commissions for the sale of defendant's land, which was never consummated. See ante, "In General," VI, A, 2, a; "Failure or Refusal of Purchaser," VI, A, 5, f, (2); post, "Questions of Fact," VI, G, 7.

#### 6. Instructions.

See, generally, the title INSTRUCTIONS.

**Misleading and Prejudicial.**—In *Jameson v. Hutchison* (Civ. App.), 109 S. W. 1096, 1097, in an action by plaintiff to recover broker's commissions for the exchange of certain lands, where there was no controversy or question but that a commission of 5 per cent was agreed on between the parties, but the testimony as to the respective values of the tracts exchanged was conflicting, it was held that a charge, which imposed upon defendant's rights to recover the conditions that plaintiff did not make a contract for 5 per cent, "as above explained," (that is, as had been stated in a previous portion of the charge), and also that defendant's equity in the land he received in exchange "was only about \$2,000 or \$3,000 while his own property was only the value of \$4,000 or less," was misleading, incorrect and prejudicial. See post, "Appellate Practice," VI, G, 9. And see, generally, the title APPEAL AND ERROR, vol. 1, p. 313.

It was held in *Jameson v. Hutchison* (Civ. App.), 109 S. W. 1096, 1097, in an action by plaintiff to recover broker's commissions for the exchange of lands, that a requested special charge that, if defendant agreed to pay the commission out of the sale of the

land conveyed to him in the exchange, and that the land had not as yet been sold, to find in favor of defendant, was incorrect, and that there should have been added, "to find (for plaintiff) without prejudice to sue in the event of the sale of the land."

**Not Separating Questions of Law and of Fact.**—In *Harrison v. Houston*, 40 Tex. Civ. App. 536, 539, 91 S. W. 647, where the court gave the following instructions to the jury: "If you believe from the evidence in this case that, for a valuable consideration, the defendant made and entered into a contract with the plaintiff, whereby it was agreed and understood between them that plaintiff should sell, or assist defendant in selling, certain land, and that when the same was sold defendant should pay plaintiff a cash commission of five per cent on the price received for the same, and that thereafter plaintiff complied with his part of said contract, if any, and said property was sold at a price and upon terms acceptable to defendant, then you will find for plaintiff five per cent on the price at which said land was sold; however, if you do not believe and find from the evidence, then your verdict will be for the defendant," but refused a requested instruction submitting only issues of fact to the jury, it was held that as the general charge given did not separate the question of law from question of fact, but submitted questions of law to the jury, it was error to have given one charge and refused the other. See ante, "Amount of Compensation," VI, D; post, "Appellate Practice," VI, G, 9.

**Charge Can Not Inade Province of Jury Where Evidence Uncontroverted.**—A charge which authorizes a finding for plaintiffs for their five per cent commission regardless of whether plaintiffs brought and presented the proposed purchasers to defendant, or put the parties in communication with each other, can not result in injury to the defendant, when

it was uncontroverted that the parties were brought into communication, and the contract as to the commissions was made with the defendant. *Brackenridge v. Claridge* (Civ. App.), 42 S. W. 1005, 1006, reversed in 91 Tex. 527, 44 S. W. 819. See ante, "General Rule," VI, A, 1.

**Abstract Propositions of Law.**—In *Bowser v. Field* (Sup.), 17 S. W. 45, 46, where the instruction that "to merely bring the buyer and seller together is insufficient to entitle an agent to a commission, unless it is the efficient cause of the sale," was asked, it was held that there was no error in refusing the charge, because it presented an abstract proposition of law incorrect under the state of facts, the evidence showing that one of the agents had done more than merely to bring the purchaser and seller together. See ante, "General Rule," VI, A, 1.

**Must Be Warranted by Pleadings.**—In *Yarborough v. Creager* (Civ. App.), 77 S. W. 645, 646, in an action by a broker to recover commissions for the sale of land, where the plaintiff rested his right to recover upon the ground that the property was sold through his efforts, and not that he had been endeavoring to sell it at the time of its conveyance to a purchaser, it was held that an instruction stating in part, that if the jury believed the plaintiff was trying to sell the land, they should find for plaintiff, was not warranted by the pleadings.

**Invading Province of Jury.**—It was held in *McLane v. Goode* (Civ. App.), 68 S. W. 707, 708, where plaintiff, a broker, swore upon trial that defendant had agreed to the prices at which he sold the different tracts of land belonging to defendant, that it would have been a gross invasion of the province of the jury to have instructed the jury to return a verdict for defendant as to certain tracts.

Where plaintiff brought an action against defendant to recover commissions on a sale made by them jointly,

as brokers, it was held that a charge which spoke of the verbal contract sued on as having made by the parties, but which also submitted to the jury to determine from the evidence whether or not they did make it, was not on the weight of evidence. *Blake v. Austin*, 33 Tex. Civ. App. 112, 115, 75 S. W. 571. See ante, "Failure or Refusal of Purchaser," VI, A, 5, f, (2); "Amount of Compensation," VI, D.

#### 7. Questions of Fact.

**Whether a real estate broker had secured a purchaser ready, able, and willing to take the property**, so as to entitle him to a commission from his principal, by the execution of a contract with such purchaser conditioned that the abstract of title prove satisfactory to the purchaser's attorney, was a question for the jury. *Smye v. Groesbeck* (Civ. App.), 73 S. W. 972. See ante, "Where Defect in Principal's Title," VI, A, 5, f, (1), (b).

**Final Assent to Contract Arranged Mostly by Letter.**—In *Patrick v. Smith*, 90 Tex. 267, 273, 38 S. W. 17, reversing 36 S. W. 762, where in an action by a broker to recover commissions for negotiating a sale of land under an alleged contract carried on by letter, most or all of the terms of the agreement had been arranged by the negotiations, but no final assent had been given, and the negotiations contemplated the making of a formal contract, which never was executed, it was held that the assent to the contract might nevertheless have been evinced by the acts of the parties, and that upon consideration of the facts there was sufficient evidence of assent to the contract by acts to make the question of its acceptance one of fact for the jury. See ante, "Where Commissions Dependent upon Receipt of Purchase Money or Consummation of Sale," VI, A, 5, d; "Sufficiency," VI, G, 5, c.

**Principal's Promise of Further Compensation if Land Satisfactory.**—Where

an agreement by a broker to accept \$500 for his services in effecting an exchange of lands did not preclude him from recovering more on a quantum meruit where, as an inducement for such agreement, the principal promised to pay a further reasonable compensation if he found the other land satisfactory, and he did so find it, it was proper to submit such issue to the jury. *Blair v. Slosson*, 27 Tex. Civ. App. 403, 404, 66 S. W. 112, affirmed in 95 Tex. 674, no op. See ante, "Amount of Compensation," VI, D. And see, generally, the title ISSUES TO THE JURY.

### 8. Judgment.

See, generally, the title JUDGMENTS AND DECREES.

**Agreement to Cancel Broker's Debt Debars Recovery of Judgment.**—In *Frost v. Byrd* (Civ. App.), 39 S. W. 127, in a suit by plaintiff to recover commissions for the sale of defendant's land, where defendant agreed that if plaintiff would find a purchaser for his farm, he would give him the balance due on a note he held against plaintiff, it was held that the plaintiffs would not be entitled to recover a money judgment against defendant for such balance which was to be canceled.

**Judgment for Excess over Amount of Commissions.**—In *Fordtran v. South End Land Co.*, 47 Tex. Civ. App. 322, 323, 105 S. W. 323, affirmed in 102 Tex. 582, no op., where a broker brought an action to recover commissions for sale of land, and defendant pleaded a set-off above the amount of commissions, it was held that it was correct to render judgment for defendant on the excess. See ante, "Right of Action and Defenses," VI, G, 2. And see, generally, the title SET-OFF, RECOUPMENT. RECONVENTION AND COUNTERCLAIM.

### 9. Appellate Practice.

See, generally, the title APPEAL

AND ERROR, vol. 1, p. 313. For special instances of prejudicial error, see ante, "Evidence," V, E, 2, d; "Actions between Principal or Broker and Third Person," V, E, 3; "In General," VI, A, 5, a; "Amount of Compensation," VI, D; "Necessity," VI, G, 4, a; "Admissibility," VI, G, 5, b; "Instructions," VI, G, 6.

**Affirmance of Judgment.**—In *Chase v. Veal & Co.*, 83 Tex. 333, 334, 18 S. W. 597, in a suit by a real estate broker to recover commissions charged to be due them by defendant for procuring purchasers for certain real estate owned and sold by him to such purchasers, where the findings were supported by the evidence of the two plaintiffs who testified in the cause that they were employed by defendant and that they had secured three purchasers, and their evidence was not without a slight support in the testimony of the other witnesses, but contrary to the positive evidence of the three purchasers and the defendant himself, it was held that the judgment would not be reversed because contrary to the preponderance of evidence. *West Bros v. Thompson*, 48 Tex. Civ. App. 362, 365, 106 S. W. 1134; *Tinsley v. Dowell*, 87 Tex. 23, 26, 26 S. W. 946, reversing 24 S. W. 928; *McDonald v. Cabiness* (Civ. App.), 98 S. W. 943, affirmed in 100 Tex. 615, 102 S. W. 721.

**Parties Who May Allege Error.**—In *Painter v. Kilgore* (Civ. App.), 101 S. W. 809, 812, where the owner of land, one of the defendants in an action to recover commissions for the sale of land, admitted his liability for commissions, and the only matter at issue was whether plaintiffs or defendants, real estate brokers, were entitled to the commissions, it was held upon a finding against the plaintiffs, that the plaintiffs had no right to complain that the verdict, "We, the jury, find for the defendants," included the owner who had admitted his liability for commissions, since they could not be affected

by a judgment in favor of the brokers against the owner and since the verdict was in effect a verdict against them on the whole case, and clearly in	favor of the defendant brokers, and furthermore that the verdict must be construed according to the matter at issue.
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### **Brothers and Sisters.**

See the title DESCENT AND DISTRIBUTION.

### **Brownsville.**

See the title MUNICIPAL CORPORATIONS.

### **Builder's Risk.**

See the titles CONTRACTS; WORKING CONTRACTS.

### **Building.**

As to building contracts, see the title WORKING CONTRACTS.  
As to mechanic's lien for building material, see the title MECHANICS' LIENS.

## **BUILDING AND LOAN ASSOCIATIONS.**

BY MOSES N. AMIS.

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#### CROSS REFERENCES.

See the titles ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

vol. 2, p. 113; ASSIGNMENTS OF ERROR, vol. 2, p. 263; BENEFICIAL AND BENEVOLENT ASSOCIATIONS, vol. 2, p. 756; CONFLICT OF LAWS; CONTRACTS; CORPORATIONS; EVIDENCE; FOREIGN LAWS; FRAUD AND DECEIT; HOMESTEAD EXEMPTIONS; HUSBAND AND WIFE; INTEREST; JOINT STOCK COMPANIES; 'LOANS; LOAN, TRUST, SURETY AND SAFE DEPOSIT COMPANIES; MECHANICS' LIENS; PLEADING; RESCISSION, CANCELLATION AND REFORMATION; SUBROGATION; USURY.

### I. Definition and Distinction.

A building and loan association is not a partnership, but a body incorporated by the statutes of the state. Whilst in a partnership each member preserves his individuality for many purposes connected with the firm business, in a corporation he loses it altogether in all dealings had between himself and the corporate body. The member, as a person, has entirely different rights, from what he possesses as a stockholder in the company. When he deals with the latter he does so as if he were dealing with another individual, or with a body in which he held no membership. *Jackson v. Cassidy*, 68 Tex. 282, 288, 4 S. W. 541.

### II. General Powers and Liabilities.

#### A. EXERCISE OF BANKING POWERS.

When a loan is made by a building and loan association to a stockholder, and his note taken for the same, if there is no retention of any part of the loan, this is not a discounting transaction prohibited by the constitution, art. 16, § 16. *Sweeney v. El Paso Bldg., etc., Ass'n* (Civ. App.), 26 S. W. 290, affirmed in 93 Tex. 721, no op.; *Blakeley v. El Paso Bldg., etc., Ass'n* (Civ. App.), 26 S. W. 292, affirmed in 93 Tex. 700, no op.

**Contracts Ultra Vires.**—Where, in an action by a building and loan association to recover on a note given for a loan of money, and the defendant relies on a state of facts showing that the contract was a discounting transaction in violation of the consti-

tution, art. 16, § 16, he may set up the plea of ultra vires and this, if sustained by the evidence, will defeat the plaintiff's recovery. *Anderson v. Cleburne Bldg., etc., Ass'n*, 4 App. Civ. Cases, § 174, 16 S. W. 298.

The constitutional provision, that no corporate body shall be created "with banking and discounting privileges," does not render a note illegal and void because it has been discounted by an incorporated building and loan association, and the illegality of such act of discounting will constitute a defense simply of ultra vires. *Logan v. Texas, etc., Loan Ass'n*, 8 Tex. Civ. App. 490, 28 S. W. 141. See *Anderson v. Cleburne Bldg., etc., Ass'n*, 4 App. Civ. Cases, § 174, 16 S. W. 298.

**Enforcement of Contracts Ultra Vires.**—A building and loan association sued to recover on a promissory note given by defendant to plaintiff for money borrowed. In making the contract for the loan a note was drawn bearing interest at the rate of two per cent per month for the time the note was to run, the defendant receiving the face value of the note, less the interest. The defendant then gave another note promising to pay twelve per cent interest on the amount of the loan. Held, that this was a discounting transaction, and the contract being in violation of the constitution, art. 16, § 16, prohibiting banking or discounting privileges to corporations, was ultra vires, and void, and the plaintiff could not recover. *Anderson v. Cleburne Bldg., etc., Ass'n*, 4 App. Civ. Cases, § 174, 16 S. W. 298, distinguishing *Sweeney v. El Paso Bldg., etc., Ass'n* (Civ. App.), 26 S. W. 290, 292, affirmed



in 93 Tex. 721, no op. See *Logan v. Texas, etc., Loan Ass'n*, 8 Tex. Civ. App. 490, 28 S. W. 141; *Rabb v. Texas, etc., Inv. Co. (Civ. App.)*, 96 S. W. 77.

**Estoppel of Defendant.**—Where, in an action by a building and loan association to recover on a note made by defendant, it is shown that the association exceeded its powers, the contract is only ultra vires, and the defendant, having received the consideration for the note, will not be heard to deny the power of the corporation to make the contract. *Logan v. Texas, etc., Loan Ass'n*, 8 Tex. Civ. App. 490, 494, 28 S. W. 141.

**Building Contracts.**—Under an agreement with a loan association, L. made a contract with S. & E. to build a house for him, giving them his notes for the contract price, secured by a mechanic's lien on the house and lot. The notes and contract lien were at once assigned to the association, which advanced the money to pay for the house as the work progressed. Held, that this was not a discounting transaction within the constitutional provision that no corporate body shall be created with banking or discounting privileges. *Luzenberg v. Bexar Bldg., etc., Ass'n*, 9 Tex. Civ. App. 261, 29 S. W. 237, affirmed in 93 Tex. 713, no op.

## B. ASSIGNMENT OF ASSETS.

**Rescission of Subscription Contract.**—Where a building and loan association makes an assignment of its assets under circumstances releasing one of its stockholders from his obligations as such, the latter's subscription contract will be rescinded. *North Tex. Sav., etc., Ass'n v. Jackson (Civ. App.)*, 63 S. W. 344.

**Rescission of Loan Contract.**—Where a building association, by a voluntary sale of all its assets, in the interest of nonborrowing members, terminates its power to mature its stock by collecting dues and earning profits from loans as contemplated by its plan of organization, and upon which profits a borrowing stockholder

has a right to rely, the latter has a right to a rescission of his loan contract, and to an equitable adjustment of his account with the association. *North Tex., etc., Loan Ass'n v. Hay*, 23 Tex. Civ. App. 98, 56 S. W. 580, affirmed in 93 Tex. 647, no op.

In making such an equitable adjustment of accounts between a loan association and a borrowing member, the latter, if chargeable with no losses, should be debited with the sum loaned and legal interest thereon, and credited with all moneys paid by him, calculated on the principle of partial payments. *North Tex., etc., Loan Ass'n v. Hay*, 23 Tex. Civ. App. 98, 56 S. W. 580, affirmed in 93 Tex. 647, no op.

**Rights of Holder of Unmatured Stock.**—When an assignment of its assets is made by a building and loan association, the rights of a holder of unmatured stock in the hands of the assignee are not thereby affected, if the assignment was made without the shareholder's consent, and this though he was in default in the payment of dues on his stock to the association. *North Tex. Sav., etc., Ass'n v. Jackson (Civ. App.)*, 63 S. W. 344.

**Estoppel of Borrowing Stockholder.**—Where a stockholder of a building and loan association was present at a meeting thereof at which its property, including a debt he was owing it, was transferred to a third party, resulting in its suspension of business, and he made no objection thereto, he is estopped thereby from claiming credit for his shares of stock on such debt, he not being included by the agreement among the class of stockholders who were to be paid anything by such transferee. *State Nat., etc., Trust Co. v. Fuller*, 26 Tex. Civ. App. 318, 63 S. W. 552, affirmed in 95 Tex. 677, no op.

**Foreclosure by Assignee—Adjustment of Equities.**—An assignee of a building and loan association held an obligation of a stockholder in the association for unmatured stock and also his deed of trust given to secure a

loan. His obligation to the assignee on the unmatured stock, under the circumstances of this case, being declared void, but his liability on the loan remaining unimpaired, it was held, that in a suit to foreclose the lien, the action could be maintained, and that in adjusting the equities between the parties, the stockholder and borrower was liable for the amount of the loan with legal interest, less the value of the stock at the time of the assignment, and the amount he had paid the association on his obligation as a stockholder. *North Tex. Sav., etc., Ass'n v. Jackson* (Civ. App.), 63 S. W. 344; *American Bldg., etc., Ass'n v. Daugherty*, 27 Tex. Civ. App. 430, 66 S. W. 131, affirmed in 95 Tex. 673, no op.; *Building, etc., Ass'n v. Logan* (Civ. App.), 33 S. W. 1088, affirmed in 93 Tex. 701, no op.

### C. LIABILITY FOR TORTS.

An owner of realty contracted for the construction of a building thereon, arranging with a building and loan association to furnish the money. When the contractor was entitled to pay for the work done he went to the architect, who furnished him an estimate addressed to the owners of the land, and which was taken by the contractor to the building and loan association, which gave its check payable to the owners of the land, who indorsed it to the contractor. In excavating for the building the contractor removed earth supporting the foundation of an adjacent building so that it fell. Held, that the building and loan association was not liable. *Henry v. Stuart* (Civ. App.), 88 S. W. 248.

An owner of realty contracted for the construction of a building thereon, arranging with a building and loan association to furnish the money. When the contractor was entitled to pay for the work done, he went to the architect, who furnished him an estimate addressed to the owners of the land, and which was taken by the contractor to

the building and loan association, which gave its check payable to the owners of the land, who indorsed it to the contractor. In excavating for the building the contractor removed earth supporting the foundation of an adjacent building so that it fell. Held, in an action therefor against the association, that evidence that the building and loan association had before taken liens on homesteads, and that the lien on the building in question was the largest one it had ever taken had no tendency to show that the building and loan association was in fact the real contractor and hence was irrelevant. *Henry v. Stuart* (Civ. App.), 88 S. W. 248.

## III. Officers and Agents.

### A. RIGHT OF ASSOCIATION TO PROFITS ACCUMULATED BY SECRETARY.

#### 1. In General.

Where the secretary of a building association makes profits in transactions wherein the association is a party, the profits belong to the association, and it is not estopped from claiming them by the knowledge of its directors that the secretary retains them, and the directors assent to such a course. *Moore v. Waco Bldg. Ass'n*, 19 Tex. Civ. App. 68, 45 S. W. 974, affirmed in 93 Tex. 692, no op.

#### 2. Examination of Secretary's Accounts.

The secretary of a building association was sued, together with his bondsmen, by the association, and auditors to examine his accounts were appointed at the request of defendants. Held, that a motion to strike out the auditors' report, made by defendants long after the auditors had reported, on the ground that the auditors were employees of plaintiff, should be refused. *Moore v. Waco Bldg. Ass'n*, 19 Tex. Civ. App. 68, 45 S. W. 974, affirmed in 93 Tex. 692, no op.

**3. Effect of Report of Auditors.**

Where auditors are appointed to examine the accounts of the parties to an action, and report to the court, their report is conclusive as to all items not excepted to. *Moore v. Waco Bldg. Ass'n*, 19 Tex. Civ. App. 68, 45 S. W. 974, affirmed in 93 Tex. 692, no op.

**B. ACTIONS ON OFFICIAL BOND.****1. Joinder of Parties.**

**Joinder of Bondsmen with Secretary.**—In an action by a building association against its secretary for violation of the conditions of his official bonds, the several sets of bondsmen may be joined with him in one action. *Moore v. Waco Bldg. Ass'n*, 19 Tex. Civ. App. 68, 45 S. W. 974, affirmed in 93 Tex. 692, no op.

**Waiver of Objections for Misjoinder.**—A secretary of a building association was sued by the association for violation of the conditions of his official bonds, and the several sets of bondsmen were made parties defendant with him in the action. Held, that the failure of defendants to object that there was a misjoinder for over four years, during which time they had filed a general demurrer and a general denial, and applied to the court to appoint auditors, and the auditors had investigated and reported, after which defendants filed an amended answer and went to trial, was a waiver of that objection. *Moore v. Waco Bldg. Ass'n*, 19 Tex. Civ. App. 68, 45 S. W. 974, affirmed in 93 Tex. 692, no op.

**Liability of Secretary's Sureties.**—Where the secretary of a building association is sued by the association for violation of the conditions of his official bonds, and the several sets of bondsmen are made parties defendant and the jury accurately specifies the amount for which each set of sureties is respectively liable, no harm results to any of the defendants by reason of joining them all in one action. *Moore v. Waco Bldg. Ass'n*, 19 Tex. Civ. App.

68, 45 S. W. 974, affirmed in 93 Tex. 692, no op.

**2. Statutes of Limitation.**

A building association appointed a committee each year to investigate the books of its secretary. The committee had free access to the books, but failed to discover certain irregularities therein, and reported each year that the books were correct. Held, that the statute of limitations did not begin to run against charges proper to be made against the secretary on account of such irregularities, at the date of such examination and report, but began to run only when the knowledge of such irregularities was brought home to the association. *Moore v. Waco Bldg. Ass'n*, 19 Tex. Civ. App. 68, 45 S. W. 974, affirmed in 93 Tex. 692, no op.

**3. Taxation of Costs on Appeal.**

In an action by a building and loan association against its secretary and his bondsmen, the court instructed the jury to find for plaintiff as to an item in the report of auditors appointed to examine the accounts of the parties, although the item had been excepted to by defendants. In their motion for a new trial defendants stated that the item in question had not been excepted to. Held, that, while the judgment must be reduced in the amount of that item, costs would be taxed against defendants on their appeal. *Moore v. Waco Bldg. Ass'n*, 19 Tex. Civ. App. 68, 45 S. W. 974, affirmed in 93 Tex. 692, no op.

**C. AGENTS.****1. Unauthorized Representations.**

An agent of a building and loan association, who has, under the by-laws, no authority to make any contract for the company, other than to receive applications for membership and for loans, and forward the same to headquarters, can not bind the company by authorized representations to an applicant for membership and for a loan, unless the company has knowledge of such representations and acts

upon them. *Guarantee Sav., etc., Co. v. Mitchell*, 39 Tex. Civ. App. 205, 87 S. W. 184. See post, "Fraudulent Representations by Association's Officers and Agents," IV, A, 2, a; "Loans," IV, D.

## 2. Repudiation of Agency.

Where all the negotiations respecting a loan made by a building and loan association are conducted by a clerk in the office of the agents of the association, and the papers are executed by the mortgagor under his direction, the association can not repudiate his agency after accepting the benefits of the instruments procured by him. *Pioneer Sav., etc., Co. v. Baumann* (Civ. App.), 58 S. W. 49, affirmed in 93 Tex. 737, no op.

## IV. Membership and Its Incidents.

### A. SUBSCRIPTION TO STOCK.

#### 1. Intent of Borrower to Become Bona Fide Member.

One T. applied to a building and loan association for a loan and was told by its secretary that in order to procure it he must first become a stockholder in the association. He did so, received his stock certificates and secured the loan. After making a number of payments to the association, he brought an action to have canceled his obligation as a stockholder and for the application of his payments to the discharge of his note for the loan. In the trial of the action, there being evidence tending to show that it was not the intention of T. to become a bona fide stockholder, it was held, that the question of his intent to do so was a question of fact for the jury. *Southern Home Bldg., etc., Ass'n v. Thomson*, 24 Tex. Civ. App. 76, 58 S. W. 202. Compare *American, etc., Sav. Ass'n v. Cornibe*, 35 Tex. Civ. App. 385, 80 S. W. 1026, affirmed in 98 Tex. 609, no op.; *Interstate Bldg., etc., Ass'n v. Crawford* (Civ. App.), 63 S. W. 1071; *Cotton States Bldg. Co.*

*v. Rawlins* (Civ. App.), 62 S. W. 805, affirmed in 97 Tex. 630, no op.

#### Subsequent Purchaser of Mortgaged Property.

—Where a borrowing member of a building association, who has pledged his stock and given a mortgage upon land to secure his loan, sells the land to another, who assumes his obligation to the association as part of the purchase price, and the association assents to the conveyance of the land, and thereafter recognizes and deals with the purchaser as a stockholder, receiving payments and dues from him on the shares of stock issued to such borrowing member, such purchaser thereby becomes a stockholder, though there be no transfer to him of the stock on the books of the association. *North Tex., etc., Loan Ass'n v. Hay*, 23 Tex. Civ. App. 98, 56 S. W. 580, affirmed in 93 Tex. 647, no op.

## 2. Fraud.

#### a. Fraudulent Representations by Association's Officers and Agents.

A building and loan association is not relieved from liability for a false representation made by its president when acting within the scope of his authority, and in accordance with a custom of dealing of the association, because the president believed such representations to be true. *Mutual Bldg., etc., Ass'n v. McGee* (Civ. App.), 43 S. W. 1030.

Fraudulent representations by officers of a building association as to the amount of annual accumulations on the stock, made to induce plaintiff to become a member, and causing him to continue monthly payments, are representations of material existing facts, sufficient to support an action for deceit. *Hunter v. International Bldg., etc., Ass'n*, 24 Tex. Civ. App. 453, 59 S. W. 596.

Where a borrowing stockholder in a building and loan association was induced to subscribe for the stock by fraudulent representations of an agent

of the association as to its solvency and profits, he is entitled to a rescission of the contract of subscription, and to have the amount paid by him as dues on his stock credited on the debt he owes the association. *Park v. Kribs*, 24 Tex. Civ. App. 650, 60 S. W. 905. See ante, "Unauthorized Representations," III, C, 1; post, "Loans," IV, D.

#### **b. Right to Rescission.**

Where a stockholder in a building and loan association was induced to subscribe for its stock by fraudulent representations of its agent, he may rescind his contract, after the corporation has been declared insolvent and a receiver appointed, where the rights of third parties have not intervened since he became a stockholder, and he has never participated in any of the proceedings of the company. *Park v. Kribs*, 24 Tex. Civ. App. 650, 60 S. W. 905.

**Laches of Stockholder and Borrower.**—Where the agent of a building and loan association located in another state represented that the company was solvent, and thereby induced defendant to contract for a loan and to subscribe for shares, and in less than two months thereafter the association went into insolvency, defendant was not guilty of laches in not discovering the condition of the company, so as to preclude him from rescinding the loan contract and his subscription for fraud. *Park v. Kribs*, 24 Tex. Civ. App. 650, 60 S. W. 905. See post, "Loans," IV, D.

#### **c. Measure of Damages in Actions for Fraud.**

In an action for fraudulent representations inducing a purchase of shares in a building and loan association, the measure of damages is the amount of payments made by the purchaser, with interest, and not the value of paid-up stock, the action amounting to a rescission of the contract, and not entitling plaintiff to its benefits. *Hun-*

*ter v. International Bldg., etc., Ass'n*, 24 Tex. Civ. App. 453, 59 S. W. 596.

#### **d. Evidence.**

When, in a suit by a building and loan association to foreclose a lien made by defendant to secure a loan, the latter pleads usury, charging fraud by plaintiff in obtaining defendant's subscription to stock, parol evidence is admissible to prove fraud, notwithstanding the subscription contract is in writing. *Cotton States Bldg. Co. v. Reily* (Civ. App.), 50 S. W. 961.

In an action against a building and loan association for fraud in inducing plaintiff to subscribe for stock in the association, which was represented to be a solvent and a going concern, ready to make loans to such members as desired to borrow, it was not essential to plaintiff's recovery that he show that he applied for a loan, or that in the beginning the parties had agreed upon the terms of a loan subsequently to be made to him, he being entitled to recover for deceit. *Trollinger v. Amarillo Sav., etc., Co.*, 46 Tex. Civ. App. 592, 103 S. W. 199.

#### **e. As Estoppel.**

**Subscription Obtained by Misrepresentation.**—Where a saving and loan company induced one by written representations to purchase its stock, upon the truth of such representations, it was estopped from insisting afterward upon any other construction. *Pioneer Sav., etc., Co. v. Peck*, 20 Tex. Civ. App. 111, 133, 49 S. W. 160, affirmed in 93 Tex. 717, no op.

### **B. MATURITY OF STOCK.**

#### **1. Representations as to Maturity.**

Where a loan association induces a person to take stock and borrow money by a statement expressly guaranteeing that the shares of stock would be paid for at their face value within a specified time, the association is estopped from claiming that the contract was merely a subscription to stock in a mutual benefit society, and that it was not to be bound for the face value,

on the maturity of the stock, unless it could pay all stockholders on a like basis. *Pioneer Savings & Loan Co. v. Peck*, 49 S. W. 160, 20 Tex. Civ. App. 111, affirmed in 93 Tex. 717, no op.

Representations by officers of a building association as to the time when shares will mature are mere expressions of opinion, and not statements of existing facts, and will not support an action for deceit. *Hunter v. International Bldg., etc., Ass'n*, 24 Tex. Civ. App. 453, 59 S. W. 596.

## 2. Evidence.

Where a certificate of stock in a building and loan association stipulates that the stock would mature when it equals its face value, as provided by the by-laws, evidence that it would mature in seven years after the date of the contract is inadmissible. *Interstate Bldg., etc., Ass'n v. Hunter* (Civ. App.), 51 S. W. 530.

## C. DUES, FINES AND ASSESSMENTS.

### 1. In General.

A loan company sent to its shareholders a circular letter stating that the stock could not be made to pay out at its fixed maturity, and, unless relieved by prompt assessments, the attempt to mature it at its face value would speedily result in bankruptcy, and that the stock contained provisions for such assessments as the board of managers deemed necessary, by which the stock could be matured at its fixed date, but such course would cause great hardship to shareholders, and the sentiment of the members, expressed by the 84,000 shares represented at the annual meeting, was that assessments should not be resorted to, but that some plan be devised which would afford the holders a safe and adequate return. The letter set out a plan submitted to the shareholders. Held, that such letter did not justify a shareholder in ceasing to pay dues and assessments, and entitle him to recover dues and assessments. *Pioneer Sav-*

*ings & Loan Co. v. Oxford* (Civ. App.), 35 S. W. 1078.

A building and loan association can not recover a sum imposed by it as fines upon the legal default of a member who gave notice for the withdrawal of his stock and claimed that the amount of his loan had been paid, when, by crediting him with usurious interest exacted and stock payments, this claim was substantially true. *Crenshaw v. Hedrick*, 19 Tex. Civ. App. 52, 47 S. W. 71, affirmed in 93 Tex. 728, no op.

## 2. Payments.

### a. By Assignee of Note.

The payment of a stockholders' indebtedness to a building and loan association by its acceptance of a negotiable note issued by the association, the note having been assigned to the stockholder before notice of any change in the corporation's regulations affecting the validity of such payment, is a satisfaction of the debt. *Goggin v. Kelly* (Civ. App.), 25 S. W. 1133.

### b. On Unmatured Stock.

In the absence of an agreement to the contrary, payments by a shareholder in a building and loan association on unmatured stock will not be applied as a credit on his obligation to the association for a loan. *Sweeney v. El Paso Bldg., etc., Ass'n* (Civ. App.), 26 S. W. 290, affirmed in 93 Tex. 721, no op.; *People's Bldg., etc., Ass'n v. Keller*, 20 Tex. Civ. App. 616, 50 S. W. 183; *Leary v. People's Bldg., etc., Ass'n*, 93 Tex. 1, 49 S. W. 632, 51 S. W. 836; *Pioneer Bldg., etc., Ass'n v. Everheart*, 18 Tex. Civ. App. 192, 44 S. W. 885. For application of other payments, see post, "Application of Payments," IV, C, 3; "Loans," IV, D; "Appropriation of Payments," IV, E, 4; "Rights of Withdrawing Member," V, A, 2; "Insolvency," VI.

## 3. Application of Payments.

The dues and fines paid to a building

and loan association by one who sustains the separate relation of stockholder and borrower, when the loan is declared usurious, should be credited as such and not as payments on the loan. *Building, etc., Ass'n v. Logan* (Civ. App.), 33 S. W. 1088, affirmed in 93 Tex. 701, no op.; Compare *Abbott v. International Bldg., etc., Ass'n*, 86 Tex. 467, 25 S. W. 620, reversing 23 S. W. 629. For application of other payments, see ante, "On Unmatured Stock," IV, C, 2, b; post, "Loans," IV, D; "Appropriation of Payments," IV, E, 4; "Rights of Withdrawing Member," V, A, 2; "Insolvency," VI.

**Set-Off.**—Where a building and loan association transfers notes and a lien on land to defendant, and the maker of the notes was a stockholder in the association, he would have no right, on obtaining judgment against the association for the value of his stock, to offset payments made on the stock against the debt so transferred. *State Nat., etc., Trust Co. v. Fuller*, 26 Tex. Civ. App. 318, 63 S. W. 552, affirmed in 95 Tex. 677, no op.

#### 4. Defaulting Stockholder.

**Ascertainment of Amount Due.**—The amount due a building and loan association by a stockholder upon his failure to pay interest and assessments, where authorized by the by-laws, may be ascertained by crediting the member with dues paid and ascertaining the withdrawal value of his stock. *Bringhurst v. Mutual Bldg., etc., Ass'n*, 19 Tex. Civ. App. 355, 47 S. W. 831, affirmed in 93 Tex. 636, no op.

**Pleading.**—The manner of ascertaining the amount due by a defaulting member of a building and loan association and the disposition of his stock can not be questioned where he made no objection thereto in his pleading. *Bringhurst v. Mutual Bldg., etc., Ass'n*, 19 Tex. Civ. App. 355, 47 S. W. 831, affirmed in 93 Tex. 636, no op.

#### D. LOANS.

##### Payments by Borrowing Stock-

**holder.**—An agreement to make a given number of monthly payments in full discharge of a building association loan was evidenced by bonds secured by a deed of trust and assignment of a certificate of stock issued to the debtor, which styled a fixed part of each monthly total as payment of principal, and the balance as payment of interest, without reference to stock dues; and such parts were so entered in the debtor's pass book. The deed and certificate indicated that a stock payment was contemplated. Held, that the part of each monthly payment so referred to as principal was on account of the principal, and not on account of stock dues. *Mathews v. Interstate Bldg., etc., Ass'n* (Civ. App.), 50 S. W. 604, 605 (see 93 Tex. 714, no op.). For application of other payments, see ante, "On Unmatured Stock," IV, C, 2, b; "Appropriation of Payments," IV, C, 3; post, "Appropriation of Payments," IV, E, 4; "Rights of Withdrawing Member," V, A, 2; "Insolvency," VI.

**Effect of Subsequent Change in By-Laws.**—Where a building association loaned money which was to be paid at the maturity of certain shares of its stock owned by and pledged to it by defendant, which stock was to be paid for in installments, and was to be credited with the earnings derived from the loan of the installments so paid, and said association subsequently changed its by-laws so as to authorize it to cease making assessments on stock of nonborrowing members, and fix a different time for the maturity of the debts of borrowing members, said association thereby rendered itself powerless to perform its contract with defendant, and defendant was entitled to be credited with the amount he had already paid in, and, having paid more than the original debt, he should be discharged. *International Bldg., etc., Ass'n v. Braden* (Civ. App.), 32 S. W. 704.

**Authority of Agent.**—In an action by a building association on a note al-

leged to have been given as the price for the construction of building, defendants claimed that the transaction was simply a loan of a smaller sum than the face of the note, and that the agent of plaintiff represented that the contract signed in addition to the note was simply a form in order to obtain the loan. Plaintiff offered evidence that it was not engaged in the business of loaning money, and that the agent's only authority was to receive applications and bids for building houses, and have the parties sign the papers after they were passed on by the home office. Held, that it was error to refuse to instruct as to the effect of the agent's want of authority. *Texas Building & Loan Ass'n v. Norwood* (Civ. App.), 46 S. W. 404.

**Effect of False Representations by Agent.**—Where a building and loan association, through its agent, verbally agrees to loan a sum named to a borrower, with interest at the rate of 5 per cent per annum, and a premium upon said sum at the rate of 5 per cent per annum, said interest to be paid in monthly and quarterly installments until the amount of the loan is repaid, and to be secured by mortgage on certain lands, and the agent, by false representations, procures from the mortgagor, who is illiterate, and unable to read and write, the execution of papers imposing obligations not contemplated in said verbal agreement, the contract of the parties will be made to conform to the verbal agreement. *Pioneer Sav., etc., Co. v. Baumann* (Civ. App.), 58 S. W. 49, affirmed in 93 Tex. 737, no op. See ante, "Unauthorized Representations," III, C, 1; "Right to Rescission," IV, A, 2, b.

**Transfer of Stock as Security for Loan.**—In an action against a building and loan association to recover the value of 60 shares of stock, it appeared that, after the stock was issued to plaintiff, he negotiated a loan

from defendant, giving a mortgage on land, and transferring the stock as security; that, a short time after making the loan, he ceased paying assessments on the stock, but made several payments on the loan; that in a settlement subsequently made, after several months' correspondence, plaintiff signed an instrument reciting that he had received from the association "abstract of title, bond, trust deed, and release of same, having this day released my stock in said association, and settled all accounts with the same;" and that plaintiff received the papers named in the instrument, and the corporation retained the certificate of stock. Held, that the instrument was a release of plaintiff's stock to defendant. *Building & Loan Ass'n of Dakota v. Hamm* (Civ. App.), 36 S. W. 313.

## E. USURIOUS LOANS.

### 1. What Constitutes Usury.

#### a. In General.

Where a stockholder in a building and loan association agrees to pay a premium for the privilege of borrowing money from the association, and such premium and the stipulated interest to be paid on the money borrowed together amount to more than the legal rate of interest, the loan is usurious. In such case all the payments of interest are applied by the law upon the principal. *Abbott v. International Bldg., etc., Ass'n*, 86 Tex. 467, 25 S. W. 620, reversing 23 S. W. 629; *People's Bldg., etc., Ass'n v. Marston*, 30 Tex. Civ. App. 100, 69 S. W. 1034; *People's Bldg., etc., Ass'n v. Rising* (Civ. App.), 34 S. W. 147; affirmed in 93 Tex. 693, no op.; *American, etc., Sav. Ass'n v. Cornibe*, 35 Tex. Civ. App. 385, 80 S. W. 1026, affirmed in 98 Tex. 609; no op.; *Building, etc., Ass'n v. Logan* (Civ. App.), 33 S. W. 1088, affirmed in 93 Tex. 701, no op.; *International Bldg., etc., Ass'n v. Mayers* (Civ. App.), 25 S. W. 1132;



International Bldg., etc., Ass'n v. Biering, 86 Tex. 476, 25 S. W. 622, 26 S. W. 39, reversing 23 S. W. 621, 1025; Jackson v. Cassidy, 68 Tex. 282, 4 S. W. 541; Hensel v. International Bldg., etc., Ass'n, 85 Tex. 215, 219, 20 S. W. 116; Bexar Bldg., etc., Ass'n v. Seebe (Civ. App.), 40 S. W. 875, affirmed in 93 Tex. 700, no op.; Building, etc., Ass'n v. Griffin, 90 Tex. 480, 39 S. W. 656, reversing 23 S. W. 629, which affirmed International Bldg., etc., Ass'n v. Abbott, 85 Tex. 220, 20 S. W. 118. Compare Cotton States Bldg. Co. v. Jones, 94 Tex. 497, 62 S. W. 741, reversing 60 S. W. 587; Pioneer Bldg., etc., Ass'n v. Everheart, 18 Tex. Civ. App. 192, 44 S. W. 885; People's Bldg., etc., Ass'n v. Keller, 20 Tex. Civ. App. 616, 50 S. W. 183. For application of other payments, see ante, "Payments," IV, C, 2; "On Unmatured Stock," IV, C, 2, b; "Loans," IV, D; post, "Rights of Withdrawing Member," V, A, 2; "Insolvency," VI.

A transaction between an individual and a building and loan association by which the former agrees to subscribe to stock in the latter, and to pay for the same in monthly installments, receiving in return dividends and certain loan privileges, and at the same time applies for a loan secured by mortgage, and a pledge of the stock subscribed for, can not be condemned as a usurious contract because the individual entered into the sale solely to secure the loan, unless the association also intended that he should not become a shareholder, and sold the stock to him merely as a cover for charging usurious interest. Guarantee Sav., etc., Co. v. Mitchell, 39 Tex. Civ. App. 205, 87 S. W. 184.

A building association, in consideration of \$750, evidenced by a note payable in 60 monthly installments, and secured by a mechanic's lien, agreed to build an addition to defendant's residence, which it did for \$500, the reasonable cash value of the work. If

defendant had paid all the installments, the association would have realized 18 per cent. per annum on the amount paid. Held that, as the contract was not for the loan of money, it is not invalid as being usurious. Mathews v. Texas Building & Loan Ass'n (Civ. App.), 48 S. W. 744.

Where a party executes to a building association his obligation for \$2,000, due in 76 months, with interest at 9 per cent, and receives thereon only \$1,800, the difference of \$200 being bid as a premium on the loan, he is not entitled, upon default in the interest payments and settlement by suit, to a credit for the \$200, the transaction not being usurious even with that sum treated as an advanced payment of interest. Lee v. Ryan, 11 Tex. Civ. App. 11, 31 S. W. 1098.

A contract by a borrower with a building and loan association is not prima facie usurious because, in addition to full legal interest, it provides for monthly payments upon the borrower's shares of stock in the concern, such contract being, upon its face, a plan analogous to that for discharging indebtedness through a sinking fund, and not invalid unless shown to be a device for evading the usury laws. Interstate Bldg., etc., Ass'n v. Goforth, 94 Tex. 259, 59 S. W. 871, reversing same case in 57 S. W. 700.

If the premium charge is not authorized by statute, and it increases the cost of loan beyond the rates of interest fixed by statute, it is usurious and void. Thompson Building and Loan Associations, § 187; State Nat., etc., Trust Co. v. Fuller, 26 Tex. Civ. App. 318, 63 S. W. 552, affirmed in 95 Tex. 677, no op.

The by-laws of a building and loan association providing for the imposition of fines upon its members when in default of dues applies to such members as stockholders only, and fines so paid will not be considered in determining whether a loan is usurious.

*Geisberg v. Mutual Bldg., etc., Ass'n* (Civ. App.), 60 S. W. 478, affirmed in 94 Tex. 690, no op.

If a contract between a borrowing member and a building association, as made, is not usurious, the fact that a settlement before maturity of the stock by applying its then value to the extinguishment of the debt may show that more has been paid than the loan would amount to with lawful interest, would not render it so. *Interstate Bldg., etc., Ass'n v. Bryan*, 21 Tex. Civ. App. 563, 54 S. W. 377.

Interest can not be charged upon a premium on a loan made by a building and loan association to a member thereof, since this would be a charge not on what the member received, but upon what he relinquished to the association. *Jackson v. Cassidy*, 68 Tex. 282, 4 S. W. 541, approved in *Hensel International Bldg. v. etc., Ass'n*, 85 Tex. 215, 20 S. W. 116.

The premium which the by-laws of a building and loan association require to be bid on loans made by it, should be taken into consideration in determining whether the loan contract bears a usurious rate of interest. See contract of a borrowing stockholder of such association held to call for more than 12 per cent interest. *State Nat., etc., Trust Co. v. Fuller*, 26 Tex. Civ. App. 318, 63 S. W. 552, affirmed in 95 Tex. 677, no op.

#### **b. Improvements on Homestead.**

Appellants made a contract for certain improvements on their homestead, to cost \$2,600, and then applied for assistance to a building and loan association, which took up the contract and had it carried out, taking appellant's note for \$3,900, with interest at 12 per cent, payable in monthly installments of \$65 each, for a period of five years, the whole to become due on any default. Held, that the excess of the amount over the \$2,600 actually advanced was interest, and the contract usurious. *Walters v. Texas*

*Bldg., etc., Ass'n*, 8 Tex. Civ. App. 500, 29 S. W. 51, affirmed in 93 Tex. 742, no op.

#### **c. Mechanics' Liens.**

When the execution of a building contract giving a mechanic's lien, and its assignment to a building and loan association are parts of a single transaction designed to secure a loan which was usurious, the association is not entitled to enforce such lien, although itself bearing interest at a lawful rate. *American Bldg., etc., Ass'n v. Daugherty*, 27 Tex. Civ. App. 430, 66 S. W. 131, affirmed in 95 Tex. 673, no op.

#### **d. Contract to Erect Building.**

A written contract between a building and loan association and the owners of real property, in which it agrees to furnish material and erect a building for them, with stipulation for a builder's, mechanic's, and material-man's lien upon the lot and improvements, duly executed under the statute and accompanied by promissory notes to it payable in monthly installments, evidences a builder's contract, and not a loan of money subject to the usury laws. *Cain v. Texas, etc., Loan Ass'n*, 21 Civ. App. 61, 51 S. W. 879, affirmed in 93 Tex. 726, no op.

Where notes given for the contract price of a house to be built for the payor, and bearing the highest lawful rate of interest from their date (the date of the contract), are assigned under previous agreement to a loan association which pays the contract price as the work progresses, such notes are not tainted with usury because a portion of the contract price evidenced by them draws interest before it is actually paid out. *Luzenberg v. Bexar Bldg., etc., Ass'n*, 9 Tex. Civ. App. 261, 262, 29 S. W. 237, affirmed in 93 Tex. 713, no op.

#### **2. Purging Usurious Contract.**

A borrower who had made with a building association a contract usurious with respect to certain payments

to a contingent fund could make a valid contract purging the original of this usurious feature but binding him to carry it out in all other respects. *Cotton States Bldg. Co. v. Jones*, 94 Tex. 497, 62 S. W. 741, reversing 60 S. W. 587.

Where a person borrows \$1,300, and gives his note for \$2,000, with interest at 10 per cent, a subsequent written contract whereby in consideration of \$1, and the repayment of the usurious interest, and a stipulation for only lawful interest after the date of the subsequent contract, he agreed that the note shall be valid and binding, does not purge the transaction of usury; and the intervention of the rights of other parties is immaterial. *El Paso Bldg., etc., Ass'n v. Lane*, 81 Tex. 369, 17 S. W. 77.

The vice of a usurious contract is not cured by an entry, made by a building and loan association after a foreclosure sale, of a credit to the borrower of a sum sufficient to reduce the interest to twelve per cent per annum. Such entry is evidence that the lender was a conscious violator of the law. *Jackson v. Cassidy*, 68 Tex. 282, 4 S. W. 541, approved in *Hensel v. International Bldg., etc., Ass'n*, 85 Tex. 215, 20 S. W. 116.

### 3. Rescission and Cancellation of Usurious Contract.

In an action to cancel a lien on the ground of usury in the contract and discharge of the debt by payments, plaintiff may have cancellation of stock certificates issued to him by the defendant building association as a part of the transaction sought to be set aside, under his prayer for general relief. *American, etc., Sav. Ass'n v. Cornibe*, 35 Tex. Civ. App. 385, 80 S. W. 1026, affirmed in 98 Tex. 609, no op.

The plaintiff in an action to cancel a building and loan mortgage in which plaintiff alleged usury, and that the written contract was not the real con-

tract but only a means of evading the usury laws, testified that the officer of the association to whom the application for the loan was made stated that the weekly payments would be first applied in payment of interest, and the remainder in payment of the principal, and that the loan contract was executed in pursuance thereof. The written loan obligation required the weekly payment of a certain sum on each share of stock, equal to ten per cent interest as fixed in such obligation plus a certain payment on the principal, till the stock was fully paid up, when the stock should be applied to the payment of the principal debt; but no stock was in fact issued. Held, sufficient evidence of usury to authorize the submission of the question whether the loan obligation was not a mere device to evade the usury laws, as the contract allowed the receipt of the full interest on the principal till the maturity of the stock and the retention till such time of payments which, according to plaintiff's testimony, should have been immediately applied on the principal. *Walter v. Mutual Home Sav. Ass'n*, 29 Tex. Civ. App. 379, 68 S. W. 536.

**Application of Doctrine.**—The doctrine that cancellation is only to be granted on payment of the debt and legal interest is not applicable to a suit to cancel a building and loan mortgage and contract which is alleged by plaintiff not to represent the real contract, but to be a device to evade the usury laws. *Walter v. Mutual Home Sav. Ass'n*, 29 Tex. Civ. App. 379, 68 S. W. 536.

**Recovery of Costs.**—Where, in an action brought by a borrowing member of a building association to cancel his loan contract, a rescission of the contract is had, and upon an equitable adjustment of the account a small balance is adjudged due the association, plaintiff is not entitled to recover costs because, prior to bringing suit, he had

offered to pay defendant more than was awarded to it by the judgment—his pleadings making no tender, but claiming that there was nothing at all due. *North Tex., etc., Loan Ass'n v. Hay*, 23 Tex. Civ. App. 98, 56 S. W. 580, affirmed in 93 Tex. 647, no op.

#### **Liability for Attorney's Fees.**

Where a mortgage to a building association provided for 10 per cent attorneys' fees in case of legal proceeding, a borrower who sued to cancel his mortgage as paid was liable for attorney's fees where a small balance was found due the association. *Crenshaw v. Hendrick*, 19 Tex. Civ. App. 52, 47 S. W. 71, affirmed in 93 Tex. 728, no op.

#### **4. Appropriation of Payments.**

Usurious interest paid on a loan by a stockholder in a building and loan association should not be credited on any other account than the principal, so long as there is principal to which it may be applied. *Heady v. Bexar Bldg., etc., Ass'n* (Civ. App.), 26 S. W. 468; *El Paso Bldg., etc., Ass'n v. Lane*, 81 Tex. 369, 17 S. W. 77.

Where plaintiff subscribed to the stock of a building and loan association and borrowed therefrom money with which to pay off a vendor's lien on his property, agreeing with the association to pay 6 per cent per annum interest and 1 per cent per month as premium and sinking fund, the compensation thus to be paid being usurious, and subsequently the association transferred the loan to a third party with the right of subrogation under the original lien, the premium, interest and sinking fund paid by plaintiff should be credited at the time of payment on the original note. *State Nat., etc., Trust Co. v. Fuller*, 26 Tex. Civ. App. 318, 63 S. W. 552, affirmed in 95 Tex. 677, no op.

Parol evidence is admissible in support of a plea of usury to show that the agent of a building and loan association who made the loan agreed that

the stock payments should be applied to the loan, although the written contract provided otherwise. *People's Bldg., etc., Ass'n v. Keller*, 20 Tex. Civ. App. 616, 50 S. W. 183.

**Adjustment of Equities.**—Where a building and loan contract was tainted with usury, the court properly charged the borrower, in an action by him for a settlement of accounts, with the amount of the loan received, and credited him with the value of the stock and the sums paid on interest and premium. *People's Bldg., etc., Ass'n v. Marston*, 30 Tex. Civ. App. 100, 69 S. W. 1034, affirmed in 97 Tex. 643, no op. For appropriation of other payments, see ante, "On Unmatured Stock," IV, C, 2, b; "Application of Payments," IV, C; "Loans," IV, D; post, "Rights of Withdrawing Member," V, A, 2; "Insolvency," VI.

#### **5. Foreign Corporations.**

**Conflict of Laws.**—Where a foreign building association makes a loan to a resident of Texas secured by trust deed upon property in this state, and the by-laws provide that payments upon dues and loans may be made to the secretary of the local board in the state where the loan is made, the laws of this state will govern in determining whether the contract is usurious, although the by-laws and certificates of stock also provide that all dues upon loans and stock are payable at the home office, and that the local agents in receiving payments of dues shall be deemed the agent of the payor and not of the association. *Southern Bldg., etc., Ass'n v. Atkinson*, 20 Tex. Civ. App. 516, 50 S. W. 170, affirmed in 93 Tex. 720, no op.; *Crenshaw v. Hedrick*, 19 Tex. Civ. App. 52, 47 S. W. 71, affirmed in 93 Tex. 728, no op.

A usurious building and loan note negotiated in Texas is governed by the laws of that state, though executed and performable in another state, according to the laws of which it would not be usurious. *People's Building, Loan*

& Saving Ass'n *v.* Bessonet (Civ. App.), 48 S. W. 52.

A contract of loan on Texas property by a building and loan association, chartered in another state, which provides for the payment of interest and premiums together exceeding the maximum rate of interest allowed by the laws of Texas, will be held usurious here, although the association is authorized by its charter to take interest on loans in any amount. *Southern Bldg., etc., Ass'n v. Atkinson*, 20 Tex. Civ. App. 516, 50 S. W. 170, affirmed in 93 Tex. 720, no op.; *Crenshaw v. Hedrick*, 19 Tex. Civ. App. 52, 47 S. W. 71, affirmed in 93 Tex. 728, no op.; *Building, etc., Ass'n v. Griffin*, 90 Tex. 480, 39 S. W. 656.

**Contracts Ultra Vires.**—A foreign building and loan association can not escape the penalties attached to a usurious contract made through its agents upon the ground that such contract was beyond its charter powers, and that it therefore had no authority to make or ratify it. *People's Bldg., etc., Ass'n v. Keller*, 20 Tex. Civ. App. 616, 50 S. W. 183.

## F. RECOVERY OF USURIOUS INTEREST.

### 1. In General.

One who pays interest on a building and loan contract tainted with usury is entitled to recover double the amount of all interest actually paid, although the first payments were not themselves usurious, and also to have the entire penalty given by the statute for usury (double recovery of the interest paid) credited on the principal of the debt. Rev. Stats., art. 3106. *American Bldg., etc., Ass'n v. Daugherty*, 27 Tex. Civ. App. 430, 66 S. W. 131, affirmed in 95 Tex. 673, no op.

Under Sayles' Civ. Stat., art. 3106, providing, where there is usury, for the recovery of double the amount of interest received or collected within two years preceding the suit, where separate monthly payments, on account of

principal and interest of a building association loan, are made, the contract does not become usurious until the principal is thereby reduced to an amount on which the monthly payment of interest would exceed the lawful rate; and it is only from that time that double interest is recoverable. *Mathews v. Interstate Bldg., etc., Ass'n* (Civ. App.), 50 S. W. 604, 605, (see 93 Tex. 714, no op.).

**Allowance of Credits.**—Where a stockholder in a building and loan association is sued on a contract declared to be usurious, he should be credited with the interest he has paid, and also the value of his stock, less unpaid dues. *International Bldg., etc., Ass'n v. Mayers* (Civ. App.), 25 S. W. 1132; *Building, etc., Ass'n v. Logan* (Civ. App.), 33 S. W. 1088, affirmed in 93 Tex. 701, no op. See *People's Bldg., etc., Ass'n v. Keller*, 20 Tex. Civ. App. 616, 50 S. W. 183.

Where usurious interest has been voluntarily paid, the difference between such payment and the amount that would be due for interest at the highest legal rate may be recovered back, even in the absence of any statute authorizing such recovery. *Bexar Bldg., etc., Ass'n v. Robinson*, 78 Tex. 163, 14 S. W. 227.

### 2. Pleading.

**Allegations of Usury.**—Allegations that the requirement by defendant building and loan association of plaintiff, who was wishing to borrow money, that he should take a certain amount of its stock, and its further requirements as to dues and payments thereon, were but a device to avoid the usury laws, will not support a judgment by default for the recovery, as usury, of money paid on such stock, where the further and specific allegations in reference to such payments show that the usury law was not violated. *Interstate Bldg., etc., Ass'n v. Bryan*, 21 Tex. Civ. App. 563, 54 S. W. 377.

### 3. Evidence.

Evidence that an agent of a building and loan association, in making other loans, agreed that stock payments should be applied to the loan, is admissible as tending to show authority in him to make a similar agreement with reference to plaintiff's loan, and that the form of the loan was but a device to evade the usury laws. *People's Bldg., etc., Ass'n v. Keller*, 20 Tex. Civ. App. 616, 50 S. W. 183.

Parol evidence of antecedent and contemporaneous acts and declarations of the parties is admissible to show that a contract with a building and loan association, fair upon its face, was in fact only a device to cover usury, although such evidence tends to vary and change the written contract. *Peightal v. Cotton States Bldg. Co.*, 25 Tex. Civ. App. 390, 61 S. W. 428.

**Burden of Proof.**—Where the contract sued on was valid on its face and made defendant a stockholder in and a borrower from the plaintiff building and loan association, and defendant alleged that the contract was but a scheme to cover usury and the transaction purely a loan, the burden of proof upon this issue was on him. *Cotton States Bldg. Co. v. Peightal*, 28 Tex. Civ. App. 575, 67 S. W. 524.

### 4. Instructions to Jury.

A charge which instructed the jury to find for plaintiff if either of two features of a contract was found to be usurious, thus ignoring an issue as to whether the usury, if any, connected with one of such features had been purged by a new agreement, was affirmatively erroneous, and no request for an instruction was necessary to make such error available for reversal. *Cotton States Bldg. Co. v. Jones*, 94 Tex. 497, 62 S. W. 741, reversing 60 S. W. 587.

## G. LIENS.

### 1. Validity of Contract.

Where a building and loan associa-

tion is empowered by its charter to aid and assist its members in improving their real estate, and a loan is made to a member for that purpose secured by a lien on his homestead, the designation in the contract of security as a "mechanic's and builder's lien" is immaterial, if the security is otherwise valid. *Heady v. Bexar Bldg., etc., Ass'n (Civ. App.)*, 26 S. W. 468. Compare *Building, etc., Ass'n v. Logan (Civ. App.)*, 33 S. W. 1088, affirmed in 93 Tex. 701, no op. See *International Bldg., etc., Ass'n v. Fortassain (Civ. App.)*, 23 S. W. 496.

Where a mechanics' and builders' lien on a homestead is given to a building and loan association by a stockholder of the association to secure a loan of money with which to improve the homestead, unless the improvements are made by the association or under its direction, the lien is void. *International Bldg., etc., Ass'n v. Fortassain (Civ. App.)*, 23 S. W. 496. See *Heady v. Bexar Bldg., etc., Ass'n (Civ. App.)*, 26 S. W. 468.

**Wife's Acknowledgment of Contract.**—A wife's acknowledgment of a contract with a building association for a mechanic's lien upon the homestead, taken before a notary who was secretary of the association, was its principal stockholder, and was interested in the contract to the extent of ten per cent commission, was invalid and created no lien. *Miles v. Kelley*, 16 Tex. Civ. App. 147, 40 S. W. 599.

**Acknowledgment before Stockholder.**—The acknowledgment before a stockholder of a building and loan association of a contract creating a lien upon land in favor of the association is invalid and can not be reformed. *Bexar Bldg., etc., Ass'n v. Heady*, 21 Tex. Civ. App. 145, 50 S. W. 1079, 57 S. W. 583, affirmed in 93 Tex. 700, no op.

### 2. Foreclosure.

#### a. Termination of Member's Liabilities for Assessments.

A stockholder's liabilities to a build-

ing and loan association for stock assessments terminates with the foreclosure and sale of his property under a lien held by the association for a loan. *Building, etc., Ass'n v. Logan* (Civ. App.), 33 S. W. 1088, affirmed in 93 Tex. 701, no op.

#### **b. Allowance of Credits.**

Under the terms of a trust deed, made to secure a loan and the value of a certain number of shares of stock in a building and loan association, it was stipulated that the payments should be made in installments, and that in default in the payment of any of the sums mentioned for three months, the whole of the principal sum secured, etc., should become due and payable, and the trustee empowered to sell the property. The stockholder having made default in his payments, it was held, that on a sale under the trust deed, he was entitled to credit for the actual value of the stock at the time of the sale, independent of the question of usury. *Leary v. People's Bldg., etc., Ass'n*, 93 Tex. 1, 51 S. W. 836, reversing 49 S. W. 632; *Rogers v. People's Bldg., etc., Ass'n* (Civ. App.), 55 S. W. 383; *Bringham v. Mutual Bldg., etc., Ass'n*, 19 Tex. Civ. App. 355, 47 S. W. 831, affirmed in 93 Tex. 636, no op. See *People's Bldg., etc., Ass'n v. Keller*, 20 Civ. App. 616, 50 S. W. 183; *Geisberg v. Mutual Bldg., etc., Ass'n* (Civ. App.), 60 S. W. 478, affirmed in 94 Tex. 690, no op. This case reverses same case in 49 S. W. 632.

**Pleading.**—In an action by a building and loan association against a stockholder and borrower to foreclose a mechanic's lien, objections by defendants as to credits or to the disposition made of their stock, will not be available unless pleaded. *Bringham v. Mutual Bldg., etc., Ass'n*, 19 Tex. Civ. App. 355, 47 S. W. 831, affirmed in 93 Tex. 636, no op.

#### **3. Suit to Cancel.**

A suit against a saving and loan

company by a stockholder to cancel a mortgage because the debt secured by it has been discharged, is not a suit to cancel a contract, but to enforce one; hence plaintiff need not surrender for cancellation his certificates of stock evidencing defendant's liability to him. *Pioneer Sav., etc., Co. v. Peck*, 20 Tex. Civ. App. 111, 129, 49 S. W. 160, affirmed in 93 Tex. 717, no op.

The certificate of shares in a savings and loan association provided that any suit on the certificate should be brought in the county in which the association had its main office. A deed of trust given by a borrowing stockholder on his lands in another state was to be canceled on the maturity of the stock. Held, that an action to cancel the deed as a cloud on the stockholder's title, and to restrain the sale of the lands under the power in the deed, was properly brought where the land was situated, especially since the courts of the state where the association was located had no jurisdiction to remove the cloud or enjoin the sale. *Pioneer Savings & Loan Co. v. Peck*, 49 S. W. 160, 20 Tex. Civ. App. 111, affirmed in 93 Tex. 717, no op.

### **V. Withdrawals from Membership.**

#### **A. NOTICE OF WITHDRAWAL.**

##### **1. Requisites.**

The by-laws of a building and loan association contained a provision that "at no time shall more than one-half of the funds in the treasury be subject to the demand of withdrawing stockholders." Another provision required any member desiring to withdraw to give thirty days' notice to the board of directors. In an action by a stockholder to recover the full amount of the premiums he had paid, it being shown that he had given the required notice, it was held that, under the facts of this case, the action could be maintained. *Printer's Bldg., etc., Ass'n v. Paxton* (Civ. App.), 33 S. W. 389.

A borrowing stockholder in a building and loan association asserts his right to have the value of his stock applied to the discharge of his debt as provided in the by-laws by notifying the association of his desire to at once discharge his debt and avail himself of all rights held by him as a stockholder, and by instituting suit to have certain usurious payments made by him applied to the principal sum and to have his bond on the deed of trust canceled. *People's Bldg., etc., Ass'n v. Keller*, 20 Tex. Civ. App. 616, 50 S. W. 183.

## 2. Rights of Withdrawing Member.

A member of a loan association is entitled to have stock payments made by him credited upon the amount of his loan, where he gave notice in writing for the withdrawal of his stock as required by the by-laws, and there is nothing in the contract of the parties which has worked a forfeiture of such right. *Crenshaw v. Hedrick*, 19 Tex. Civ. App. 52, 47 S. W. 71, affirmed in 93 Tex. 728, no op.

### Credits Allowed Borrowing Member.

—A borrowing member of a building and loan association, whose contract authorized her to withdraw on sixty days' notice, after keeping her certificate in force for five years or more, and receive on such withdrawal all monthly and withdrawal installments paid on her certificate, with 10 per cent interest from the date of each payment, has the right at any time after the lapse of five years to withdraw and have the amount due on her certificate appropriated to the payment of her debt to the association, where it is sufficient to pay such debt in full. *Pioneer Sav., etc., Co. v. Pancoast*, 17 Civ. App. 312, 43 S. W. 280, affirmed in 93 Tex. 717, no op. For application of other payments, see ante, "On Unmatured Stock," IV, C, 2, b; "Application of Payments," IV, C, 3; "Loans," IV, D; "Appropriation of Payments," IV, E, 4; post, "Insolvency," VI.

A contract between a building and loan association and one of its members, authorizing her to withdraw on sixty days' notice, after keeping her certificate in force for five years or more, and receive on such withdrawal a sum equal to all monthly and withdrawal installments, is presumptively valid, even though the association loses thereby. *Pioneer Sav., etc., Co. v. Pancoast*, 17 Tex. Civ. App. 312, 43 S. W. 280, affirmed in 93 Tex. 717, no op.

Membership fees paid by a member of a loan association can not, upon notice of withdrawal of his stock, be applied on the loan made to him by the association. *Crenshaw v. Hedrick*, 19 Tex. Civ. App. 52, 47 S. W. 71, affirmed in 93 Tex. 728, no op.

## B. WITHDRAWAL VALUE OF STOCK.

In the absence of evidence to the contrary, the withdrawal value of stock in a building and loan association at a certain time is presumed to be its value at a later date. *Bexar Bldg., etc., Ass'n v. Seebe* (Civ. App.), 40 S. W. 875, affirmed in 93 Tex. 700, no op.

## C. RECOVERY OF STOCK PAYMENTS.

**Pleading.**—A by-law of a building and loan association provided for the withdrawal by a stockholder of his stock after thirty days' notice, etc. In this requirement was a proviso, viz, "that at no time shall more than one-third of the funds in the treasury be applied to the demands of withdrawing stockholders without the consent of the board of directors." In a suit by a stockholder to recover the amount he had paid in on his stock, the petition alleging demand and refusal of payment, and plaintiff's compliance with the requirements of the by-law, but omitting any reference to the proviso, it was held, that, there being a material variance between the allegations and



the by-law, the latter was inadmissible in evidence. Nor could the plaintiff recover for the reason that the petition did not allege, nor was there any proof that there were any funds in the treasury nor that the board of directors consented to the plaintiff's demand. *Texas, etc., Loan Ass'n v. Kerr* (Sup.), 13 S. W. 1021.

**Time to Sue.**—Where suit to recover on stock of savings and loan company was brought by attachment before its maturity, but judgment was not rendered till after its maturity, it was immaterial whether the suit was brought before or after obligation matured. *Pioneer Sav., etc., Co. v. Peck*, 20 Tex. Civ. App. 111, 49 S. W. 160, affirmed in 93 Tex. 717, no op.

Where the by-laws of a loan association provided that the association should have 90 days after the filing of claims and their approval to pay matured shares of stock, the act of the association, after the maturity of plaintiff's shares, in offering him a specified sum, which was less than their face value, in full settlement, on condition that the shares should be surrendered and a receipt in full given, estops the association from setting up the prematurity of an action brought before the expiration of the 90 days,—especially where it continues to repudiate its contract. *Pioneer Savings & Loan Co. v. Peck*, 49 S. W. 160, 20 Tex. Civ. App. 111, affirmed in 93 Tex. 717, no op.

**Tender of Certification for Cancellation.**—In an action by a stockholder against a savings and loan association to recover the matured value of his stock, the petition need not tender the certificate of stock for cancellation. *Pioneer Savings & Loan Co. v. Peck*, 49 S. W. 160, 20 Tex. Civ. App. 111.

## VI. Insolvency.

**Adjustment of Equities.**—Upon the insolvency of a building and loan association, a borrowing member is not

entitled to have the full amount of the dues paid in by him applied to the payment of his debt, but all losses that impair the value of the stock should be applied equally to every share, whether owned by borrowing or nonborrowing members. *Price v. Kendall*, 14 Tex. Civ. App. 26, 36 S. W. 810, affirmed in 93 Tex. 648, no op. See *North Tex., etc., Loan Ass'n v. Hay*, 23 Tex. Civ. App. 98, 56 S. W. 580, affirming 93 Tex. 647, no op.

Where a contract between a building and loan association and a borrowing member provides that if the member desires to have his shares of stock redeemed in the repayment of his debt, they shall be taken at a cash valuation not less than the amount of dues paid thereon, with 5 per cent interest, such provision does not entitle the borrowing member, where the association has become insolvent, to have applied to his debt on the loan, in a suit brought to recover the debt by a receiver of the association, the amount of dues paid by him, with interest, there being no payment or tender of the balance of the debt. *Price v. Kendall*, 14 Tex. Civ. App. 26, 36 S. W. 810, affirmed in 93 Tex. 648, no op. See *North Tex., etc., Loan Ass'n v. Hay*, 23 Tex. Civ. App. 98, 56 S. W. 580, affirmed in 93 Tex. 647, no op. For application of other payments, see ante, "On Unmatured Stock," IV, C, 2, b; "Application of Payments," IV, C, 3; "Loans," IV, D; "Appropriation of Payments," IV, E, 4; "Rights of Withdrawing Member," V, A, 2.

## VII. Remedies.

As to remedies, see ante, "Assignment of Assets," II, B; "Fraudulent Representations by Association's Officers and Agents," IV, A, 2, a; "Rescission and Cancellation of Usurious Contract," IV, E, 3; "Recovery of Usurious Interest," IV, F; "Withdrawals from Membership," V.

## **Building Restrictions and Restrictive Agreement.**

See the title COVENANTS.

## **Burden of Proof.**

See, generally, the title PRESUMPTIONS AND BURDEN OF PROOF,  
and references there given.

## **Burial.**

See the titles CEMETERIES; DEAD BODIES.  
As to burial expenses, see the title EXECUTORS AND ADMINISTRATORS.

## **Burning Grass.**

See the title FIRES.

## **Burying Grounds.**

See the title CEMETERIES.

## **Business Homestead.**

See the title HOMESTEAD EXEMPTIONS.

## **Buyer and Seller.**

See the titles SALES; VENDOR AND PURCHASER.

## **By-Bidding.**

See the title AUCTIONS AND AUCTIONEERS, vol. 2, p. 612.

## **By-Laws.**

See, generally, the titles BENEFICIAL AND BENEVOLENT ASSOCIATIONS, vol. 2, p. 761; CORPORATIONS; MUNICIPAL CORPORATIONS.  
As to by laws of trade unions, see the title LABOR.

## **Bystanders.**

As to signing bill of exceptions by, see the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL. See, also, the title NEW TRIALS.

## Calendars and Trial Dockets.

See the title COURTS. See, also, references under DOCKETS.

## Calling the Docket.

See the title COURTS.

## Calls.

As to construction of calls in deeds, see the title BOUNDARIES.

As to calls on unpaid subscriptions to stock, see the title STOCK AND STOCKHOLDERS. As to mortuary call, see the title BENEFICIAL AND BENEVOLENT ASSOCIATIONS, vol. 2, p. 776.

## CANALS.

### CROSS REFERENCES.

See the titles BRIDGES, ante, p. 159; CONSTITUTIONAL LAW; NAVIGABLE WATERS; TOWAGE, TUGS, AND TOWS; WATERS AND WATERCOURSES.

**Right of Action for Tolls.**—Where a franchise authorized the collection of tolls from a lessee using a water channel, and for that purpose authorized suit to be brought in the name of the city of Corpus Christi for the benefit of the owners of the franchise, the refusal of the city to permit the use of its name as a plaintiff could not defeat the right, and the owners of the franchise can maintain the action in their own name. *Morris v. Schooner Leona*, 62 Tex. 35, 38.

A franchise of collecting tolls on all freight passing over a certain channel granted to the city of Corpus Christi was transferred by the city to plaintiffs upon certain considerations,—among them, that of keeping the channel of a certain width and depth throughout its entire length, as required by the laws of the state. There was evidence to show that during the entire month of May, 1881, the channel was not of the requisite depth and width for its whole length, and that

the city council, after having given notice to plaintiffs to restore it to its contract dimensions, passed an ordinance suspending the collecting of tolls till the channel should be restored, and that the order was in force during that month. Held, in a suit by plaintiffs to recover tolls on freight transported during the month of May, 1881, that, as they had failed to keep the channel of the depth and width required by the state and their contract with the city, they were not entitled to maintain the suit. *Morris v. The Leona*, 67 Tex. 303, 3 S. W. 281.

**Right to Enforce Payment of Tolls.**—By the act under which the water channel was constructed, it was provided that any one holding the bonds of the city of Corpus Christi, to pay which the tolls were to be applied, could enforce the payment of tolls in the courts by compulsory process. Held, that the appellants as owners of those bonds could not be affected in their rights to sue by a refusal of the

city to permit its name to be used as plaintiff. *Morris v. Schooner Leona*, 62 Tex. 35, 38.

**Contract Can Not Be Impaired by Legislation.**—The agreement between *Morris & Cummings* and the city of Corpus Christi, that they should have the right to collect tolls on the channel connecting Aransas Bay and Corpus Christi, on stipulative considerations and conditions, until the bonds issued by the city should be paid off by the amount received from tolls, was a contract that the state could not impair by subsequent legislation. *Morris v. Schooner Leona*, 67 Tex. 303, 3 S. W. 281. The decisions in *Morris v. Schooner Leona*, 62 Tex. 35, 38; *Morris v. Gussett*, 62 Tex. 728, 745, and *Morris v. State*, 65 Tex. 53, reaffirmed.

But that contract was binding in all its provisions, and that portion which provided for a suspension of the collection of tolls as long as the channel was not of proper dimensions, was the only means reserved by which an observance of that portion of the contract which was intended to preserve a proper channel for the transit of commerce, could be enforced. *Morris v. Schooner Leona*, 67 Tex. 303, 311, 3 S. W. 281.

The declaration of the legislature that, if the holders of a franchise to collect tolls for the navigation of an artificial channel shall permit the channel to become so obstructed as to impede navigation, "the collection of tolls by them shall be suspended until all obstructions shall be removed or said channel deepened to the depth heretofore specified," amounts to a waiver of the right to have a forfeiture of the franchise declared for such cause; particularly where the obstruction is only temporary, and not serious, and where a municipal corporation is the real owner of the privilege, and the persons holding the franchise, and who were responsible for the obstruction, have no other means of payment of

their claim for opening the channel. *State v. Morris*, 73 Tex. 435, 11 S. W. 392.

**Construction of Franchise—Effect of Ordinance.**—The city of Corpus Christi, under act of February 16, 1854, was given the right to construct a channel between the Bay of Aransas and the Bay of Corpus Christi; to pay for it with money in the city treasury, and to borrow money if necessary, giving bonds therefor; to levy tolls on vessels passing through the channel; to refund the money used, with interest, and to pay off the bonded debt accruing for the money borrowed to execute the work. Under the act, the city of Corpus Christi employed certain parties to do the work, and afterwards the state granted the employees sixteen sections of land per mile of channel to be constructed. After this the city, by consolidated ordinance, provided for issuing to the same employees \$500,000 in city bonds for the completion of the work, with a provision that they should be permitted to collect tolls on vessels passing through the channel, until the bonds were paid. Held, that the effect of the ordinance was to transfer to the employees, to the extent of the power of the city to do so, the franchise of collecting tolls, and require them to appropriate the sums collected to the payment of the bonds issued to them by the city. *Morris v. Gussett*, 62 Tex. 728, 745.

**Power of Eminent Domain.**—See the title EMINENT DOMAIN.

**Insufficient Compliance with Statute.**—A company organized by voluntary association, for the purpose of constructing, operating, and owning a canal, and for the purpose of navigation by such vessels as the directory of the company might deem proper, between the waters of Galveston bay and those of Sabine lake, and the tributaries thereof and therein, to the navigable waters of the Mississippi river, and to the end that the steamboat

navigation might be established between Galveston Bay and said river and its tributaries, was not such an enterprise as could be incorporated under the act of December 2, 1871 (Paschal's Dig., p. 1214), concerning private corporations. *Texas, etc., Nav. Co. v. Galveston County*, 45 Tex. 272, 291.

**Effect of Failure to Observe Condition.**—On the failure of Morris & Cummings to keep the channel of the dimensions required by their contract, it was the right of the city of Corpus Christi, after giving them notice and allowing them a reasonable time to comply with their contract, to act through the city council and suspend the collection of tolls until the channel was restored. *Morris v. Schooner Leona*, 67 Tex. 303, 304, 3 S. W. 281.

**Construction of Stipulation.**—The stipulation in regard to the channel was in effect an agreement on the part of Morris & Cummings that they would not charge tolls while the channel was in a shoaled condition; this stipulation inured to the benefit of every vessel that passed the channel, and it was violative of their contract to attempt to collect them. *Morris v. Schooner Leona*, 67 Tex. 303, 311, 3 S. W. 281.

**Action for Damages.**—When the natural and proximate result of the wrongful refusal of the company to permit a tug to pass through its cut or channel, in order to get access to and to tow a vessel up to and through said

channel, is to cause the detention of the loaded vessel and compel the discharge of her freight by lighters, whereby damage results, such damage may be recovered from the company. *Buffalo, etc., Co. v. Milby*, 63 Tex. 492, 502.

The Buffalo Bayou Ship Channel, or cut across Morgan's Point, owned and controlled by the Buffalo Bayou Ship Channel Company, is a public highway for the passage of vessels, subject to the right of the company to collect tolls. The character of that channel being such as to require the agency of tugs to carry vessels through it, any wrongful refusal of the company to permit a tug engaged in the effort to carry a vessel laden with merchandise through said channel, whereby damage results to the owner of vessel and cargo, is such a proximate cause of the damage as to enable such owner of the vessel and cargo to maintain an action against the company. *Buffalo, etc., Co. v. Milby*, 63 Tex. 492, 502.

No obligation rested upon the owner of the vessel and cargo to pay a past indebtedness from the owner of the tug to the company, payment of which was demanded by the company as the condition on which the tug would be permitted to pull the vessel through the channel. *Buffalo, etc., Co. v. Milby*, 63 Tex. 492, 502. See the title TOWAGE, TUGS AND TOWS.

## Cancellation of Instruments.

See the title RESCISSION, CANCELLATION AND REFORMATION.

## Capacity.

As to capacity to contract, see the title CONTRACTS and references there given. As to mental capacity, see the title INSANITY.

## Capias.

See the title EXECUTION AGAINST THE BODY AND ARREST IN CIVIL CASES.

### **Capita.**

See the title DESCENT AND DISTRIBUTION.

### **Capital Stock.**

See the titles BANKS AND BANKING, vol. 2, p. 690; CORPORATIONS; INSURANCE; JOINT STOCK COMPANIES; PARTNERSHIP. As to taxation of, see the title TAXATION.

### **Capitation Tax.**

See the title ELECTIONS.

### **Caption.**

See the title DEPOSITIONS AND INTERROGATORIES.

### **Care---Carelessness.**

See, generally, the title NEGLIGENCE.

### **Carlisle Tables.**

See the titles MORTALITY TABLES.

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BY A. P. WALKER.

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### **CROSS REFERENCES.**

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TIES; PENALTIES AND FORFEITURES; PILOTS; PIRACY; PLEDGE AND COLLATERAL SECURITY; PRINCIPAL AND AGENT; PRODUCTION OF DOCUMENTS; RAILROADS; RECEIPTS; RECEIVERS; RELEASE; REVENUE LAWS; SALES; SALVAGE; SEAMEN; SHIPS AND SHIPPING; SPECIFIC PERFORMANCE; STATUTES; STOCKYARDS; STOPPAGE IN TRANSITU; STREET RAILROADS; STRIKES; TOWAGE, TUGS AND TOWS; TURNTABLES; USAGES AND CUSTOMS; VARIANCE; VENUE; VERDICT; WAREHOUSES AND WAREHOUSEMEN; WHARVES AND WHARFINGERS; WRECKS.

As to carriage of dead bodies, see the title DEAD BODIES.

## **I. Definitions and General Consideration.**

### **A. DEFINITION AND DISTINCTIVE CHARACTERISTICS.**

It is the business of a common carrier to carry persons and property for hire. *Texas, etc., R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 226, 78 S. W. 548, affirmed in 98 Tex. 635, no op.

Carriers of animals are common carriers. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 169, 2 S. W. 574. See the title CARRIERS OF LIVE STOCK.

**Carriers of Goods.**—See the title CARRIERS OF GOODS.

**Carriers of Passengers.**—See the title CARRIERS OF PASSENGERS.

**Private Carriers and Persons Occasionally Pursuing Occupation of Carrier.**—See the title CARRIERS OF GOODS.

### **B. PERSONS AND CORPORATIONS WHO ARE CARRIERS.**

#### **1. Boatmen.**

See *Chevaillier v. Patton*, 10 Tex. 344; *Philleo v. Sanford*, 17 Tex. 227, 231.

#### **2. Ferryman.**

A ferryman is a common carrier (*Tex. 1855*). *Albright v. Penn*, 14 Tex. 290; *Johnson v. Erskine*, 9 Tex. 1, 12. See the title FERRIES.

Ferryman are, in a restricted sense, common carriers. *Henry v. Holtz*, 1 White & W., Civ. Cas. Ct. App., § 775.

#### **3. Express Companies.**

Express companies are common carriers. *Houston, etc., R. Co. v. Adams*,

49 Tex. 748, 758. See, generally, the title EXPRESS COMPANIES.

#### **4. Railroads.**

##### **a. In General.**

A railway company is a common carrier of both freight and passengers. *Houston, etc., R. Co. v. Moore*, 49 Tex. 31, 47; *G. C. & S. F. R. Co. v. McGown*, 65 Tex. 640; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567.

Constitution, art. 10, § 2, fixes the status of railroad companies as common carriers, and limits the power of the legislature to vary their liability from that which pertains to common carriers as distinguished from private carriers. *Mo. P. R. Co. v. Harris*, 1 White & W. Civ. Cas. Ct. App., § 1258. See, to the same effect, *Ft. Worth, etc., R. Co. v. Rogers*, 21 Tex. Civ. App. 605, 608, 53 S. W. 366; *Houston, etc., R. Co. v. Smith*, 63 Tex. 322, 325.

In an action against a railway company for compelling plaintiff's wife and child to ride in a cold, filthy car, the court, in the absence of an admission that the defendant was a common carrier, should have given a charge to that effect, without submitting the question; *Const. art. 10, § 2*, declaring that railroad companies are common carriers. *Duck v. St. Louis & S. W. Ry. Co. (Civ. App.)*, 63 S. W. 891.

##### **b. Railroads in Hands of Receivers, Trustees or Agents.**

A common carrier of freight having contracted with the shipper to trans-

port cotton, can not avoid liability for its loss by showing that the road was under the control of a receiver at the time of contracting. *Gulf, etc., R. Co. v. Insurance Co.* (Civ. App.), 28 S. W. 237.

**Surrender of Management and Control to Other Persons.**—Railway companies voluntarily assume duties to the public from which they can not free themselves by surrendering the management and control of their roads to other persons, in the absence of such law as would permit them; and there is in Texas no statute according such a privilege. *Woodhouse v. Rio Grande R. Co.*, 67 Tex. 416, 3 S. W. 323; *Rio Grande R. Co. v. Cross*, 5 Tex. Civ. App. 454, 456, 23 S. W. 529, affirmed in 93 Tex. 648, no op.

**Railroad Operated by Trustee in Mortgage or Deed of Trust.**—A provision in the railway charter which authorized the company to raise money by the sale of bonds, and to secure the bonds by a mortgage of its road, capital stock, franchises, etc., did not authorize the company to surrender the control and management of its road to the trustees in such mortgage, and thus relieve itself from its liabilities and duties to the state and the public. The company was still liable for loss occurring during such control. *Rio Grande R. Co. v. Cross*, 5 Tex. Civ. App. 454, 23 S. W. 529, affirmed in 93 Tex. 648, no op., following *Woodhouse v. Rio Grande R. Co.*, 67 Tex. 416, 3 S. W. 323.

In the case of *Woodhouse v. Rio Grande Railway Company*, 67 Tex. 416, 3 S. W. 323, it does not appear that the court had under consideration the clause in the defendant's charter, which is a special act of the legislature, authorizing the company to raise money by the sale of bonds and to secure the same by a mortgage of its road, its capital stock, its corporate franchises, etc., in such manner and form as said company or its directors might deem best and expedient; but

the power to mortgage contained in the charter is not sufficient to authorize the defendant to surrender control of its railway and the management thereof to other persons, and relieve itself of its liabilities and duties to the state and public. The trustees, therefore, must be treated as the agents of the defendant for the management and operation of its railway in the discharge of its duties as public carriers. *Rio Grande R. Co. v. Cross*, 5 Tex. Civ. App. 454, 458, 23 S. W. 529, affirmed in 93 Tex. 648, no op.

**Receiver Continuing to Operate Road after Sale and Confirmation.**—

When receiver of a railroad continued to operate it for the benefit of a purchaser, after sale and confirmation, and after time of delivery to purchaser as fixed by the court, the purchaser was liable for damages to freight occurring during such time. *Houston, etc., R. v. Bath & Co.*, 17 Tex. Civ. App. 697, 712, 44 S. W. 595, affirmed in 93 Tex. 731, no op.

**5. Receivers of Railroads.**

"In cases in which railways are operated by receivers appointed by courts, it is held that the receiver becomes a common carrier, subject officially to the liabilities attaching to that business as well as to the liabilities of a master to the servant, and that, from the public nature of the business, earnings of the property while in his hands may be applied to discharge obligations arising in the course of the business; and it is true that in this way the owner of such property is made through the appropriation of earnings of its property to pay debts incurred through the negligence of a receiver or his servants; but those cases stand on exceptional grounds, and are justified only by public considerations not now necessary to consider." *Turner v. Cross*, 83 Tex. 218, 227, 18 S. W. 578.

The authority conferred by the court (appointing him) on the receiver of

the railroad of appellant is not shown by the record in the case. And in the absence of such showing, it will be presumed that he was empowered to manage and operate the road, which necessarily devolved upon him the duties and responsibilities of a common carrier for hire, and cast upon him, in his official capacity, in operating said road, the same duties and obligations that were on the company before his appointment. *Beach on Receivers*, §§ 359, 724. But it can not be assumed that his authority, duty, or liability could be extended beyond the road so as to authorize him to make contracts for carriage of freight over other roads of which he had no control, and thus make the property placed in his hands for preservation liable for the failure of other companies to perform his contracts. *International, etc., R. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 11, 27 S. W. 680, affirmed in 87 Tex. 311. See the title **RECEIVERS**.

#### **6. Shipowners and Charterers, Navigation Companies, etc.**

See the title **SHIPS AND SHIP-  
PING**.

In *Houston, etc., Nav. Co. v. Insurance Co.*, 89 Tex. 1, 9, 32 S. W. 889, reversing 31 S. W. 560, 685, it was held, that the proper construction of the language used in the charter of the navigation company is simply to express as matter of law that it is to be regarded as a common carrier, and as such subject to whatever law may be applicable to a common carrier in the business in which it may be engaged. The effect of this statutory declaration is to relieve persons who may have claims against it of the necessity of establishing its character as a common carrier, and to make it liable as such for all losses sustained or injuries inflicted in the transaction of its business. The validity of such a provision in the charter, if found to be in conflict with the laws of the

United States, was not determined but it was held that the language used does not have the effect to make the corporation created by the charter subject to state control when engaged in interstate commerce, but that, being a common carrier, and so declared by its charter to be, its liability as such is to be determined under the law which may be applicable to the character of commerce in which it may be engaged at the time. See, also, the title **INTERSTATE COMMERCE**.

#### **7. Sleeping Car Companies.**

Sleeping car companies are common carriers, although they do not assume the duties and liabilities which the common law imposes upon common carriers as to ordinary freight. *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120, 122, 5 S. W. 814; *Pullman Palace Car Co. v. Matthews*, 74 Tex. 654, 656, 12 S. W. 744. See the title **CARRIERS OF PASSENGERS**.

#### **8. Street Railways.**

"Street railways are common carriers of passengers, with duties and responsibilities similar to those of a railroad company." *San Antonio St. R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752, affirmed in 93 Tex. 719, no op.; *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 82, 15 S. W. 264. See the title **STREET RAILROADS**.

**Street car companies** are carriers. See *El Paso Elec. R. Co. v. Harry*, 37 Tex. Civ. App. 90, 83 S. W. 735.

#### **9. Transfer Companies.**

A transfer company is a common carrier. *Texas, etc., R. Co. v. Capper*, 38 Tex. Civ. App. 61, 84 S. W. 694.

#### **10. Wagoners.**

See the title **CARRIERS OF  
GOODS**.

### **C. CONTRACT SEEKING TO LAY DOWN CHARACTER AS CAR- RIER.**

A railway company can not, by contract, lay down its public character as a carrier of passengers and goods, which the law, as well as the nature

of the employment in which it engages, fixes upon it, and become a mere private carrier. The constitution of this state, the general laws and charters of such corporations, make their employment that of common or public carriers of passengers and goods. Const., art. 10, § 2; R. S., ch. 10. This employment they voluntarily assume, and, in recognition of the public nature of their business, the law bestows upon them many privileges and benefits which it does not confer on private persons or strictly private corporations, which often operate as a burden on individuals and communities, and could not be lawfully conferred on the mere private carrier. *G., C. & F. R. Co. v. McGown*, 65 Tex. 640, 645.

## II. Classification of Carriers.

### A. WITH RESPECT TO DUTIES AND LIABILITIES.

#### 1. Common Carriers.

See ante, "Definition and Distinctive Characteristics," I, A. See the title CARRIERS OF GOODS.

#### 2. Private Carriers.

See the title CARRIERS OF GOODS.

### B. WITH RESPECT TO SUBJECT OF CARRIAGE.

#### 1. Carriers of Passengers.

See the title CARRIERS OF PASSENGERS.

#### 2. Carriers of Goods.

See the title CARRIERS OF GOODS.

#### 3. Carriers of Live Stock.

See the title CARRIERS OF LIVE STOCK.

### C. INITIAL AND CONNECTING CARRIERS.

See the title CONNECTING CARRIERS.

## III. Combination and Consolidation of Carriers.

See the titles CORPORATIONS;

## MONOPOLIES AND CORPORATE TRUSTS; RAILROADS.

Where a contract included not only the withdrawal of an opposition line of stages, but bound each party to run his end of the line, the effect of the contract was to make both lines run in connection with each other, and defendant in an action for breach of the contract could prove the failure of the plaintiff to run his line in such manner as to secure travel. *Compton v. Western Stage Co.*, 25 Tex. Supp. 67.

The terms of the contract were, "that they would run in connection their respective routes between Austin and Waco and Waco and Dallas." As to passengers, the effect of the contract was to make the whole distance between Austin and Dallas one line. They might pay at one end of it their passage through to the other; so of any part of the line. It was, therefore, necessarily contemplated in the contract, and as the very essence thereof, that each party should not only run his part of the line, but also run it in such way as to reasonably accommodate the passengers throughout the whole contracted line, at whatever end or part of each line they might start. *Compton v. Western Stage Co.*, 25 Tex. Supp. 67, 68.

Withdrawing the opposition line of the plaintiff was not all the considerations moving the defendants to make the contract. He must perform his part in keeping up his end of the line. *Compton v. Western Stage Co.*, 25 Tex. Supp. 67, 68.

## IV. Right of Carrier to Make Rules Regulating Business.

A railway company, has, unquestionably, the right to make reasonable regulations for conducting its business; and parties dealing with it must conform to such regulations. *Houston, etc., R. Co. v. Moore*, 49 Tex. 31, 47.

Railroads can make reasonable rules regulating its business, but they can

not be made and enforced if violative of the law, without liability to a person injured by their enforcement. *Eddy v. Rider*, 79 Tex. 59, 15 S. W. 113.

Where railroad regulations are unnecessary and put shippers to delay and expense, the carrier may be liable. *Donovan v. T. & P. R.*, 64 Tex. 519, 520.

Art. 4484, Sayles' Civ. Stats., gives to railway corporations "the right to regulate the time and manner in which passengers and property shall be transported," but it has never been thought that such regulations would be enforced by the courts except where they were reasonable, and whether or not they are in any case reasonable is a question to be determined according to all the circumstances of such case. *Texas, etc., R. Co. v. Currie*, 33 Tex. Civ. App. 277, 76 S. W. 810, affirmed in 97 Tex. 648, no op.

Railroad companies may make reasonable regulations of their own for the management and running of their trains, or they may follow general customs in such management and running; which, when established, known, and acted on by the public, may impose upon the companies duties in reference to others, a breach of which, to their injury, might render such companies liable to damages. The facts involved in such regulations and customs, upon which duties would arise, not being matters known to the court, would have to be proved as other facts, where a breach of such duties might become the subject matter of a suit for damages. *Texas, etc., R. Co. v. Murphy*, 46 Tex. 356, 370.

That a regulation of a railway company, that freight and passengers will be carried on its road in separate trains, is a reasonable regulation, can hardly be doubted by any one. *Houston, etc., R. Co. v. Moore*, 49 Tex. 31, 47.

It is the duty of agents of a railway

company to enforce the regulations of the company, but not to give reasons why such regulations were made; and if, in giving such reasons, they use actionable language, they and not the company will be liable. *Donovan v. T. & P. Ry. Co.*, 64 Tex. 519.

It is no ground for damages against the company that a drayman was discharged by his employer, because an agent of the company informed the employer that the drayman would not be allowed to violate proper regulations of the company. *Donovan v. T. & P. R. Co.*, 64 Tex. 519. For particular rules, see the titles CARRIERS OF GOODS; CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS.

**Exclusion of "Runners" from Carriers' Vehicles and Premises.**—See the title CARRIERS OF PASSENGERS.

"The well-established right of carriers to make reasonable regulations for the conduct of passengers and others transacting business upon their premises is accompanied by the right to exclude from their premises persons having no business with the carrier, and whose presence would be detrimental to his interests, or the safety and convenience of passengers. This rule follows naturally from the strict accountability to which the carrier is held for the safety of passengers and goods intrusted to his charge." *Texas, etc., R. Co. v. Pearl*, 3 App. Civ. Cases, § 4.

**Regulation Requiring Business to Be Transacted Over Counter and Goods Received on Platform.**—See the title CARRIERS OF GOODS.

## V. Regulation and Control of Carriers.

### A. REGULATION BY STATE.

#### 1. Regulation by Legislature.

##### a. Under Constitution of 1876.

##### (1) In General.

The Constitution of 1876, in regard

to the transportation of freight by railroad companies, left in force the common law rules affecting common carriers and applicable to such companies until the act of 1879, which was passed in obedience to art. 10, § 2, of the constitution. *Houston & T. C. Ry. Co. v. Rust & Dinkins*, 58 Tex. 98.

### (2) Power to Correct Abuses.

Article 10, § 2, of the constitution confers power upon the legislature to pass laws for the correction of all abuses of railroad franchises and business transacted in pursuance thereof. *Railroad Commission v. Houston, etc., Ry.*, 90 Tex. 340, 351, 38 S. W. 750. See *Houston, etc., R. Co. v. Harry & Bros.*, 63 Tex. 256, 259.

Under § 2, art. 10, state constitution, empowering the legislature to pass laws to correct abuses and prevent discrimination in rates on railroads, it rests with the legislature to determine what constitute abuses and to fix penalties for their punishment. *Houston, etc., R. Co. v. Harry & Bros.*, 63 Tex. 256, 259, Bk. III Tex. Notes, 515.

The word "abuses" as used in this amendment means "any improper use of a right or a privilege; as, abuse of a franchise." The language "the Legislature shall pass laws to correct abuses" is competent to express a command to the legislative department to pass laws for the correction of all abuses or improper uses of the franchises which had been granted or might be granted to railroads in this state, as well as all abuses connected with or growing out of business transacted in the exercise of such franchise. *Railroad Commission v. Houston, etc., R. Co.*, 90 Tex. 340, 351, 38 S. W. 750.

The intention embodied in the section of the constitution is fairly expressed by the following analysis of its provisions: The legislature shall pass laws to regulate railroad freight and passenger tariffs on the different railroads in this state, etc. The legis-

lature shall pass laws to correct abuses on the different railroads in the state, etc. The legislature shall pass laws to prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, etc. *Railroad Commission v. Houston, etc., R. Co.*, 90 Tex. 340, 351, 38 S. W. 750.

**Not Restricted to Such as Are Connected with Freight and Passenger Tariffs.**—Under Const., art. 10, § 2, giving the legislature power "to regulate railroad freight and passenger tariffs, correct abuses, and prevent unjust discrimination and extortion" in rates, the power to correct abuses is not restricted to such as are connected with freight and passenger tariffs. *Railroad Commission of Texas v. Houston & T. C. R. Co.* (Tex. Sup.), 38 S. W. 750, 90 Tex. 340.

**Mode of Correcting.**—It was left to the legislature's discretion to decide whether the abuse to be corrected should be declared a crime and punished as such, or whether a civil injury, and be corrected by a civil action given by statute to the person whose rights had been violated, and allowing him to recover a fixed sum as a penalty, or as exemplary damages, far in excess of the actual damages suffered. *Houston, etc., R. Co. v. Harry & Bros.*, 63 Tex. 256.

### b. Charter Provisions.

See post, "Interstate Shipments," V, A, 1, c; "Charter Provisions," V, A, 1, d, (3), (a).

A provision in a charter of a corporation created by the state that it shall be subject in the transportation of freight to the laws applicable to common carriers means the laws of the state governing common carriers. *Houston Direct Navigation Co. v. Insurance Co. of North America* (Civ. App.), 31 S. W. 560, 685.

**As to Rates.**—See post, "Operation and Effect," V, A, 1, d, (3).



### c. Interstate Shipments.

Interstate shipments are not subject to regulation by the laws of the state. *Gulf, etc., R. Co. v. Crossman Bros.*, 11 Tex. Civ. App. 622, 33 S. W. 290; *Texas, etc., R. Co. v. Clark*, 4 Tex. Civ. App. 611, 614, 23 S. W. 698. See the title INTERSTATE COMMERCE.

A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable, according to the law of the state, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if, by negligence in transportation, he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe safe-guards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, the state has the power to redress, and to punish. *Armstrong v. Galveston, etc., R. Co.*, 92 Tex. 117, 120, 46 S. W. 33, reversing 43 S. W. 614.

**Charter Provision.**—A provision in the charter of a corporation chartered by a state, that in the transportation of freight it shall be subject to the laws applicable to common carriers, does not render the corporation, when engaged in interstate commerce, subject to state control. *Houston, etc., Nav. Co. v. Insurance Co.*, 89 Tex. 1, 10, 32 S. W. 889, reversing 31 S. W. 560.

### d. Regulation of Rates.

#### (1) In General.

In the absence of some constitutional restraint, the legislature has power to prescribe reasonable maximum railroad rates. *Houston, etc., R. Co. v. Harry & Bros.*, 63 Tex. 256, 259.

The constitution confers upon the legislature the right to fix railroad maximum rates, and relief from such rates must be obtained from the legislature, and not from the courts. *State v. Farmers' Loan & Trust Co.*, 81 Tex. 530, 17 S. W. 60.

#### (2) Interstate Shipments.

A state can make no law regulating the rate of freight for the carriage of goods between that state and another state, although the regulation be construed as applying to so much of the line of transit as lies within its borders. *Gulf, etc., R. Co. v. Dwyer*, 73 Tex. 572, 10 S. W. 1001; *Texas, etc., R. Co. v. Clark*, 4 Tex. Civ. App. 611, 614, 23 S. W. 698. See the title INTERSTATE COMMERCE.

#### (3) Operation and Effect.

##### (a) Charter Provisions.

A charge for freight from Shreveport, La., to the Texas line, in excess of the limits of the charter of the Southern Pacific Railroad Company, is not a violation of such charter, nor does an action arise from such overcharge. *Knight & Co. v. Southern Pac. R. Co.*, 41 Tex. 406.

The rate for freight to which the Southern Pacific Railroad Company is limited by its charter has no reference to any road except that which the company is authorized to build and operate in Texas. *Knight v. Southern Pac. R. Co.*, 41 Tex. 406. See ante, "Charter Provisions," V, A, 1, b.

**International and Great Northern Railway Company.**—Since the incorporation of International and Great Northern Railway Company, under laws subjecting it to legislative control as to rates, there has been no legislation withdrawing such control. *State v. Farmers' Loan, etc., Co.*, 81 Tex. 530, 550, 17 S. W. 60.

##### (b) Standard of Charge.

Where carrier is allowed by law to charge fifty cents per hundred or twenty-five cents per foot, it can not

charge according to both standards on the same article. *Central R. Co. v. Hearne*, 32 Tex. 546, 562.

**(c) Anti-Pass Act.**

Act March 26, 1907 (Laws 1907, p. 93, c. 42), prohibiting carriers from carrying persons or property free of charge or giving free passes or having property transported free, does not apply to a contract made prior to its passage, whereby an express company, in consideration of certain sums paid, was entitled to free transportation for its employees and property for a term of years. (Civ. App.) *Texas & N. O. R. Co. v. Wells-Fargo Express Co.*, 108 S. W. 172, judgment affirmed (Sup.), 110 S. W. 38; (Civ. App.), *Gulf, Colo. & S. F. Ry. Co. v. Wells-Fargo Express Co.*, 108 S. W. 174, judgment affirmed (Sup.), 110 S. W. 41.

The contract is not impaired by the act; the act being prospective in its operation, and the mutual services to be performed by the contracting parties being valuable considerations for their respective obligations, and the term "free of charge" and similar expressions used in the contract meaning that no specific additional charge should be made for such services. *Texas, etc., R. Co. v. Wells-Fargo Exp. Co.*, 101 Tex. 564, 110 S. W. 38. See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**.

Such transportation was not done "free of charge" within the meaning of said act nor was it the giving or granting of a free pass, frank, privilege substitute for pay or a subterfuge used or given to be used instead of the regular fare or right of transportation; nor was it a selling of "transportation for anything except money or for any greater or less rate than is charged to all persons under the same conditions;" nor does it fall within any other inhibition of the statute. The transportation though done after the passage of the act was on good consideration and in the execution of a

contract which was valid when made. *Texas, etc., R. Co. v. Wells-Fargo Exp. Co.*, 101 Tex. 564, 110 S. W. 38.

By "free pass" and "frank" is meant the authority for free service. *Texas, etc., R. Co. v. Wells-Fargo Exp. Co.*, 101 Tex. 564, 110 S. W. 38.

**(4) Judicial Review.**

The courts have established the rule that the reasonableness and justice of rates fixed by the legislature, or by a commission empowered by it so to do, are ordinarily questions committed to the discretion of those bodies, and not subject to revision by the courts, but in such cases the law did not authorize any revision of such action by the judicial department. It has been generally held, especially by the supreme court of the United States, that the action of the legislature of a state or of a commission created by it in fixing rates of transportation, would be revised and would be set aside and annulled, when it violates the constitutional right of the carrier to that degree that it amounts to a taking of property without proper compensation or without due process of law. But in doing so the courts have not revised the exercise of discretionary power on the part of the legislature or the commission, but it is an interference on the part of the judiciary to protect parties against a violation of the constitution of the United States, or of the state, whether it be in making or enforcing the law. It has not been held that every rate, rule or regulation which does not violate the constitution is reasonable but that extreme degree of unreasonableness which confiscates property gives jurisdiction to the court. If our statute has not changed the law, the same test must be applied in this case. *Railroad Commission v. Houston, etc., R. Co.*, 90 Tex. 340, 353, 38 S. W. 750.

Power to fix maximum railroad rates being conferred upon the legislature, relief from such rates should come from that department of the

government and can not be afforded by courts. *State v. Farmers' Loan, etc., Co.*, 81 Tex. 530, 550, 17 S. W. 60.

Courts can not afford equitable or other relief to the state upon the sole ground that the railroad may thereby be placed in such a position that it may, without injury to itself or its creditors, serve the public at a lower rate than it could if such relief were not given, when under positive legislation no legal obligation would rest on the corporation to make the burden on the public less than the law expressly authorizes. *State v. Farmers' Loan, etc., Co.*, 81 Tex. 530, 550, 17 S. W. 60.

**c. Detention of Freight.**

See post, "Penalty for Refusal to Deliver Freight," VII, H.

**f. Regulations Respecting Operation of Trains.**

By our general laws, relating to railroads, certain duties are imposed upon companies running passenger and freight trains upon their roads, such as posting up signs where common roads cross the track, badges worn by certain officers, giving notice of time of running cars, receiving and transporting passengers and freight, when presented a reasonable time previous to starting from the stations, ringing a bell or blowing a whistle in passing roads and streets, providing brakes and careful brakemen, stopping at the stations five minutes, the breach of which duties so prescribed, may be declared, as matter of law, to be wrongful or negligent, when the acts constituting the breach of duty may affect any one injuriously. *Texas, etc., R. Co. v. Murphy*, 46 Tex. 356, 370.

**Requiring Brakeman on Hindmost Car.**—Article 4517, Rev. Stat., requiring railway companies to have a sufficient brake and keep a faithful brakeman upon the hindmost car of all trains transporting passengers and merchandise, applies only to trains which carry both, and not to those

which are merely passenger trains. *State v. International, etc., R. Co.*, 29 Tex. Civ. App. 149, 68 S. W. 534, affirmed in 95 Tex. 686, no op., following *Ft. Worth, etc., R. Co. v. Shetter* (Civ. App.), 58 S. W. 179; *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2; *Schloss v. Atchison, etc., R. Co.*, 83 Tex. 601, 604, 22 S. W. 1014.

**g. Regulation of Time of Stoppage.**

See the title CARRIERS OF PASSENGERS.

**h. Termini, Stations, Depots, Ticket Offices, Stockpens, etc., Intersecting Lines.**

See the title RAILROADS.

**Stockpens.**—See the title CARRIERS OF LIVE STOCK.

**2. Railroad Commissions.**

**a. Statutory Provisions.**

See post, "Correction of Abuses and Prevention of Discrimination," V, A, 2, c, (1), (b).

**b. Power to Make Rules and Regulations.**

**(1) Prevention of Abuses and Discrimination.**

See post, "Prevention of Abuses and Discrimination," V, A, 2, b, (1).

**(2) Interstate Shipments.**

An interstate shipment is not subject to the regulation of the railroad commission of Texas. *Gulf, etc., R. Co. v. State*, 97 Tex. 274, 285, 78 S. W. 495, affirming 73 S. W. 429; *Gulf, etc., R. Co. v. State*, 32 Tex. Civ. App. 1, 5, 73 S. W. 429, affirmed in 97 Tex. 274; *Houston, etc., Nav. Co. v. Insurance Co.*, 89 Tex. 1, 32 S. W. 889; *Fielder v. Missouri, etc., R. Co.*, 92 Tex. 176, 46 S. W. 633, affirming 42 S. W. 362; *State v. Gulf, etc., R. Co.* (Civ. App.), 44 S. W. 542, affirmed in 93 Tex. 696, no op. See the title INTERSTATE COMMERCE.

**Rates.**—See post, "Power in General," V, A, 2, c, (1), (a).

**(3) Control of Courts.**

See post, "Contesting Reasonableness," V, A, 2, b, (4), (b).

**(4) Reasonableness as an Essential.****(a) Test of Reasonableness.**

✓ In actions instituted under articles 4565 and 4566, Rev. Stat., to determine whether regulations adopted by the railroad commission are unreasonable and unjust, the test of reasonableness is not in a consideration of the question whether such regulation amounts to a taking of property without proper compensation, such test being only applicable in determining the constitutionality of the law. The reasonableness and justice of the regulation is to be determined by the same rules as if it were an issue in other classes of suits, except as to the conclusive character of the evidence required. *Railroad Commission v. Houston, etc., R. Co.*, 90 Tex. 340, 341, 38 S. W. 750.

The terms "unreasonable" and "unjust" are not to be restricted to mean that the regulation complained of is a taking of property without proper compensation, or without due process of law. *Railroad Commission of Texas v. Houston & T. C. R. Co.*, 38 S. W. 750, 90 Tex. 240.

The test to be applied to every such decision is, that it shall not be unreasonable or unjust to such railroad company or other person complaining. The great number of subjects to which this action may apply, and the fact that it may embrace all or any one of them, and may be instituted by any person interested, for any cause which will show it to be unreasonable, manifests an intention on the part of the legislature to establish a much more liberal rule than previously existed upon this subject. The decision made in establishing rates, classifications, rule, charge, orders or other regulation, might frequently be unreasonable and unjust, and yet might not amount to the taking of property without proper compensation, or without due process of law. *Railroad Commission v. Houston, etc., R. Co.*, 90 Tex. 340, 354, 38 S. W. 750.

A railroad company will not be relieved from the operation of the rules of the railroad commission because to observe them will be at increased expense and inconvenience to the company, without an equal corresponding benefit to the public, where it does not appear that an observance of the rules will occasion an unreasonable disproportion between the benefits to the public and the expense and inconvenience to such company. *Railroad Commission of Texas v. Houston & T. C. R. Co.*, 40 S. W. 526, 1052, 16 Tex. Civ. App. 129.

**(b) Contesting Reasonableness.**

**Jurisdiction and Issues.**—The discretion conferred by the legislature upon the railroad commission, if in any way subject to the control of the courts, should not be interfered with unless manifestly abused, to the substantial injury of the party complaining. *International, etc., R. Co. v. Railroad Commission (Civ. App.)*, 86 S. W. 16, affirmed in 99 Tex. 332, 89 S. W. 961. ✓

In an action brought under articles 4565, 4566, Rev. Stat., for determining the reasonableness and justice of a rate or regulation established by the railroad commission, the only issue is, are the rates, etc., put in issue by the pleading, as applied to the character of shipments alleged, unjust and unreasonable? The jurisdiction of the court is limited to the determination of that issue. *Railroad Commission v. Weld*, 95 Tex. 278, 66 S. W. 1095, reversing 66 S. W. 122. L

**Petition.**—A petition attacking the railroad commission's regulation as "unreasonable" need not allege that the operation of the rule works confiscation of the property. *Railroad Commission v. Houston, etc., R. Co.*, 90 Tex. 340, 354, 38 S. W. 750.

**Burden of Proof—Jurisdiction to Determine Unreasonableness.**—Under Rev. St. arts. 4565, 4566, providing that, if any railroad company is dis-

satisfied with any rule or regulation adopted by the railroad commission, it may file a petition in court, stating its objections, on the trial of which the burden shall be on the plaintiff to show that the rule or regulation is unjust and unreasonable, the court in which such petition is filed has jurisdiction to determine whether the regulation is unreasonable and unjust. *Railroad Commission of Texas v. Houston & T. C. R. Co.*, 38 S. W. 750, 90 Tex. 340.

#### **Weight and Sufficiency of Evidence.**

—The burden thrown upon the complainant by the law of proving the regulations unjust and unreasonable, is not met by showing that better rules could have been made, or that the rules do not work as advantageously as if no rules had been adopted. *Railroad Commission v. Houston, etc., R. Co.*, 16 Tex. Civ. App. 129, 40 S. W. 526, 1052, affirmed in 93 Tex. 694, no op.

**Questions of Law and Fact.**—The facts by which the reasonableness of regulations adopted by the railroad commission are to be determined are to be ascertained by the jury or court trying the case. *Railroad Commission v. Houston, etc., R. Co.*, 16 Tex. Civ. App. 129, 40 S. W. 526, 1052, affirmed in 93 Tex. 694, no op.

Whether the rules and regulations of the railroad commission are reasonable or not, as applied to a particular railroad company, is a question of law for the court. *Railroad Commission of Texas v. Houston & T. C. R. Co.*, 40 S. W. 526, 1052, 16 Tex. Civ. App. 129.

**Final Judgment—Appeal.**—In an action brought under articles 4565, 4566, for determining the reasonableness and justice of a rate or regulation established by the railroad commission, the decree of the court settling the issue, "are the rates, etc., put in issue by the pleading, as applied to the character of shipments alleged, unjust and unreasonable," as a final judgment from which appeal will lie. *Railroad Com-*

*mission v. Weld*, 95 Tex. 278, 66 S. W. 1095, reversing 66 S. W. 122.

**Findings of Court—Appeal and Error.**—In *Railroad Commission v. Houston, etc., R. Co.*, 16 Tex. Civ. App. 129, 40 S. W. 526, 1052, affirmed in 93 Tex. 694, no op., a conclusion of the trial court that no public interest would be subserved by the enforcement of such regulations was not a proper deduction.

The appellant court is not bound by the deduction drawn from the facts by the trial court that such regulations are unreasonable, but will determine the effect to be given them, and, if its conclusion differs from that of the court below, will reverse and render. *Railroad Commission v. Houston, etc., R. Co.*, 16 Tex. Civ. App. 129, 40 S. W. 526, 1052, affirmed in 93 Tex. 694, no op.

A finding that as much cotton can be transported on a car when uncompressed as when compressed, supported by evidence apparently mere opinion, and opposed to physical laws, rules of common experience, and general knowledge possessed by men of ordinary intelligence when applied to the undisputed facts, held, not binding on the appellate court. *Railroad Commission v. Houston, etc., R. Co.*, 16 Tex. Civ. App. 129, 40 S. W. 526, 1052, affirmed in 93 Tex. 694, no op.

#### **c. Particular Regulations Considered.**

##### **(1) Regulation of Rates.**

##### **(a) Power in General.**

The railroad commission law deprived railroad companies of the power to make rates and conferred that authority upon the commission. The commission was organized as arbiter between carriers and shippers and for that purpose is invested with large but not absolute powers. *Railroad Commission v. Weld*, 96 Tex. 294, 405, 73 S. W. 529, reversing 68 S. W. 1117.

In fixing freight rates, the Railroad Commission may consult public in-

terest so as to give support to weak enterprises and not to exclude from market, things which would not bear transportation if the charges were based upon absolute equality and may take into question the probability that a carload rate for shipping cotton would create a monopoly because of the advantages enjoyed by certain persons controlling an improved method of bailing cotton. *Railroad Commission of Texas v. Weld & Neville*, 96 Tex. 394, 73 S. W. 529.

And this, being a legislative function committed to it, can not be controlled by the courts. *Railroad Commission v. Weld*, 96 Tex. 394, 73 S. W. 529, reversing 68 S. W. 1117.

Discrimination in rates is often necessary to uphold justice and to promote the public good, and such discrimination is not unjust to him who gets in service the equivalent of what he pays. *Railroad Commission v. Weld*, 96 Tex. 394, 408, 73 S. W. 529, reversing 68 S. W. 1117.

The performance of the duties of the railroad commission in making rates requires that classification be made so as to secure equality as near as may be in the carriage of similar articles, and each shipper is entitled to have his property carried for a reasonable compensation for the service rendered to him. In making the classification and rates of charges, the railroad companies must also be protected in their right to have a fair return from their business; but in determining this question the railroad commission must have in view the entire business operations of the railroads. A marked difference between the right of the shipper and the carrier in determining the reasonableness of rates consists in this—when considered from the shipper's standpoint, it must be reasonable as to the particular property carried; that is, the charge must not be more than a fair compensation for the services rendered to the shipper in the carriage

of the particular property; when, however, the commission considers the reasonableness of rates from the standpoint of the railroads, it is not confined to the particular article, but must look to the whole business of the railroads, which are required to carry many articles at a loss, as a single transaction, which must be made up by levying higher rates upon such articles as can bear it within the limit of reasonable compensation. The rate and classification must be so arranged as to give a result of just and reasonable compensation on the entire business of the railroad company, but the rate on each article need not be reasonable if considered alone; but the aggregate must, however, produce a reasonable return. *Railroad Commission v. Weld*, 96 Tex. 394, 408, 73 S. W. 529, reversing 68 S. W. 1117.

**Power Dependent upon Whether Shipment Interstate or Intrastate.**—See ante, "Interstate Shipments," V, A, 2, b, (2).

A firm of grain dealers in Kansas City contracted with a merchant in Goldthwaite, Texas, to deliver a carload of corn at that place at a named price, having already agreed to purchase the corn to fill this sale from another dealer who had shipped it to his order from South Dakota, via Kansas City, where it was sacked and reloaded, to Texarkana, Texas; receiving the car at the latter place they had it rebilled to their order at Goldthwaite, in the same car and without breaking bulk, over connecting lines of road wholly in Texas, and delivered to their customer. Held, that the shipment from Texarkana to Goldthwaite was not interstate commerce; but was subject to the regulations of the railroad commission of Texas, and the company became liable for charging more than the rate prescribed for such shipment from Texarkana to Goldthwaite by the state regulations. *Gulf, etc., R. Co. v. State*, 97 Tex. 274, 78

S. W. 495, affirming 32 Tex. Civ. App. 1, 73 S. W. 429.

**(b) Correction of Abuses and Prevention of Discrimination.**

Acts 1891, p. 57, c. 51, § 3 (Rev. St. 1895, art. 4562), providing that the railroad commission shall have power to correct abuses and prevent unjust discrimination in rates, is not unconstitutional. *International, etc., R. Co. v. Railroad Commission*, 99 Tex. 332, 89 S. W. 961, affirming 86 S. W. 16. See the title STATUTES.

The act of 1891, p. 57, c. 51, § 3 (Rev. Stats. 1895, art. 4562), providing that the railroad commission shall have power to correct abuses and prevent unjust discrimination in rates, applies only to the correction of abuses and unjust discrimination in rates, and not to abuses in general. *International, etc., R. Co. v. Railroad Commission*, 99 Tex. 332, 89 S. W. 961, affirming 86 S. W. 16, overruling *Railroad Commission v. Houston, etc., R. Co.*, 90 Tex. 340, 38 S. W. 750.

If the failure of the railroad companies to make a connection at the crossing in question be an abuse, the act which establishes the railroad commission did not give that body the power to correct it. If they have that power, it must be sought elsewhere. *International, etc., R. Co. v. Railroad Commission*, 99 Tex. 332, 89 S. W. 961, 962, affirming 86 S. W. 16.

Railroad commission has no power to enact a law defining "abuse" on the part of a railroad company. *Railroad Commission v. Houston, etc., R. Co.*, 90 Tex. 340, 352, 38 S. W. 750.

**(c) Authorizing Advances.**

An official circular published by the railroad commission of Mexico authorizing defendant railroad company to advance its rates 15 per cent., with a proviso that, if the exchange should in any manner be established at a rate of 220 per cent. or less, previous advice of the Secretary of Communications and Public Works would sus-

pend the advance so authorized until the exchange dropped to a lower rate than such limit, was sufficient authority to authorize defendant to advance its freight rates 15 per cent., although the rate of exchange was less than 220, until the advanced rates should be suspended by the Secretary of Communications. *Ulmer v. National R. Co. of Mexico (Civ. App.)*, 84 S. W. 838.

**(d) Operation and Effect.**

The railroad commission law depriving railroad companies of the power to make rates and conferring that authority upon the commission, necessarily took from shippers any right of redress against carriers in case the rates were unreasonable, because they are compelled by law to carry at the rate fixed by the commission, and can not be held responsible for excess in charges thus forced upon them. *Railroad Commission v. Weld*, 96 Tex. 394, 405, 73 S. W. 529, reversing 68 S. W. 1117.

**(e) Contesting Reasonableness of Rates.**

**aa. Jurisdiction.**

**In Absence of Statute.**—In the absence of statute, courts have no power to revise rates made by the railroad commission, but in the exercise of their equity powers they may enjoin such rates as confiscatory and violative of the federal and state Constitutions. *Judgment (Sup. 1908)*, 113 S. W. 741, reversed on rehearing. *Gulf, C. & S. F. R. Co. v. Railroad Commission of Texas*, 102 Tex. 338, 116 S. W. 795.

**Under Statutes of Texas.**—To secure the rights of both carrier and shipper against errors or intentional wrongs which might be committed by the railroad commission in fixing rates, articles 4564-65-66 were adopted, which give the railroads a right of action against the commission to set aside such rates as might be prescribed for their government in case they

should be unremunerative, giving to the shippers an action against the commission to secure a reduction of such rates in case they be unreasonably high. *Railroad Commission v. Weld*, 96 Tex. 394, 405, 73 S. W. 529, reversing 68 S. W. 1117.

Rev. St. 1895, arts. 4565, 4566, authorizing a railroad company or other person interested, dissatisfied with any rate adopted by the railroad commission, to file a petition setting forth the objection, and providing that in actions to contest the reasonableness of rates the burden is on plaintiff to show by satisfactory evidence their unreasonableness, confer on the courts power to examine into the reasonableness of rates fixed by the railroad commission, and a citizen, as well as a railroad company, instituting an action, must show by clear and conclusive proof that the rates complained of are unreasonable. Judgment (Sup. 1908), 113 S. W. 741, reversed on rehearing. *Gulf, C. & S. F. R. Co. v. Railroad Commission of Texas*, 102 Tex. 338, 116 S. W. 795.

Sayles' Ann. Civ. St. art. 4565, and Batts' Ann. Civ. St. art. 4565, providing that any railroad company, or other party in interest, dissatisfied with the decision of any rate adopted by the commission, may file a petition, setting forth the particular cause of objection to such decision, in a court of competent jurisdiction in Travis county, Tex., against the commission as defendant, only authorizes the trial of a judicial controversy between the litigants, and does not confer on the court an advisory power to pass on the rules and regulations of the commission. (Civ. App.) *Railroad Commission of Texas v. Weld*, 66 S. W. 122, judgment reversed. 66 S. W. 1095, 95 Tex. 278.

Under Rev. St. 1895, arts. 4565, 4566, authorizing an action against the railroad commission by a party dissatisfied with a rate made by it, in which

such party must show that the rate is unreasonable and unjust to him, the inquiry is not limited to whether the rate is so unreasonable and unjust as to amount to the taking of property without due process of law. Judgment, *Railroad Commission of Texas v. Weld* (Civ. App. 1902) 68 S. W. 1117, reversed. *Railroad Commission of Texas v. Weld & Neville*, 73 S. W. 529, 96 Tex. 394.

It is not necessary, in order to show the unreasonableness or injustice of the rate attacked, to prove that it is confiscatory or that the operation of the road under the rates prescribed will not produce a reasonable and just compensation for services rendered by the company to shippers and a reasonable return upon the investment made and the money expended in carrying on the business. *Gulf, etc., R. Co. v. Railroad Commission*, 102 Tex. 338, 352, 116 S. W. 795; *Railroad Commission v. Houston, etc., R. Co.*, 90 Tex. 340, 352, 38 S. W. 750; *Railroad Commission v. Weld*, 96 Tex. 394, 403, 73 S. W. 529, reversing 68 S. W. 1117.

The issue is whether or not, under all the facts and circumstances, the rate is unreasonable and unjust. *Railroad Commission v. Houston, etc., R. Co.*, 90 Tex. 340, 38 S. W. 750; *Gulf, etc., R. Co. v. Railroad Commission*, 102 Tex. 338, 358, 116 S. W. 795; *Railroad Commission v. Weld*, 96 Tex. 394, 404, 73 S. W. 529, reversing 68 S. W. 1117; *Railroad Commission v. Weld*, 95 Tex. 278, 66 S. W. 1095, reversing 66 S. W. 122.

A railroad company, under §§ 4565, 4566, has the right to attack any rate, or it may attack any number or all of the rates prescribed for it by the railroad commission as being unreasonable and unjust. The railroad company is not required to attack all of the rates prescribed. *Gulf, etc., R. Co. v. Railroad Commission*, 102 Tex. 338, 352, 116 S. W. 795.

**Articles 4565-66 do not confer legis-**



lative power upon the courts, but by subjecting the rates to be made by the commission to examination, their reasonableness becomes a judicial question and there is no conflict between those articles and the provision of the constitution which provides that "no person or collection of persons being of one of these departments shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." The making of rates by the commission is the exercise of legislative authority which the court can not exercise, but whether the law under which it acts has been complied with is a question for the courts. *Railroad Commission v. Weld*, 96 Tex. 394, 403, 73 S. W. 529, reversing 68 S. W. 1117.

**Meaning of "Unreasonable and Unjust."**—At common law in a proceeding of this kind the terms "unreasonable and unjust" meant that the rate charged was more than a fair compensation for the services rendered, or that the difference in rates constituted an unjust discrimination against the complainant. *Railroad Commissions v. Weld*, 96 Tex. 394, 405, 73 S. W. 529, reversing 68 S. W. 1117.

**bb. Rules of Procedure or Mode of Determining Question.**

In the case of *Railroad Commission v. Houston, etc., R. Co.*, 90 Tex. 340, 38 S. W. 750, the court said respecting the jurisdiction conferred by articles 4565, 4566, Rev. Stat.: "The conferring of that jurisdiction upon the courts of itself imposed the duties to try the case by the ordinary rules of procedure, unless otherwise provided." Upon re-examination of that question the court adhered to the conclusions announced in that case, and held that the legislature intended to confer upon the courts power to determine the question of the reasonableness of rates as they affect the rights of shippers and the railroads by the same rules that would be applied in deter-

mining a like question between other parties. *Railroad Commission v. Weld*, 96 Tex. 394, 403, 73 S. W. 529, reversing 68 S. W. 1117; *Gulf, etc., R. Co. v. Railroad Commission*, 102 Tex. 338, 353, 116 S. W. 795.

"In actions of this character the courts will determine the question of the reasonableness and justice of any matter by the same rules as if it were an issue in other classes of suits, except as to the conclusive character of the evidence." *Railroad Commission v. Houston, etc., R. Co.*, 90 Tex. 340, 355, 38 S. W. 750; *Railroad Commission v. Weld*, 96 Tex. 394, 404, 73 S. W. 529, reversing 68 S. W. 1117; *Gulf, etc., R. Co. v. Railroad Commission*, 102 Tex. 338, 353, 116 S. W. 795.

Courts are limited in their review of the work of the commission by the terms of the statute and can not go into an investigation of the methods by which the commission arrived at its conclusions. *Railroad Commission v. Weld*, 96 Tex. 394, 409, 73 S. W. 529, reversing 68 S. W. 1117.

**cc. Pleading and Issues.**

**(aa) Petition.**

While the railroad company had the right to call in question the one rate, it was required to show by clear and satisfactory evidence that the rate so attacked was "unjust and unreasonable." It follows that the petition must contain allegations of such facts and circumstances as would, if true, authorize the court to adjudge the rate to be unjust and unreasonable as a matter of law. *Gulf, etc., R. Co. v. Railroad Commission*, 102 Tex. 338, 352, 116 S. W. 795.

The petition in this case alleges that hauling lumber over that portion of its road designated in the petition, at the rate specified by the commission, will not yield a sufficient revenue to pay the cost of transportation. There is nothing in the petition to show what were the earnings of the railroad in hauling lumber over the remainder of

its said railroad. It does not show the amount of lumber traffic carried over that road from points beyond the stations designated from which the objectionable tariffs are prescribed. It may be and doubtless is a fact that trains which start from points beyond the specified stations take up and carry as a part thereof cars loaded with lumber destined to Beaumont or Port Arthur, thus the operation of that train may yield a sufficient profit to make the rates reasonable, whereas, taken separately, the rate from any one of the points, if carried by separate trains, would not be reasonable. It may be true that such freight, though not remunerative, considered alone, would, when thus carried, contribute to the cost of such train to a degree that would be reasonable compensation, therefore the rates can not be held, upon the facts stated, unreasonable and unjust as a matter of law. *Gulf, etc., R. Co. v. Railroad Commission*, 102 Tex. 338, 352, 116 S. W. 795.

**(bb) Issues.**

See ante, "Jurisdiction," V, A, 2, c, (1), (e), aa.

**dd. Demurrer.**

Where the petition attacking the reasonableness of a rate fixed by the Railroad Commission is demurred to, the court, in determining whether the unreasonableness of the rate is established by clear and satisfactory evidence, must consider the allegations of the petition as facts proved by clear and satisfactory evidence. Judgment (Sup. 1908) 113 S. W. 741, reversed on rehearing. *Gulf, C. & S. F. R. Co. v. Railroad Commission of Texas*, 102 Tex. 338, 116 S. W. 795.

**ee. Evidence.**

**(aa) Burden and Degree of Proof.**

Under Rev. Stat., 1895, arts. 4565, 4566, providing for a contest of the reasonableness of rates fixed by the railroad commission, a citizen as well as a railroad company, instituting an

action, must show by clear and conclusive proof that the rates complained of are unreasonable. Judgment (1908) 113 S. W. 741, reversed on rehearing. *Gulf, etc., R. Co. v. Railroad Commission*, 102 Tex. 338, 116 S. W. 795.

Article 4566 places the citizen in such an action as this upon the same footing as it does the railroad corporations and requires of such citizen who may be a shipper upon the railroad to make just as clear and conclusive proof of the unreasonableness or injustice of the rates as is required of a railroad company. *Gulf, etc., R. Co. v. Railroad Commission*, 102 Tex. 338, 353, 116 S. W. 795.

**(bb) Weight and Sufficiency.**

The railroad company can not select one rate and a particular part of its road for the application of that rate, showing thereby the deficiency in profit, and from that establish that the rate is not unreasonable. A railroad company can not select an unimportant article and attack the rate prescribed for that as being unreasonable because it would not pay for the transportation of such article alone. Public carriers must of necessity carry many things which of themselves would not compensate them for the carriage. *Gulf, etc., R. Co. v. Railroad Commission*, 102 Tex. 338, 352, 354, 116 S. W. 795.

Where a railroad company attacking the reasonableness of the rate on lumber as fixed by the Railroad Commission showed that the revenue derived from hauling lumber at such rate was not sufficient to pay the cost of transportation, the rate was unreasonable, though a railroad company cannot select an unimportant article and attack the rate prescribed for that as unreasonable because it does not pay for the transportation thereof. Judgment (Sup. 1908) 113 S. W. 741, reversed on rehearing. *Gulf, C. & S. F. R. Co. v. Railroad Commission of Texas*, 102 Tex. 338, 116 S. W. 795.

Rates established by the railroad commission are not shown to be unreasonable and unjust to a complainant, where the same rate per hundred pounds is allowed to him as to his competitors, by proof that cotton shipped by him, by the use of appliances which he controlled, was compressed to a greater density, allowing more to be shipped to the car, was not subject to injury by fire or water, and hence could be safely shipped on flat cars, and could be carried more cheaply and yield the carrier a greater profit per hundred, unless a rate by carload, instead of by weight merely, was allowed by the commission. *Railroad Commission v. Weld*, 96 Tex. 394, 73 S. W. 529, reversing 68 S. W. 1117.

Plaintiff in an action against the railroad commission does not, as required by Rev. St. 1895, art. 4566, show that the freight rate on cotton made by it is unreasonable and unjust to him because there is no car rate, and because it is the same amount per 100 pounds whether pressed to a density of 40 pounds to the cubic foot, as shipped by him, or to a density of only 22½ pounds, as shipped by others. Judgment, *Railroad Commission of Texas v. Weld* (Civ. App. 1902) 68 S. W. 1117, reversed. *Railroad Commission of Texas v. Weld & Neville*, 73 S. W. 529, 96 Tex. 394.

There is no rule of the common law nor provision of the statute which requires the carrier or the commission to make rates based upon carload lots, nor is there any precedent or principle by which the reasonableness of a rate (as it affects individual shippers) made by carriers or by the commission can be determined by a comparison of the profits derived from the shipment of different classes of freight. *Railroad Commission v. Weld*, 96 Tex. 394, 407, 73 S. W. 529, reversing 68 S. W. 1117.

In *Railroad Commission v. Houston*, etc., R. Co., 16 Tex. Civ. App. 129, 40

S. W. 526, 1052, affirmed in 93 Tex. 694, no op., the testimony in that case was held not to show that as much cotton could be carried upon flat cars uncompressed as compressed, but the contrary.

**(f) Presumption and Judicial Notice.**

The courts will not take judicial cognizance of the acts of the state railroad commission, and there is no presumption that it has established freight rates over any particular road. *Thompson v. San Antonio, etc., R. Co.*, 11 Tex. Civ. App. 145, 32 S. W. 427.

**(2) Transportation and Compressing Cotton.**

The railroad commission had jurisdiction and authority under the constitution, to make and enforce the regulations of the compressing of cotton shipped over railways embraced in Com. Tar. No. 1A, promulgated June 21, 1895, and amendment thereto of Oct. 7, 1895, if not found unreasonable or unjust. (Quære, whether it possessed such power independent of the authority given in the amendment to art. 10, § 2, of constitution.) *Railroad Commission v. Houston, etc., R. Co.*, 90 Tex. 340, 38 S. W. 750.

Under Rev. St. art. 4574, declaring it to be an unjust discrimination for any railroad to give undue or unreasonable preference or advantage to any particular person or locality, or subject any particular description of traffic to any undue or unreasonable prejudice, delay, or disadvantage; and article 4562, empowering the railroad commission to correct abuses,—it is competent for such commission to prescribe regulations governing the shipment of cotton and the compressing of cotton in transit. *Railroad Commission of Texas v. Houston & T. C. R. Co.*, 38 S. W. 750, 90 Tex. 340.

In *Railroad Commission v. Houston*, etc., R. Co., 90 Tex. 340, 38 S. W. 750, the rules of the commission under

consideration regulated the compressing of cotton and provided for the tariffs to be charged for its transportation. The power there exercised falls within that provision of § 3 of the act, which makes it the duty of the commission "to adopt all necessary rates to govern and regulate railroad freight and passenger tariffs." *International, etc., R. Co. v. Railroad Commission*, 99 Tex. 332, 89 S. W. 961, affirming 86 S. W. 16.

The rules of the railroad commission, which, in effect, require railway companies transporting cotton, on request of the shipper, to have it compressed at the initial point, or at the nearest compress thereto on the line of route, are not unreasonable, as applied to the Houston & Texas Central Railroad Company. *Railroad Commission of Texas v. Houston & T. C. R. Co.* (Tex. Civ. App.) 40 S. W. 526, 1052, 16 Tex. Civ. App. 129, affirmed in 93 Tex. 694, no op.

The railroad commission having authority to regulate the subject of compressing cotton in transit, the exercise of its discretion therein could not be set aside or pronounced unreasonable because a court found that the points selected and rules adopted for compressing were not the best nor such as the court would have selected. *Railroad Commission v. Houston, etc., R. Co.*, 16 Tex. Civ. App. 129, 40 S. W. 526, 1052, affirmed in 93 Tex. 694, no op.

Such rules will not be set aside because the points selected for compressing it are not the best, under the circumstances, and the rules are not the wisest that could be made. *Railroad Commission of Texas v. Houston & T. C. R. Co.*, 40 S. W. 526, 1052, 16 Tex. Civ. App. 129.

One shipping cotton by bill of lading containing notation, "To be compressed in transit," is not entitled to deduction from freight rate fixed by the railroad commission, though it is

not compressed; there being no compress at shipping point or intermediate station; the rules of the commission providing that a shipper desiring his cotton delivered compressed, when there is no compress at shipping point, shall insert in bill of lading, "To be compressed in transit," and it shall be the carrier's duty to comply with instruction if there is a compress at an intermediate station. *Galveston, H. & S. A. Ry. Co. v. Orthwein-Fitzhugh Cotton Co.*, 69 S. W. 490, 27 Tex. Civ. App. 623.

**Where a shipper of cotton had special contract with compress company** for compressing it, he can not recover damages against the carrier, by whom it was shipped independently or joined with the compress company in an action for damages, for improperly compressing it. *Sass v. Houston, etc., R. Co.*, 17 Tex. Civ. App. 603, 605, 606, 43 S. W. 270.

Where a shipper of cotton had a special agreement with a compress company located between the place of shipment and point of destination, in regard to its compression, providing for inspection by a certain person at the point of destination, the railroad company which transported it was not liable for improper compression, though the shipper stamped on the bill of lading that the cotton was to be compressed in transit, and, in the absence of such contract, the railroad company might have been liable under the rules of the railroad commission, providing that when the bill of lading is so stamped the railroad company must comply with such instructions, if there is an accessible compress. *Sass v. Houston & T. C. R. Co.*, 43 S. W. 270, 17 Tex. Civ. App. 603.

**Interstate Shipments.**—The order of the railroad commission, June 21, 1895, regulating the compressing of cotton shipped by rail, was not intended to apply to interstate shipments, and is

not invalid as being an attempt to regulate such commerce. *Railroad Commission v. Houston, etc., R. Co.*, 16 Tex. Civ. App. 129, 40 S. W. 526, 1052, affirmed in 93 Tex. 694, no op.

Owners of cotton, destined by them for shipment to foreign ports, applied to a railway for foreign bills of lading over its road and defendant's connecting line to Galveston, with directions to compress it at Palestine, where it reached such connecting line and where they were operating a compress. This being refused they took bills of lading to Galveston, with directions to transport "flat," that is, without compressing, and at Palestine exchanged these for foreign bills of lading by defendant, and had the cotton compressed there in disregard of the rules of the railroad commission as to compressing cotton in transit. Held, that the shipment was a foreign one, despite the form of the original bill of lading, and not subject to state regulations as to compressing. *State v. International, etc., R. Co.*, 31 Tex. Civ. App. 219, 71 S. W. 994, affirmed in 97 Tex. 647, no op.

In an action against a railroad company, brought by direction of the railroad commission, for failure to stop a shipment of cotton at the first compress, it appeared that the president of the first compress on the line of shipment telephoned the railroad company that the shipper had stated to him that the cotton which was billed to a foreign port was going to be changed, and asked that his compress get it; and it appeared that some time previous the president of such compress, in going over some bills, had observed a lot of cotton on which the marks had been changed, and yet the defendant had paid for compressing the cotton. Held, that the evidence was insufficient to show that the railroad company was aware that the shipper did not intend to ship the cotton abroad. *State v. San Antonio & A.*

*P. Ry. Co.*, 73 S. W. 572, 32 Tex. Civ. App. 58.

**Contesting Reasonableness.**—Where a railroad company sued the railroad commission to set aside in their entirety, as unreasonable, certain regulations adopted by the commission relative to the shipping of cotton, it was not entitled to partial relief on a showing that, while the rules were unreasonable as to shipments on flat cars, they were not unreasonable as to shipments in box cars. *Railroad Commission of Texas v. Houston & T. C. R. Co.*, 40 S. W. 526, 1052, 16 Tex. Civ. App. 129.

Though evidence should show as much cotton could be carried on flat car when uncompressed as if compressed, held, this would not warrant setting aside the railroad commission regulation requiring the compressing of cotton, fifteen or twenty per cent thereof being carried in box-cars, whose capacity is increased by compressing. *Railroad Commission v. Houston, etc., R. Co.*, 16 Tex. Civ. App. 129, 146, 40 S. W. 526, 1052, affirmed in 93 Tex. 694, no op.

### (3) Regulations as to Running of Trains.

The railroad commission is bound to enforce the regular running of trains. *Railroad Commission v. Chicago, etc., R. Co.*, 102 Tex. 393, 117 S. W. 794.

### (4) Location of Station.

See the title RAILROADS.

### (5) Requiring Railroads Crossing Each Other to Put in Intersecting Tracks.

See the title RAILROADS.

### (6) Requiring Construction of Switch.

See the title RAILROADS.

## 3. Venue of Suits against Carrier.

The act of March 13, 1905 (General Laws, page 29), concerning the venue of suits against common carriers in this state, held constitutional. *St. Louis, etc., R. Co. v. Cassidy South-*

western, etc., Co., 48 Tex. Civ. App. 484, 107 S. W. 628, affirmed, no op.; Texas Cent. R. Co. v. Marrs, 100 Tex. 530, 101 S. W. 1177; St. Louis, etc., R. Co. v. Moon, 47 Tex. Civ. App. 209, 103 S. W. 1176; St. Louis, etc., R. Co. v. Boshear (Civ. App.), 108 S. W. 1032; St. Louis, etc., R. Co. v. Wester (Civ. App.), 96 S. W. 769. See the titles CONSTITUTIONAL LAW; FOREIGN CORPORATIONS; INTERSTATE COMMERCE; VENUE.

## **B. REGULATION BY UNITED STATES.**

See the title INTERSTATE COMMERCE.

## **VI. Discrimination in Charges or Facilities.**

### **A. POWER OF RAILROAD COMPANY TO DISCRIMINATE.**

Railway companies derive their charter rights from the state and owe an equal duty to every citizen, and they can not exercise their charter rights in such manner as to benefit an individual, town or community, to the detriment of another. *H. & T. C. Ry. Co. v. Smith*, 63 Tex. 322.

A railway company independent of Act 1879, prohibiting unjust discrimination in rates for transportation, etc., is held to the strictest impartiality in the conduct of its business in withholding all privileges or preferences from one customer which are not extended to all others, but this rule is subject to the qualification, that where a freight rate is reasonable for all customers, contracts for a less rate may be made in special cases when the discrimination is reasonable and just, but the discrimination must not subject others to unreasonable disadvantages, nor must it be made to give one individual preference to the disadvantage of another, or to give preference and advantage to one locality to the prejudice of another locality, and a mere

discrimination in favor of a customer is not unlawful unless it amounts to an unjust discrimination. *Houston & T. C. Ry. Co. v. Rust Dinkins*, 58 Tex. 98.

A railroad company as a common carrier is required to treat the public with equality and fairness. *Houston, etc., Ry. Co. v. Rust*, 58 Tex. 98, 108.

Whether discrimination is lawful or not is determined by applying facts to the law. *Houston, etc., R. Co. v. Rust*, 58 Tex. 98, 110.

Charge making liability of carrier depend solely on question of inequality of freight rates charged to plaintiff as compared to rates charged others, irrespective of other facts in case is erroneous. *Houston, etc., R. Co. v. Rust*, 58 Tex. 98, 110, 111.

**In Rates.**—Prior to the enactment of the commission law, railroad companies were authorized by statute to make their rates of freight and their rules and regulations, but were limited in their charges to a reasonable sum not to exceed fifty cents per hundred pounds per hundred miles; the charges to be uniform on each class of freight and unjust discrimination was forbidden. The fact that the carrier charged one person a greater sum than was charged to another for "transportation in this state of any freight of the same kind and class in equal or greater quantities for the same or less distance" was made prima facie evidence of unjust discrimination, but the carrier was permitted to rebut this presumption by showing that it was not unjust discrimination. Art. 4258, Sayles' Old Edition of Rev. Stats. It will be observed that the violation of the law did not consist alone in the discrimination in charges, but depended upon the justness of such discrimination. That statute declared in a negative form what the common law affirmed of the same subject; that is, at common law a carrier was permitted to discriminate in freight rates, pro-

vided the circumstances were not such as to make it unjust and unreasonable. Under the statute discrimination in rates is prohibited unless it appears not to be unjust and unreasonable. At common law the party complaining was required to show that the discrimination was unjust and unreasonable, while by statute the burden of proof was upon the carrier to establish that it was reasonable and just. *Railroad Commission v. Weld*, 96 Tex. 394, 404, 73 S. W. 529, reversing 68 S. W. 1117. See post, "Penalty and Damages for Unjust Discrimination, and Extortion or Overcharge," VII, G.

## **B. WHAT CONSTITUTES UNJUST DISCRIMINATION AND EXTORTION.**

### **1. In General.**

See post, "Penalty and Damages for Unjust Discrimination, and Extortion or Overcharge," VII, G.

### **2. Charging More for Short than Long Haul.**

Rev. Stat., § 4257, prohibiting railroad companies from charging more for a short than a long haul is not confined to cases where the freight is being transported between the same points. *Texas & Pacific Ry. Co. v. Kuteman*, 79 Tex. 465, 14 S. W. 693.

### **3. Preference to Shipper in Order of Forwarding Goods.**

See post, "Penalty for Preference in Order of Forwarding," VII, E. See the title CARRIERS OF GOODS.

Revised Statutes of 1895, article 4537, requires a railroad to forward property received on a platform used by it for handling that kind of property in the order in which it is received. *Hill v. St. Louis, etc., R. Co.* (Civ. App.), 75 S. W. 874, reversed in 97 Tex. 506.

### **4. Charging Less than Maximum Rate.**

The statute does not prohibit a carrier from charging less than the maximum rates fixed by the commission, where no discrimination appears. *Wells, Fargo Exp. Co. v. Williams*

(Civ. App.), 71 S. W. 314; *Thompson v. San Antonio, etc., R. Co.*, 11 Tex. Civ. App. 145, 147, 32 S. W. 427. See, also, the title CARRIERS OF GOODS.

## **VII. Penalties and Forfeitures Imposed by Statutory Regulations.**

### **A. PENALTIES GENERALLY.**

**Liability.**—Statutes which impose penalties upon carrier for neglect of duty are to be strictly construed; and those who seek to recover such penalties must bring their cases clearly within the terms of the statute. *Austin, etc., R. Co. v. Slator*, 7 Tex. Civ. App. 344, 346, 26 S. W. 233; *Schloss v. Atchison, etc., R. Co.*, 85 Tex. 601, 22 S. W. 1014; *Bonner v. Franklin Co-Op. Ass'n*, 4 Tex. Civ. App. 166, 23 S. W. 317.

In providing that such penalty may be recovered of the carrier, it is not intended that it should apply to a case where the act done was not and could not be the act of the carrier. *Texas, etc., R. Co. v. Barnhart*, 5 Tex. Civ. App. 601, 604, 23 S. W. 801, 24 S. W. 331.

A railway company is not liable for a statutory penalty for an act done while such road was in the hands of the receiver. *Texas, etc., R. Co. v. Barnhart*, 5 Tex. Civ. App. 601, 23 S. W. 801, 24 S. W. 331, citing *Hays v. Houston, etc., R. Co.*, 46 Tex. 272.

The rule that a carrier who receives goods from another and pays the charges which have then accrued can only be reimbursed for the just and reasonable charges which were due for the carriage has no application in a suit for a penalty. *G. C. & S. F. Ry. Co. v. Dwyer*, 84 Tex. 194, 19 S. W. 470.

Certainly that rule can not place burden of proof on defendant in suit for penalty for overcharging. *Gulf, etc., R. Co. v. Dwyer*, 84 Tex. 194, 200, 19 S. W. 470.

**Recovery—Burden of Proof.**—There is authority for holding, that when a statutory penalty, for neglect of duty by a carrier is sought to be recovered in a civil action, the plaintiff must show facts which justify a recovery beyond a reasonable doubt. *Gulf, etc., R. Co. v. Dwyer*, 84 Tex. 194, 195, 19 S. W. 470; *Texas, etc., R. Co. v. Barnhart*, 5 Tex. Civ. App. 601, 603, 23 S. W. 801, 24 S. W. 331.

**B. PENALTY AND DAMAGES FOR FAILURE TO FURNISH FACILITIES FOR TRANSPORTATION.**

**1. Statutory Provisions Generally.**

**a. Constitutionality, Nature and Purpose.**

Sayles' Civ. St. arts. 4227a, 4227b, par. 2, imposing a penalty on railroad companies for failure to furnish facilities for the transportation of freight, were enacted for the purpose of prescribing rules by compliance with which the shipper should have the right to recover a penalty, and not for the purpose of determining who should have power to make contracts for the furnishing of such facilities. *McCarty v. G. C. & S. F. Ry. Co.*, 79 Tex. 33, 15 S. W. 164.

Sections 4497-4502 are independent statutes not amendatory of nor affecting the construction of the Revised Statutes in force when it was enacted. *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 558, 45 S. W. 2, reversing 40 S. W. 431. See post, "Points at Which Carrier Has No Agent," VII, B, 2, e. (2).

**Not a Deprivation of Property without Due Process of Law.**—See post, "Effect of Strikes or Other Public Calamities," VII, B, 2, i.

**b. Application to Interstate and Intrastate Commerce.**

Articles 4497 to 4500, Sayles' Rev. Stat., providing for penalties against a railroad company for failure to furnish cars upon application in writing

therefor by a shipper, are void as to interstate commerce. *Houston, etc., R. Co. v. Mayes*, 44 Tex. Civ. App. 621, 622, 99 S. W. 1166, reversing *Houston, etc., R. Co. v. Mayes*, 36 Tex. Civ. App. 606, 83 S. W. 53, affirmed in 98 Tex. 620, no op.; and overruling *Houston, etc., R. Co. v. Everett* (Civ. App.), 86 S. W. 17, reversed on another point in 99 Tex. 269. See, to the same effect, *Texas, etc., R. Co. v. Allen*, 42 Tex. Civ. App. 331, 98 S. W. 450, affirmed in 100 Tex. 525, 101 S. W. 792.

Rev. Stat., 1895, arts. 4497-4502, as amended by acts 1899, p. 67, c. 48, imposing a penalty and damages on common carriers for failure to provide cars for the shipment of stock within a certain number of days after demand, while invalid in so far as it related to interstate commerce, was nevertheless valid as a regulation of intrastate commerce. *Allen v. Texas, etc., R. Co.*, 100 Tex. 525, 101 S. W. 792. See the title INTERSTATE COMMERCE.

**c. Strict Construction.**

Rev. St. 1895, arts. 4497-4502, imposing a penalty for failure of a railroad company to furnish freight cars to an applicant therefor, will be strictly construed. Judgment (Civ. App. 1897) 40 S. W. 431, reversed. *Houston, E. & W. T. Ry. Co. v. Campbell*, 45 S. W. 2, 91 Tex. 551, 43 L. R. A. 225; *Houston, etc., R. Co. v. Buchanan*, 42 Tex. Civ. App. 620, 94 S. W. 199; *Texas, etc., R. Co. v. Loving* (Civ. App.), 98 S. W. 451, 452, affirmed in 101 Tex. 663, no op.; *Texas, etc., R. Co. v. Barrow*, 33 Tex. Civ. App. 611, 613, 77 S. W. 643, affirmed in 101 Tex. 663, no op. See, also, *Schloss v. Atchinson, etc., R. Co.*, 85 Tex. 601, 22 S. W. 1014; *Texas, etc., R. Co. v. Hughes*, 99 Tex. 533, 91 S. W. 567.

Sayles' Ann. Civ. St. 1897, arts. 4497-4502, as amended by Laws 1899, p. 67, c. 48, imposing a penalty for failure



of a railroad company to furnish cars on application, being penal both as to the railroad company and as to the shipper, must be strictly construed. *Texas, etc., R. Co. v. Blocker*, 48 Tex. Civ. App. 100, 106 S. W. 718.

The statute imposes a heavy penalty, and it is an elementary rule, that such statutes must be strictly construed. This does not imply that the courts are authorized to refuse to give effect to the intention of the legislature, but it proceeds upon the theory that it is not reasonable to presume it is their intention to impose a punishment, except in so far as that purpose is clearly manifested by the language employed in the statute. *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 557, 45 S. W. 2, reversing 40 S. W. 431.

This statute being highly penal, it results as a corollary from the above rule that the penalty provided for should not be awarded at the suit of either the railroad company or the shipper, unless the complainant brings himself clearly within its terms and spirit. *Texas, etc., R. Co. v. Blocker*, 48 Tex. Civ. App. 100, 106 S. W. 718, citing *Texas, etc., R. Co. v. Hughes*, 99 Tex. 533, 91 S. W. 567; and *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 557, 45 S. W. 2, reversing 40 S. W. 431. See, to the same effect, *Texas, etc., R. Co. v. Loving* (Civ. App.), 98 S. W. 451, affirmed in 101 Tex. 663, no op.; *Texas, etc., R. Co. v. Barrow*, 33 Tex. Civ. App. 611, 613, 77 S. W. 643, affirmed in 101 Tex. 663, no op.; *Texas, etc., R. Co. v. Hughes*, 99 Tex. 533, 91 S. W. 567, 568. See, also, *Schloss v. Atchinson, etc., R. Co.*, 85 Tex. 601, 22 S. W. 1014.

Shipper desiring to recover penalty for carrier's failure to furnish cars, must comply strictly with law. *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 38, 15 S. W. 164.

The entire statute should be looked to, and its provisions so construed as to make it effective alike in favor of

and against each of the parties affected by it. That portion of it prescribing the duties of the railroad company should be given such meaning, under the rules controlling in its construction, as will effect the purpose designed (that is, the furnishing to the shipper of proper facilities for the transportation of his property); and that portion of it prescribing the duties of the shipper should be given such meaning, under the same rules of construction, as will effect the purpose designed (that is, the protection of the railroad company against his improvident or improper demand for cars, or his failure to make use of same when furnished to him); and further than may be necessary to accomplish these purposes the penalties denounced should not be held to apply. *Texas, etc., R. Co. v. Blocker*, 48 Tex. Civ. App. 100, 106 S. W. 718.

The statute imposing a penalty on a railroad company for failure to furnish cars on demand, being penal in character, must be strictly construed, and will not by implication be held to impose the duty to furnish cars beyond its own line. *Houston & T. C. R. Co. v. Buchanan*, 42 Tex. Civ. App. 620, 94 S. W. 199. See post, "Purposes for Which Cars to Be Used," VII, B, 2, g.

#### d. Repeal.

Article 279 is repealed by implication, so far as concerns railroad companies, by Sayles' Civ. St. art. 4227, providing that, in case of the refusal of any such corporation to transport any property or to deliver the same at the regular time, such corporation shall pay all damages, and article 4227a, § 3, that, if cars are not furnished when applied for, the railroad company shall forfeit \$25 per day for each car. *San Antonio & N. P. Ry. Co. v. Bailey*, 4 Willson, Civ. Cas. Ct. App. § 68, 15 S. W. 203.

Rev. Stats., art. 279 prescribing a

penalty against common carriers of not less than \$5.00 nor more than \$500 for refusing to transport goods, does not apply to a case of the carrier's refusal to furnish a shipper a car on which to load freight for transportation for which the only penalty prescribed is that specified by Sayles' Civ. St., Art. 4227, 4227a, § 3, imposing a penalty of \$3.00 a day for each car not furnished. *S. A. & A. P. Ry. Co. v. Bailey*, 4 Willson, § 68, 15 S. W. 203.

## 2. Liability for Penalty.

### a. In General.

See ante, "Repeal," VII, B, 1, d.

The statute enforces the duty to furnish cars by prescribing penalties besides giving an action for damages caused by nonperformance. *Allen v. Texas, etc., R. Co.*, 100 Tex. 525, 101 S. W. 792, 794, affirming 42 Tex. Civ. App. 331.

Penalties and damages are recoverable under the statute when it has been complied with by the shipper, whenever the carrier fails to furnish the cars as demanded, unless the carrier can show that its failure was due to no omission of duty on its part; but when it sets up facts showing that it is entitled to a hearing which shall be full and effectual, the statute is not intended to deny this right; it merely imposes a duty which ordinarily can be performed, as is rendered sufficiently apparent by records of cases coming before the appellate courts in which no carrier has yet shown that compliance with it was, without fault on its part, rendered impracticable. *Allen v. Texas, etc., R. Co.*, 100 Tex. 525, 101 S. W. 792, 795, affirming 42 Tex. Civ. App. 331.

### b. Necessity for and Application of Provisions of Contract for Cars.

In the absence of a contract, the duty of the railroad is to furnish the shipper cars for the transportation of his freight upon his making a timely

demand therefor. Rev. Stats., arts. 4494, 4496. *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 560, 45 S. W. 2, reversing 40 S. W. 431.

The statutory cause of action against a carrier for failure to furnish cars for the shipment of freight does not arise on the written shipping contract, and provisions in such contract that an action thereon must be brought within 40 days, has no application to a cause of action for failure to furnish cars called for by the contract. *McCarty v. G. C. & S. F. Ry. Co.*, 79 Tex. 33, 15 S. W. 164.

### c. Application, Notice or Demand for Cars.

#### (1) To Whom Made.

##### (a) In General.

The contract must be made by the superintendent or "person in charge of transportation" at the point of shipment. *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 35, 15 S. W. 164.

As a prerequisite to a recovery of the penalty prescribed by the statute, the shipper must make application in writing to the superintendent or person in charge of transportation. *Austin, etc., R. Co. v. Slator*, 7 Tex. Civ. App. 344, 346, 26 S. W. 233.

##### (b) Local Agent.

The local agent of a railroad at a station at which a shipper desires to have cars furnished him has authority to receive applications therefor. (Civ. App. 1906) *Texas & P. Ry. Co. v. Allen*, 42 Tex. Civ. App. 331, 98 S. W. 450, judgment reversed *Allen v. Texas & P. Ry. Co.*, 100 Tex. 525, 101 S. W. 792. See, also, *Austin, etc., R. Co. v. Slator*, 7 Tex. Civ. App. 344, 347, 25 S. W. 233; *Easton v. Dudley*, 78 Tex. 236, 239, 14 S. W. 583; *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 558, 45 S. W. 2, reversing 40 S. W. 431.

A railroad's local agent, in charge of its transportation at that point, is the "person in charge of transporta-

tion," to whom, as alternative to the superintendent, application for stock cars may be made, under Sayles' Civ. St. art. 4227a, § 1, before bringing action against the company for the penalty for refusing to furnish such cars prescribed in Sayles' Civ. St. art. 4227b, §§ 1, 2. *Austin & N. W. R. Co. v. Slator*, 7 Tex. Civ. App. 344, 26 S. W. 233.

A railroad company is liable for failure to provide cars for cattle shipment where application was made to a local agent in charge of transportation. *Austin, etc., R. Co. v. Slator*, 7 Tex. Civ. App. 344, 346, 26 S. W. 233.

## **(2) Requisites of Application.**

### **(a) In General.**

The requisites of an application for cars as prescribed by Rev. Stat., art. 4498, are: "Said application for cars shall state the number of cars desired, the place at which they are desired and the time they are desired; provided, that the place designated shall be at some station or switch on the railroad." *Texas, etc., R. Co. v. Hughes*, 99 Tex. 533, 91 S. W. 567.

An application in writing signed by the applicant, dated April 9, 1903, and addressed to the agent of a railroad company, stating that, for the purpose of making a shipment of cattle from a certain point on the line of the company in Texas to a given point outside of the state, the applicant desired 17 cars at the point named in Texas on April 20, 1903, and that the applicant therewith tendered one-fourth of the amount of the freight charges for the use of the cars, is sufficient. (1904) *Houston & T. C. R. Co. v. Mayes*, 83 S. W. 53, 36 Tex. Civ. App. 606, reversing (1906) 26 S. Ct. 491, 201 U. S. 321, 50 L. Ed. 772.

### **(b) Writing.**

Where the shipper made written demand for stable ears, but afterwards orally agreed with the railroad agent

to accept cars of any kind, this did not entitle him to recover the statutory penalty for failure to furnish the cars, the oral agreement not being such a written demand as the statute requires. *Texas, etc., R. Co. v. Barrow*, 33 Tex. Civ. App. 611, 77 S. W. 643, affirmed in 101 Tex. 663, no op.

### **(c) Statement of Time When Cars Desired.**

The law requires the shipper in his application to name the time when he desired the cars. Art. 4498, Sayles' Ann. Civ. St. 1897. *Texas, etc., R. Co. v. Blocker*, 48 Tex. Civ. App. 100, 106 S. W. 718.

And when there is no specification of time in the application, the application is insufficient and the shipper has no cause of action for a failure to furnish the cars demanded. *Texas, etc., R. Co. v. Hughes*, 99 Tex. 533, 91 S. W. 567, 568.

Where in an action to recover a penalty, under the statute, for defendant railroad's failure to furnish cars to plaintiff on demand and for damages arising out of such delay, it appeared that the order requested that the cars be delivered "as soon as possible," plaintiff was not entitled to recover the penalty or to recover damages based only on the failure of defendant to furnish the cars on such order within the time specified by the statute. *Texas & P. Ry. Co. v. Shipman* (Civ. App.), 98 S. W. 449, following *Texas, etc., R. Co. v. Hughes*, 99 Tex. 533, 91 S. W. 567, which held that: "As soon as possible" specifies no time whatever.

### **d. Tender of Charges.**

Article 4227a (Sayles' Civ. Stat., art. 4227a, § 4) requires the shipper, at the time of applying for cars, to deposit with "the agent of the company" one-fourth of the amount of the freight charge for the use of such cars, unless the railroad shall agree to deliver the cars without such de-

posit. *Austin, etc., R. Co. v. Slaton*, 7 Tex. Civ. App. 344, 347, 26 S. W. 233.

The provision of Sayles' Civ. St. art. 4227a, § 4, requiring an applicant for cars from a railroad company for loading, in order to subject the company to liability for the penalty for a failure to furnish them, to deposit with the agent of the company at the time of making the application one-fourth the amount of the freight charges, is to be given a reasonable construction, and, as the application is required to be made to the "superintendent or person in charge of transportation," while the deposit is to be made with an agent, a tender of the amount to a station agent on the morning following the sending of a written application to the superintendent is sufficient. (Civ. App. 1897) *Houston, E. & W. T. Ry. Co. v. Campbell*, 40 S. W. 431, reversed (1898) 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225.

Where the amount of the deposit required to be made with an application for cars was \$14.85, a tender by the applicant of \$15 in bills to the agent, without demanding change, is sufficient, and the refusal of the agent to accept it dispenses with the necessity for the deposit. (Civ. App. 1897) *Houston, E. & W. T. Ry. Co. v. Campbell*, 40 S. W. 431, reversed (1898) 91 Tex. 551, 42 S. W. 2, 43 L. R. A. 225.

#### **c. Places Where Cars to Be Furnished.**

##### **(1) In General.**

The statute makes it the duty of railroad companies to furnish cars at the place of starting and the junctions of other railroads, and at sidings and stopping places established for receiving and discharging way passengers and freight. Rev. Stat. 1895, art. 4498. *Allen v. Texas, etc., R. Co.*, 100 Tex. 525, 101 S. W. 792, 794, affirming 42 Tex. Civ. App. 331; *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 558, 45 S. W. 2, reversing 40 S. W. 431.

##### **(2) Points at Which Carrier Has No Agent.**

Articles 4497-4502, Rev. Stat., providing penalties for failure on part of railroad companies to furnish cars on demand and deposit with the agent of one-fourth of the freight charge, do not apply to shipments from points at, or for, which company has no agent. *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 558, 45 S. W. 2, reversing 40 S. W. 431.

Rev. St. 1895, art. 4499, provides a penalty for the failure of a railroad company to furnish freight cars to one applying therefor; and article 4500 requires such applicant to "deposit with the agent of such company," at the time of making his application, a part of the freight charges. Held, that, if at the point of shipment the company has no agent, the penalty is not recoverable. Judgment (Civ. App. 1897) 40 S. W. 431, reversed. *Houston, E. & W. T. Ry. Co. v. Campbell*, 45 S. W. 2, 91 Tex. 551, 43 L. R. A. 225.

Rev. Stat. 1895, art. 4498, which requires applicants to state where the cars are desired, which must be at "some station or switch," does not make every switch a receiving and discharging station, and a switch at which the company has no agent is not within the statute; and this, although article 4522 enacts that, where a railroad company constructs a switch, it is bound to furnish cars for transportation of freight therefrom. Judgment (Civ. App. 1897), 40 S. W. 431, reversed. *Houston, E. & W. T. Ry. Co. v. Campbell*, 45 S. W. 2, 91 Tex. 551, 43 L. R. A. 225.

The proviso in art. 4498, Rev. Stat., that the place designated shall be at some station or switch on the railroad, was not intended to make every switch a receiving and discharging station. *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2, reversing 40 S. W. 431.

Rev. St. 1895, art. 4522, enacting that, where a railroad company constructs a switch, it is bound to furnish cars for transportation of freight therefrom, and in default thereof shall be subject to the same penalties as in other cases, does not apply to an action under articles 4497-4502, passed subsequent thereto as an independent law, which provide a penalty for failure of a railroad company to furnish freight cars to one applying therefor. Judgment (Civ. App. 1897), 40 S. W. 431, reversed. *Houston, E. & W. T. Ry. Co. v. Campbell*, 45 S. W. 2, 91 Tex. 551, 43 L. R. A. 225.

A switch is a mere side track, so constructed as to permit the passage of cars from and to the main track; and it is a matter of common knowledge that railroads have many switches where freight is neither received nor discharged. So that to give the proviso the construction claimed for it would be to give it an effect contrary to that intended and to empower an applicant to require cars to be furnished at a point not provided for shipping goods, and would make every switch a receiving and discharging station. Clearly the legislature did not intend this. The difficulty in the plaintiff's way is not that the place of shipment was a switch. It is that it was not a switch at or for which there was an agent, and therefore does not come within the terms of the statute. *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 558, 45 S. W. 2, reversing 40 Tex. 431.

**f. Character of Cars to Be Furnished.**

Texas statute fixing penalty on railroad companies for failure to furnish cars when applied for in manner therein prescribed, does not designate the character of cars to be furnished and does not apply where cars of a particular kind are demanded. *Austin, etc., R. Co. v. Slator*, 7 Tex. Civ. App. 344, 346, 26 S. W. 233; *Texas, etc., R. Co. v. Barrow*, 33 Tex. Civ. App. 611, 613,

77 S. W. 643, affirmed in 101 Tex. 663, no op.

The statute requires railroad companies to furnish suitable cars for transportation of sheep, goats, hogs, and calves. *Sayles' Civ. Stats.*, art. 4237b, §§ 1, 2. A shipper has no right to demand that a particular kind of car shall be furnished, and recover the penalty for a failure to furnish such car, unless he shows by averment and proof that no other car would be proper or suitable for the transportation of the freight he desired to ship. *Austin, etc., R. Co. v. Slator*, 7 Tex. Civ. App. 344, 346, 26 S. W. 233.

The only requirement in this respect that can be lawfully imposed by a shipper, is that the cars furnished should be reasonably suited to the purposes intended. *Texas, etc., R. Co. v. Barrow*, 33 Tex. Civ. App. 611, 613, 77 S. W. 643, affirmed in 101 Tex. 663, no op., and citing *Austin, etc., R. Co. v. Slator*, 7 Tex. Civ. App. 344, 26 S. W. 233.

Where the shipper demands cars of a particular kind, such as stable cars, he requires of the carrier a duty not imposed by the statute, for a violation of which he must look for redress to an action for damages upon his contract, and not to one to recover the statutory penalty, unless he shows affirmatively that no other cars would be proper or suitable for such freight as he desired to ship. *Texas, etc., R. Co. v. Barrow*, 33 Tex. Civ. App. 611, 77 S. W. 643, affirmed in 101 Tex. 663, no op.

*Sayles' Civ. St.* 1897, art. 4497 et seq., imposes a penalty on any railroad which fails to furnish cars to a shipper after written application by him, stating the number of cars and the place at which they are desired, etc. Held that, where one applied for stable cars for the shipment of cattle, the railroad was not required to furnish such cars; it not appearing that they were the only suitable and proper

kind of cars for the transportation of cattle. *Texas & P. Ry. Co. v. Barrow*, 77 S. W. 643, 33 Tex. Civ. App. 611.

The parties are at liberty to make any contract they see fit to make respecting the kind of cars to be used in shipping, but they can not make one imposing duties different from those imposed by statute, and then for a breach of it claim the penalty prescribed for a breach of the statutory defined duties. *Texas, etc., R. Co. v. Barrow*, 33 Tex. Civ. App. 611, 614, 77 S. W. 643, affirmed in 101 Tex. 663, no op.

Though a shipper made a binding contract with a railroad for stable cars, its failure to deliver them did not entitle the shipper to recover the statutory penalty. *Texas & P. Ry. Co. v. Barrow*, 77 S. W. 643, 33 Tex. Civ. App. 611.

Where a shipper demanded stable cars for a shipment of cattle, such cars not being the only suitable ones for shipment of cattle, the railroad was not required to furnish other suitable cars. *Texas & P. Ry. Co. v. Barrow*, 77 S. W. 643, 33 Tex. Civ. App. 611.

**g. Purposes for Which Cars to Be Used.**

**(1) Cars to Be Used beyond Termini of Company's Own Line.**

The statute imposing a penalty on a railroad company for failure to furnish cars on demand imposes no duty on Texas carriers to furnish cars beyond the termini of their own lines of railway. *Houston, etc., R. Co. v. Buchanan*, 42 Tex. Civ. App. 620, 94 S. W. 199; *Texas, etc., R. Co. v. Loving* (Civ. App.), 98 S. W. 451, 453, affirmed in 101 Tex. 663, no op.; *Houston, etc., R. Co. v. Everett*, 99 Tex. 269, 89 S. W. 761.

**(2) Cars to Be Used by Connecting Carrier.**

An application by a shipper of cattle to a railroad for cattle cars, which

stated that the shipper desired to bill cattle over defendant's road to a point in the state, and from that point over another road to a point in another state, was insufficient to warrant a recovery against the carrier under Sayles' Rev. St. arts. 4497, 4499, imposing a penalty on carriers for delay in furnishing cars on application. *Texas & P. Ry. Co. v. Loving* (Civ. App.), 98 S. W. 451, affirmed in 101 Tex. 663, no op.

An application for cars, signed by the applicant and addressed to the agent of a railroad company, stated that "for the purpose of making a shipment of cattle from L. to F.," the applicant desired stock cars, and tendered a fourth of the freight charges. L. was a station on the line of the railroad company, but F. was one on the line of a connecting carrier. There was no traffic arrangement between the two roads with reference to the use of cars owned by either. Held, that the demand was a request for cars to be used by a connecting carrier, and the company was not liable for the penalty imposed by the statute for failing to supply the cars. *Houston & T. C. R. Co. v. Buchanan*, 42 Tex. Civ. App. 620, 94 S. W. 199.

**h. Time within Which Cars Must Be Furnished.**

It requires the railroad company, if ten or a less number of cars are applied for, to furnish them in three days from the receipt by it of the application therefor. Article 4497, Sayles' Ann. Civ. St. 1897. *Texas, etc., R. Co. v. Blocker*, 48 Tex. Civ. App. 100, 106 S. W. 718.

Under Sayles' Ann. Civ. St. 1897, arts. 4497, 4498, 4499, providing for a penalty against a carrier for failure to furnish cars on application, and requiring the application to state the time when they are desired, and allowing the carrier three days after receiving the application in which to

furnish the cars, an application for cars requiring them to be furnished the day after the date of the application is not a sufficient compliance with the statute to subject the carrier to the penalty. *Texas & P. Ry. Co. v. Blocker*, 48 Tex. Civ. App. 100, 106 S. W. 718.

**Reasonable Time.**—By Rev. Stat., arts. 4494, 4496, as soon as a reasonable time elapsed after cattle were offered for transportation, it became the duty of a railway company to furnish sufficient accommodations for the transportation of same, and a breach of such duty rendered it liable for all damages sustained thereby. *Davis v. Texas, etc., R. Co.*, 91 Tex. 505, 44 S. W. 822, reversing 42 S. W. 1008. See, also, *Easton v. Dudley*, 78 Tex. 236, 238, 14 S. W. 583.

What is a "reasonable time" is, in the absence of an agreement, a question of fact for the jury and depends upon all the circumstances, such as the place and character of the shipment, the amount of freight being then offered and on hand for transportation at that and other points on the line, etc. *Davis v. Texas, etc., R. Co.*, 91 Tex. 505, 509, 44 S. W. 822, reversing 42 S. W. 1008.

In determining the question of the reasonableness of the time, all the incidents of the service, such as the probable breaking of machinery, etc., are circumstances for the jury. *Davis v. Texas, etc., R. Co.*, 91 Tex. 505, 510, 44 S. W. 822, reversing 42 S. W. 1008.

It was error to charge that the carrier would be excused in law, if it was prevented from furnishing cars, etc., by then having an unusually large number of cattle shipments upon its road. *Davis v. Texas, etc., R. Co.*, 91 Tex. 505, 44 S. W. 822, reversing 42 S. W. 1008.

Rev. St. 1895, art. 4497, provides that, where a written application for cars is made to a railroad company,

not to exceed six days shall constitute a reasonable time in which to furnish them; article 4499 imposes a penalty for failure to furnish cars so ordered within a reasonable time; and article 4500 authorizes the railroad company to require a deposit of one-fourth the amount of freight. In an action against a railroad company for failure to furnish cars within a reasonable time after being ordered it appeared that, though application was not made in the manner required by statute, and the railroad company did not require a deposit, it did accept the order, and no excuse for the delay in furnishing cars was offered except that traffic was unusually heavy. Held that, in view of the statutes, the court was justified in assuming in its instructions that nine days was a reasonable time within which to furnish the cars. *Texas & P. Ry. Co. v. Smith & White*, 79 S. W. 614, 34 Tex. Civ. App. 571.

Evidence which merely showed a congested condition of transportation facilities about the time of plaintiff's order for cars did not show a sufficient excuse for the carrier's failure to furnish the cars within a reasonable time. *Texas, etc., R. Co. v. Smith*, 34 Tex. Civ. App. 571, 79 S. W. 614, affirmed in 98 Tex. 635, no op.

In an action for damages for failure to furnish cars to a shipper within a reasonable time it was not error for the charge to assume that a failure to furnish the cars for nine days after order made for them was negligence, since the statute makes a failure to furnish them for six days ground for the statutory penalty in such case. *Texas, etc., R. Co. v. Smith*, 34 Tex. Civ. App. 571, 79 S. W. 614, affirmed in 98 Tex. 635, no op.

**Facts Relieving from Liability.**—The statute is imperative. Upon compliance therewith as to the form and manner of the application and the tender of freight, the requirement of

the statute is absolute, and by virtue thereof, regardless of the issue of negligence, the railroad company is required to furnish the desired cars. *Texas, etc., R. Co. v. Allen*, 42 Tex. Civ. App. 331, 98 S. W. 450, affirmed in 100 Tex. 525.

**i. Effect of Strikes or Other Public Calamities.**

Rev. Stat. 1895, arts. 4497-4502, impose penalties and damages on carriers for failure to furnish cars at designated points within certain times after demand, and declare that the carrier shall not be bound to comply with the act provided it is prevented from doing so by strikes or other calamities. Held, that the exceptions so provided were not exclusive, and did not prevent the carrier from pleading any legitimate defense in excuse of its failure to comply with the act, and hence the same was not unconstitutional as a deprivation of the carrier's property without due process of law. *Allen v. Texas, etc., R. Co.*, 100 Tex. 525, 101 S. W. 792, affirming 42 Tex. Civ. App. 331.

**j. Tender of Freight Where Cars Refused.**

A railroad company having refused to furnish cars to a shipper as required by articles 4494 and 4496, Rev. Stat., such shipper may recover damages without first preparing and tendering the freight for shipment. *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 560, 45 S. W. 2, reversing 40 S. W. 431, citing *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491.

**k. Time within Which Shipper Required to Load Cars.**

It requires the shipper to fully load the cars furnished within 48 hours after they are furnished. Article 4500, Sayles' Ann. Civ. St. 1897. *Texas, etc., R. Co. v. Blocker*, 48 Tex. Civ. App. 100, 106 S. W. 718.

**l. Refusal to Accept Freight.**

Article 4227a, § 1, Sayles' Rev. Civ. Stat., does not apply to cases where

shipper sues for damages for refusal to accept freight, but only to actions for the penalty on refusal to furnish cars. *Galveston, etc., R. Co. v. Schmidt* (Civ. App.), 25 S. W. 452, 453.

By refusing to furnish cars on request, a railroad company does not incur the penalty imposed by Rev. St. 1879, art. 279, providing that for refusing to transport goods common carriers shall incur a penalty of not less than \$5 nor more than \$500, to be recovered by the owner of the goods. *San Antonio & N. P. Ry. Co. v. Bailey*, 4 Willson, Civ. Cas. Ct. App. § 68, 15 S. W. 203.

**3. Amount of Penalty and Measure of Damages.**

**Recovery of Actual Damages Occasioned by Failure to Furnish Cars Demanded.**—Where plaintiff sued to recover the penalty imposed by Sayles' Ann. Civ. St. 1897, arts. 4498, 4499, for failure of a carrier to furnish freight cars on application, which statute also provides that the shipper could recover actual damages occasioned by such failure, and fails to recover the penalty, he will be precluded from recovering damages. *Texas & P. Ry. Co. v. Blocker*, 106 S. W. 718, 48 Tex. Civ. App. 100.

**Contract to Furnish Cars—Oral Contract.**—Though Act 20th Leg. Sess. imposes a penalty on railroad companies for failure to furnish freight cars after demand therefor in writing, an action will lie for the breach of an oral contract to furnish cars. *Missouri Pac. R. Co. v. Harmonson*, 4 Willson, Civ. Cas. Ct. App. § 91, 16 S. W. 539.

**Tender of Freight.**—Under Rev. St. 1895, art. 4494, requiring railroad companies to furnish accommodation for the transportation of all such property as shall be offered for transportation, etc., after a railroad company had refused to furnish transportation to the shipper, the latter was not



bound to prepare and offer his freight, in order to become entitled to damages for the refusal. Judgment (Civ. App. 189), 40 S. W. 431, reversed. *Houston, E. & W. T. Ry. Co. v. Campbell*, 45 S. W. 2, 91 Tex. 551, 43 L. R. A. 225.

In the case of *Texas & Pacific Ry. Co. v. Nicholson*, 61 Tex. 491, it was held, that a tender of the property was unnecessary, where the proposed shipper had been informed in advance that it was not required and would not be accepted. That was a case of a breach of a contract to ship at a certain time; but the principle is the same. The rule announced is a general one and applies to all offers and tenders. When the defendant knew that the transportation would not be furnished he was not bound, in order to recover for the wrong done him, to prepare and offer the wood. It was his duty to pursue that course best calculated to lessen the damage resulting from the wrong. *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 560, 45 S. W. 2, reversing 40 S. W. 431.

#### **Knowledge of Contract of Sale.**

In an action against a railroad company by a seller, who lost the benefit of the sale by the refusal of the company to furnish cars in which to ship the goods, it is immaterial whether the company had knowledge of the contract of sale. Judgment (Civ. App. 1897), 40 S. W. 431, reversed. *Houston, E. & W. T. Ry. Co. v. Campbell*, 45 S. W. 2, 91 Tex. 551, 43 L. R. A. 225.

In such suit it is not requisite for plaintiff's recovery that defendant appear to have had knowledge of such contract and there is no error in excluding evidence of notice thereof to the carrier. *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 561, 45 S. W. 2, reversing 40 S. W. 431.

**Facts Relieving from Liability.**—The fact that a buyer notified a railroad

company not to carry any more of the seller's property consigned to the buyer does not absolve the company from its duty to the seller to furnish him with cars for transportation of the property sold. Judgment (Civ. App. 1897) 40 S. W. 431, reversed. *Houston, E. & W. T. Ry. Co. v. Campbell*, 45 S. W. 2, 91 Tex. 551, 43 L. R. A. 225.

**Measure of Damage.**—Where a seller loses the benefit of the sale by the refusal of a railroad company to furnish him with cars in which to ship the goods in violation of Rev. St. § 4499, his measure of damages against the company is the profits lost by his inability to fulfill his agreement, provided he would otherwise have performed same. Judgment (Civ. App. 1897) 40 S. W. 431, reversed. *Houston, E. & W. T. Ry. Co. v. Campbell*, 45 S. W. 2, 91 Tex. 551, 43 L. R. A. 225, citing *Houston, etc., R. Co. v. Hill*, 70 Tex. 51, 7 S. W. 659.

Where a railroad company, with knowledge that an applicant for cars had contracted to sell and deliver wood, failed, without reasonable excuse, to furnish him cars for its shipment, by reason of which the contract was annulled by the purchaser, it is liable to the applicant for the profits he would have made on the contract as actual damages. (Civ. App. 1897) *Houston, E. & W. T. Ry. Co. v. Campbell*, 40 S. W. 431, reversed (1898) 45 S. W. 2, 91 Tex. 551, 43 L. R. A. 225.

#### **4. Recovery of Penalty.**

##### **a. Pleading Issues and Proof.**

###### **(1) Petition.**

**Amendment.**—See post, "Remand," VII, B, 4, b.

###### **(2) Answer.**

In an action against a carrier for failure to furnish cars after demand, as required by Rev. St. 1895, arts. 4497-4502, an answer failing to allege facts showing that the carrier had performed its duty of providing a sufficient number of cars to meet the or-

dinary needs of its business, which it could reasonably anticipate, or that the scarcity of cars and existing demands for them were the result of circumstances beyond its power reasonably to control and provide against, was demurrable. Judgment, *Texas & P. Ry. Co. v. Allen* (Civ. App. 1906) 98 S. W. 450, reversed. *Allen v. Texas & P. Ry. Co.*, 100 Tex. 525, 101 S. W. 792, citing *Texas, etc., R. Co. v. Barrow* (Civ. App.), 94 S. W. 176, 177.

### (3) Issues and Proof.

Where the answer of the defendant did not allege facts showing that it had performed the duty laid upon it by law of providing a sufficient number of cars to meet the ordinary needs of its business, which it could reasonably anticipate, nor that the scarcity of cars and the existing demands for them were the result of circumstances beyond its power reasonably to control or provide against, and was therefore demurrable, evidence offered to show the facts alleged in the answer was properly excluded, there being no pleading to warrant its admission. *Allen v. Texas, etc., R. Co.*, 100 Tex. 525, 101 S. W. 792, 795, affirming 42 Tex. Civ. App. 331.

**Evidence.**—The evidence offered to show the lack of authority in defendant's station agent to contract for or control the furnishing of cars was also properly excluded. No question of contracting was involved in the case, and the statute, as amended in 1899, in effect treats such agents as authorized to receive such demands for cars. *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 558, 45 S. W. 2, reversing 40 S. W. 431; *Allen v. Texas, etc., R. Co.*, 100 Tex. 525, 101 S. W. 792, 794, affirming 42 Tex. Civ. App. 331. See ante, "Local Agent," VII, B, 2, c, (1), (b).

In a suit for failure to furnish cars for plaintiff's shipments of freight, it is not competent for defendant to show previous delay of intended consignee in unloading similar shipments, the carrier's remedy being not against the

shipper but against the consignee for damage. *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 561, 45 S. W. 2, reversing 40 S. W. 431.

In an action against a railroad for failure to furnish freight cars, the exclusion of a bond entered into by plaintiff with a consignee for the performance of a contract for shipment between them, was not error where the contract was otherwise established. *Houston, E. & W. T. Ry. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2.

In an action by a seller, who lost the benefit of the sale by a railroad company's refusal to furnish cars, held, that a bond of the buyer for performance was not admissible to strengthen plaintiff's case where it bore no sureties. *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2, reversing 40 S. W. 431.

In action for damages for failure of a railroad to furnish cars for handling freight, evidence of defendant's animosity toward consignee is admissible as strengthening plaintiff's theory that defendant refused to furnish cars, but cause of such animosity is immaterial. *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 561, 45 S. W. 2, reversing 40 S. W. 431.

Where the records kept in the train dispatcher's office showed the number of cars ordered during the time in question and no effort was made to produce them or excuse offered for not doing so, there was no error in excluding the testimony of the train dispatcher to show the number of cars ordered, the witness stating that he could not give the number from memory anywhere near accurately. *Texas, etc., R. Co. v. Smith*, 34 Tex. Civ. App. 571, 79 S. W. 614, affirmed in 98 Tex. 635, no op.

**As to Negligence.**—In cases grounded alone upon negligence, an extraordinary rush of business and a scarcity of cars after demand therefor are circumstances proper to be submitted to the

jury, together with all other evidence in determining the issue of negligence vel. non. Texas, etc., *R. Co. v. Allen*, 42 Tex. Civ. App. 331, 98 S. W. 450, affirmed in 100 Tex. 525. See Texas, etc., *R. Co. v. Nelson*, 38 Tex. Civ. App. 605, 86 S. W. 816. See, also, Texas, etc., *R. Co. v. Felker*, 40 Tex. Civ. App. 604, 90 S. W. 530; Houston, etc., *R. Co. v. Smith*, 63 Tex. 322, 323; *Davis v. Texas, etc., R. Co.*, 91 Tex. 505, 44 S. W. 822, reversing 42 S. W. 1008.

**Declarations of Conductor.**—In action against railroad for damages for failure to furnish cars, declarations of conductor while switching cars for loading showing carrier's determination to furnish no cars for plaintiff's shipments to a certain consignee, are admissible. Houston, etc., *R. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2, reversing 40 S. W. 431.

**Charge of Court.**—Evidence considered and held to show no valid excuse for delay in furnishing a shipper with cars within a reasonable time, and to afford no basis for a charge that if the carrier used ordinary care and diligence to furnish the cars, and could not furnish them earlier than it did, it would not be liable for damages resulting from the delay. Texas, etc., *R. Co. v. Powell*, 34 Tex. Civ. App. 575, 79 S. W. 86, affirmed in 98 Tex. 635, no op.

In an action for negligent delay of a carrier in furnishing a shipper with cars, a charge which seems to be on the weight of evidence in assuming that the delay constituted negligence will not be held error on that account where, in another paragraph, the question of whether such delay was negligence is treated as one for the determination of the jury. Texas, etc., *R. Co. v. Powell*, 34 Tex. Civ. App. 575, 79 S. W. 86, affirmed in 98 Tex. 635, no op.

#### **b. Remand.**

In an action against a carrier, plain-

tiff sought to recover the statutory penalty for a failure to furnish cars. On appeal from a judgment for plaintiff it appeared that he was not entitled to such recovery, but that he had alleged in general terms that defendant negligently failed and refused to deliver the cars. Held, that, on reversal, the cause would be remanded that plaintiff might amend his petition, and have a trial on the issues of negligence and actual damages. Texas, etc., *R. Co. v. Allen*, 42 Tex. Civ. App. 331, 98 S. W. 450, affirmed in 100 Tex. 525.

#### **5. Recovery of Actual Damages Occasioned by Failure to Furnish Cars.**

In suit for failure of railroad to furnish cars for plaintiff's shipments, defendant can not show notice from consignee, who had contract with plaintiff, that he would not receive goods from plaintiff. The shipper had a right to ship to him and hold him to his contract. Houston, etc., *R. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2, reversing 40 S. W. 431.

#### **6. Penalty for Consignee's Failure to Unload Cars.**

Under Rev. St. 1895, art. 4501, making the consignee liable to a penalty to the railroad company for failure to unload the cars within 48 hours after delivery and notice, the consignor is not liable for failing to see that cars are unloaded at their destination. Judgment (Civ. App. 1897), 40 S. W. 431, reversed. Houston, E. & W. T. Ry. Co. v. Campbell, 45 S. W. 2, 91 Tex. 551, 43 L. R. A. 225.

### **C. PENALTY FOR REFUSAL TO RECEIVE AND CARRY FREIGHT.**

#### **1. Statutory Provisions.**

Article 279, Rev. Stat., prescribing penalty against common carrier for refusing to transport goods is not now applicable to railroads since it has been impliedly repealed by acts of April 2 and 4, 1887, amending Art. 4227, Rev.

Stat. S. A. & A. P. R. Co. *v.* Bailey, 4 App. Civ. Cases, § 68, 15 S. W. 203; St. Louis, etc., R. Co. *v.* Kay & Co., 85 Tex. 558, 560, 22 S. W. 665; S. C. (Civ. App.), 23 S. W. 91.

Rev. St., art. 279, prescribing the rights and duties of common carriers in general, provides that any carrier refusing to transport goods as required by that section shall be liable for all damages thereby sustained, and also for a penalty of not less than \$5 nor more than \$500. Act April 2, 1887, amending article 4227, which provides for the organization of railroad companies, and defines their obligations, declares that in case of the refusal of such corporation to transport any passenger or property, and deliver the same at the regular appointed time, it shall pay all damages sustained, with costs of suit, and in case of transportation of property, in addition, special damages at the rate of 5 per cent. a month on the value for the detention beyond the time reasonably necessary. Held, that it was not intended by the amendment to provide a new penalty for railroad companies, and also leave them liable under the former one, but that article 279, so far as it related to railroad corporations, was repealed by amended article 4227. St. Louis & S. W. Ry. Co. *v.* Kay, 22 S. W. 665, 85 Tex. 558.

## 2. Liability for Penalty.

Under Sayles' Rev. Civ. St., arts. 4226, 4227, requiring carriers to furnish sufficient transportation for all property, and making them liable for all damages caused by their refusal to transport such property, a shipper who shows that he was ready to pay freight charges may recover damages caused by a refusal to transport his property. Galveston, H. & S. A. Ry. Co. *v.* Schmidt (Civ. App.), 25 S. W. 452.

**Refusal to Furnish Car.**—Article 279, Rev. Stat., prescribing a penalty against common carriers for refusing to transport goods, does not apply to a refusal of a car when requested. S. A.

& A. P. R. Co. *v.* Bailey, 4 App. Civ. Cases, § 68, 15 S. W. 203.

**Tender of Freight Charges.**—Under Rev. St., art. 279, providing that, on the tender of the legal and customary rates of freight on goods offered for transportation, any common carrier refusing to transport shall be liable in damages to the party injured, a carrier can not escape liability for failure to transport on the ground that plaintiff did not tender the freight charges at the time the freight was offered, as he was not bound to make such tender until after the carrier had loaded the goods ready for transportation. Texas & P. Ry. Co. *v.* Hays, 2 Willson, Civ. Cas. Ct. App., § 391.

## 3. Recovery.

**Pleading and Proof.**—Under Rev. St., art. 279, providing "that upon the tender of the legal and customary rates of freight on goods offered for transportation, \* \* \* any common carrier refusing to transport," etc., "shall be liable to the party injured for all damages," etc., in a petition against the carrier for a refusal to carry freight it is not necessary to aver a tender of the money for the freight, it being sufficient to aver a readiness and willingness to pay. Texas & P. R. Co. *v.* Hays, 2 Willson, Civ. Cas. Ct. App., § 391.

Under Sayles' Rev. Civ. Stat., arts. 4226, 4227, a shipper can recover damages caused by carrier's refusal to receive and transport freight by allegation and proof that he was ready and willing to pay charges. Galveston etc., R. Co. *v.* Schmidt (Civ. App.), 25 S. W. 452, 453.

## D. PENALTY UNDER STATUTE PRESCRIBING FORM AND CONTENTS OF BILL OF LADING.

Article 280, Rev. Stat., prescribes that "common carriers are required, when they receive goods for transportation, to give to the shipper, when it is demanded, a bill of lading or memo-

random in writing, stating the quantity, character, order, and condition of the goods." *Schloss v. Atchinson, etc., R. Co.*, 85 Tex. 601, 22 S. W. 1014; *Sherman, etc., R. Co. v. Conly (Civ. App.)*, 37 S. W. 253.

This, under our statute, constitutes a bill of lading. It is a contract entered into between the parties at the time the goods are delivered for transportation, and is equally binding on both parties. *Schloss v. Atchinson, etc., R. Co.*, 85 Tex. 601, 22 S. W. 1014. See post, "Bills of Lading," X.

**Refusal.**—If a bill of lading of goods shipped is demanded of the common carrier, and refused, the party injured by such refusal has his remedy in a penalty of not less than five, nor more than five hundred dollars. *Missouri Pac. Ry. Co. v. Douglas*, 2 Willson, Civ. Cas. Ct. App., § 31.

To recover penalty from carrier for refusing compliance with art. 322, Rev. Stat., ability to comply or willful neglect must be shown. *Conley v. Sherman, etc., R. Co.*, 90 Tex. 295, 297, 38 S. W. 519, affirming 37 S. W. 253.

Refusal implies that the party refusing has the ability to do the thing demanded of him, or, if he has not the ability, the want of it must arise from his own negligence or want of proper attention to the business entrusted to him. *Conley v. Sherman, etc., R. Co.*, 90 Tex. 295, 297, 38 S. W. 519, affirming 37 S. W. 253.

A carrier is not liable for penalty under a statute prescribing the contents of a bill of lading, where agent declined to specify on ground of insufficient information. *Conley v. Sherman, etc., R. Co.*, 90 Tex. 295, 297, 38 S. W. 519, affirming 37 S. W. 253.

Under Rev. St. 1895, art. 322, imposing a penalty on a common carrier for refusing to give a shipper, when demanded, a bill of lading or memorandum in writing stating the quantity, character, order, and condition of goods received for shipment, a railroad company is not liable because an

agent refused to state, in a bill of lading, the weight or quantity of a car of lumber, loaded by the shipper, at a switch where there was no agent or means of weighing, and when the shipper did not furnish the agent an invoice of the shipment. (1897) *Conly v. Sherman, S. & S. Ry. Co. (Sup.)*, 38 S. W. 519, 90 Tex. 295; (1896) *Sherman, S. & S. Ry. Co. v. Conly (Civ. App.)*, 37 S. W. 253.

**Demand.**—Under Rev. St. 1879, art. 280, imposing a penalty on a carrier for a failure to furnish to a shipper on demand a bill of lading stating the quantity of the shipment, a demand by a shipper of lumber of a bill of lading stating the "weights or amount, or something more definite," is insufficient to warrant an infliction of the penalty for its refusal. *Sherman, S. & S. Ry. Co. v. Conly (Civ. App.)*, 37 S. W. 253. But see *Conly v. Sherman, etc., R. Co.*, 90 Tex. 595, 38 S. W. 519, refusing a writ of error, on the ground that the proper result was reached, in which the supreme court question the correctness of the ruling of the appellate court herein, that a demand by the shipper that the agent insert, "the weight, quantity, or something more definite," in the bill of lading was not a sufficiently specific demand to entitle him to recover the penalty prescribed by art. 322, Rev. Stat., for failure of a carrier to give a bill of lading specifying the quantity of the goods shipped.

**Ownership of Goods.**—Under Rev. St., art. 280, giving the shipper of goods a right to recover a penalty of a railroad company for a refusal to give a bill of lading, he may recover, though he does not own the goods. *Missouri Pac. Ry. Co. v. Price*, 3 Willson, Civ. Cas. Ct. App., § 361.

**Specification of Quantity.**—Quantity is that which answers the question "How much?" It is the attribute of being "so much" and "not more nor less." Thus, where a statute required a bill of lading to specify the

quantity of a shipment of lumber, the quantity might be ascertained either by measurement, or weight. *Texas & P. Ry. Co. v. Cuteman*, 4 Willson Civ. Cas. Ct. App., § 1, 14 S. W. 1069.

Under Rev. St. 1879, art. 280, imposing a penalty on common carriers for refusing to give, when it is demanded, a bill of lading stating "the quantity, character, and condition of the goods" received for transportation, a railroad company incurs the penalty by giving a bill of lading for lumber, describing it as "a car load" only, when the shipper demands that the weight be stated. *Texas & P. Ry. Co. v. Cuteman*, 4 Willson, Civ. Cas. Ct. App., § 1, 14 S. W. 1069.

The description of the lumber as a "carload" only, is not a sufficient statement of the quantity shipped. *Texas, etc., R. Co. v. Cuteman*, 4 App. Civ. Cases, § 1, 14 S. W. 1069.

**Amount of Penalty.**—The amount of the penalty is not less than five nor more than five hundred dollars. *Missouri Pac. R. Co. v. Douglas & Sons*, 2 App. Civ. Cases, § 28.

#### **E. PENALTY FOR PREFERENCE IN ORDER OF FORWARDING.**

Rev. St. 1895, arts. 4537, 4539 providing that a railroad company giving a preference to one shipper over another in the order or time of forwarding goods delivered for transportation shall be liable for all losses resulting from the delay, and also liable to a penalty for each act of discrimination are valid. (Civ. App. 1903), *Hill & Morris v. St. Louis Southwestern Ry. Co. of Texas*, 75 S. W. 874, reversed *St. Louis Southwestern Ry. Co. of Texas v. Hill & Morris* (1904), 80 S. W. 368, 97 Tex. 506.

The penalty prescribed by Rev. St., art. 4539, for violation of arts. 4535, 4538, regulating railroads, is inapplicable to art. 4537, requiring every railroad to forward goods in the order in which they are received, which origi-

nally only imposed a liability for damages for its violation, the incorporation of art. 4539 into the revised statutes not indicating an intent to make the penalty therein prescribed, applicable to such other provisions. *St. Louis Southwestern Ry. Co. v. Hill & Morris*, 97 Tex. 506, 80 S. W. 368.

Act April 10, 1883, § 8 (Acts 1883, p. 69, c. 70), makes railroads liable in damages for injuries to goods, caused by their failure to forward them in the order in which they are received. Act April 2, 1887 (Acts 1887, p. 110, c. 120), amending Rev. St. 1879, arts. 4251-4255, prescribes, in article 4255, a penalty on railroads which refuse to interchange business on certain terms, or which "violate in any manner any other provision of this, and the four preceding articles." The compilers, who "arranged and collated into the proper titles, chapters and articles" laws already existing, without material change, so as to make up Rev. St. 1895, collected the five articles of the act of 1887, numbering them from 4535 to 4539, without any change, except that they added to article 4537 the provision of the act of 1883 above quoted, so that it would appear from the face of the article that the penalty prescribed by Act 1887, art. 4255 (now 4539), applied to a violation of the act of 1883. Held, that the mere rearrangement of these sections, without anything to indicate an intention to alter or amend the law, could not be regarded as the enactment of a new rule, nor an amendment of an existing law, so as to make the penalty prescribed in the act of 1887 apply, where it did not apply before, to a violation of the act of 1883. Judgment, *Hill & Morris v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App. 1903), 75 S. W. 874, reversed. *St. Louis Southwestern Ry. Co. of Texas v. Hill & Morris*, 80 S. W. 368, 97 Tex. 506.

Under Rev. St., art. 283, requiring common carriers to forward goods in the order in which they are received,

and providing that the trip shall be considered as having commenced from the time of the signing of the bill of lading, the liability as a common carrier does not attach until a bill of lading is given or the goods have been delivered to and received by the carrier. *Texas & P. Ry. Co. v. Wheat*, 2 Willson, Civ. Cas. Ct. App., § 165.

Rev. St., art. 283, providing that where common carriers receive goods for transportation into their warehouses they shall forward them in the order in which they are received, and that in case they shall fail to do so, they shall be liable for all damages occasioned from the delay, provided that the liability of a common carrier shall attach, as at common law, from and after the signing of the bill of lading, refers only to liability of common carriers after delivery of the thing to be transported, and does not affect an action against the carrier for breach of a parol contract to receive cattle for transportation on a certain day. *Texas & P. Ry. Co. v. Hamm*, 2 Willson, Civ. Cas. Ct. App., § 494.

Rev. St. 1895, art. 4537, directing railroads receiving goods for transportation into their "warehouses or depots" to forward them in the order in which they are received, and making them liable for losses occasioned by a failure so to do, requires a railroad to forward property received for shipment in the order in which it is received, though merely received on a platform used for handling that kind of property; the phrase "warehouses or depots" embracing the entire station of the road. (Civ. App. 1903) *Hill & Morris v. St. Louis Southwestern Ry. Co. of Texas*, 75 S. W. 874, reversed *St. Louis Southwestern Ry. Co. of Texas v. Hill & Morris* (1904) 80 S. W. 368, 97 Tex. 506.

Where the petition in an action against a railway company for unlawful discrimination stated a cause of action for the recovery of the penalty prescribed by Rev. St. 1895, art. 4539,

but the evidence only established the fact that plaintiff sustained damages because of the company's delay in seasonably forwarding property delivered to it for carriage, the court had jurisdiction to render judgment for the actual damages. (Civ. App. 1903), *Hill & Morris v. St. Louis Southwestern Ry. Co. of Texas*, 75 S. W. 874, reversed *St. Louis Southwestern Ry. Co. of Texas v. Hill & Morris* (1904), 80 S. W. 368, 97 Tex. 506.

#### F. PENALTY FOR DELAY IN FORWARDING.

Under Rev. Stat., art. 4575, subd. 2, a delay in transportation of freight held a discrimination, entitling the person injured to recover penalty prescribed by art. 4575. *Gulf, etc., R. Co. v. Lone Star Salt Co.*, 26 Tex. Civ. App. 531, 63 S. W. 1025.

**Cumulative Penalties.**—Rev. St., art. 4496, declares a penalty against railroads for delay in shipping freight. Railway Commission Law, arts. 4574, 4575, subsequently enacted, provide that delay in transportation shall constitute a discrimination, for which the railroad shall be liable to a penalty; and article 4581 of the commission law declares that such law shall not release any right of action by any person for a penalty which may have arisen or may hereafter arise under the state law, and that all laws in conflict shall be repealed. Held that, where plaintiff presented a cause of action entitling him to recover the penalty provided by article 4575, he was entitled to recover, without reference to whether Rev. St., art. 4496, was repealed by the commission law. *Gulf, C. & S. F. Ry. Co. v. Lone Star Salt Co.*, 63 S. W. 1025, 26 Tex. Civ. App. 531.

A shipper being entitled to recover a statutory penalty for unjust discrimination under the railway commission law, § 4575, it was immaterial in such action whether Rev. Stat., 4496, prescribing a like penalty, was repealed

by the commission law. *Gulf, etc., R. Co. v. Lone Star Salt Co.*, 26 Tex. Civ. App. 531, 63 S. W. 1025.

The fact that the car tendered was a refrigerator car, not suitable or usually used for the transportation of the kind of freight loaded therein, was no defense, on the ground that the company was not liable to transport such freight in such car. *Gulf, etc., R. Co. v. Lone Star Salt Co.*, 26 Tex. Civ. App. 531, 63 S. W. 1025.

That the car tendered to a railroad company for shipment was not the car in which freight was originally loaded by a connecting carrier, held no defense to an action to recover a penalty for delay. *Gulf, etc., R. Co. v. Lone Star Salt Co.*, 26 Tex. Civ. App. 531, 63 S. W. 1025.

**Burden of Proof.**—Article 4496, providing a remedy for the refusal of a railway company to transport property "at the regularly appointed time," places the burden of proof on the company "to show that the delay was not negligent." *Texas, etc., R. Co. v. Smith*, 34 Tex. Civ. App. 571, 573, 79 S. W. 614, affirmed in 98 Tex. 635, no op.

## G. PENALTY AND DAMAGES FOR UNJUST DISCRIMINATION AND EXTORTION OR OVERCHARGE.

### 1. Statutory Provisions Generally.

Revised Statutes of 1895, arts. 4537, 4539, relating to discriminations in the transporting of goods by railroads, held valid. *Hill v. St. Louis, etc., R. Co.* (Civ. App.), 75 S. W. 874, reversed in 97 Tex. 506.

Under Texas statute, prior to passage of act of April 10, 1883, penalties were given for overcharges, but were never given for mere discrimination in charges. *Woodhouse v. Rio Grande R. Co.*, 67 Tex. 416, 419, 3 S. W. 323.

Act April 10, 1883, prescribing a penalty for discrimination in freight charges does not repeal Rev. St., art. 4258, prescribing a penalty for making over-

charges for freight. *Missouri Pac. Ry. Co. v. Rains*, 3 Willson, Civ. Cas. Ct. App., § 66; *G. C. & S. F. R. Co. v. Lamkin*, 3 App. Civ. Cases, § 80; *Missouri Pac. R. Co. v. Parkhurst*, 3 App. Civ. Cases, § 159.

The act of April 10, 1883, § 7, expressly re-enacts the penalty for overcharge of freight. *Etter v. Missouri Pac. R. Co.*, 2 App. Civ. Cases, §§ 58, 59; *State v. Andrews*, 20 Tex. 230.

Act April 10, 1883 (Gen. Laws 18th Leg. Reg. Sess. p. 70, § 10), prescribing a penalty for a discrimination in freight charges, does not preclude a recovery of the penalty prescribed by Rev. St., art. 4258, for freight overcharges. *Missouri Pac. Ry. Co. v. Parkhurst*, 3 Willson, Civ. Cas. Ct. App., § 159.

The statutory remedy for overcharge in freight afforded by art. 4258, Rev. St. is not exclusive, but cumulative, and he who would recover the penalty provided by it must bring himself clearly within its terms. *Murray & Bro. v. G. C. & S. F. R. Co.*, 63 Tex. 407.

The remedy given by art. 4258, Rev. Stat., for overcharge on freight, has not been taken away or impaired or in any way affected by act of April 10, 1883, except that as condition precedent to party's right to remedy he must give notice in writing to railroad of overcharge at least twenty days before instituting suit. *Missouri Pac. R. Co. v. Parkhurst*, 3 App. Civ. Cases, § 159. See post, "Notice and Claim of Overcharge," VII, G, 3, b, (3).

Under Rev. St., art. 4258, prescribing a penalty for an overcharge on freight, a shipper can recover only one penalty for several overcharges made against him prior to the institution of an action by him. *Gulledge v. Missouri Pac. Ry. Co.*, 3 Willson, Civ. Cas. Ct. App., § 168.

**Act of May 6, 1882**, declaring it to be unlawful for railroad to charge greater amount for transporting freight than is specified in bill of lading provides



no penalty for its violation. *Dwyer v. G. C. & S. F. R. Co.*, 3 App. Civ. Cases, § 79.

The word "rate" in art. 4257, Rev. Stat., if used in the sense of proportion, must be limited to the ascending scale. *Murray Bro. v. G. C. & S. F. R. Co.*, 63 Tex. 407, 411.

**Repealing of Statute Imposing Penalty for Overcharge of Passenger Fares.**—See the title CARRIERS OF PASSENGERS.

## 2. To What Carriers Applicable.

### a. Carriers Who Are Parties to Bill of Lading.

Statute prescribing penalty for overcharge by carrier applies only to carriers who are parties to bill of lading, either by original contract or by ratification. *Gulf, etc., R. Co. v. Dwyer*, 84 Tex. 194, 200, 19 S. W. 470.

Acceptance of freight by carrier from connecting carrier, being compulsory, can not be deemed a ratification of a bill of lading making overcharge, so as to subject the receiving company to a penalty, in absence of other evidence. *Gulf, etc., R. Co. v. Dwyer*, 84 Tex. 194, 198, 199, 19 S. W. 470.

In a suit against a common carrier for a penalty for withholding goods, and for overcharges, the carrier can not, under a general denial, prove a mistake in the weight or classification, though the bill of lading attached to the petition provides that the weight and classification are subject to correction. *Ft. Worth & D. Ry. Co. v. Lillard* (Tex. App.), 16 S. W. 654, 4 Tex. App. Civ. 123.

### b. Carriers of Interstate Commerce.

Rev. St. 1895, art. 4575, providing that, if any railroad subject to the act unjustly discriminates against a person, it shall be liable to the one injured thereby for a certain penalty, is not applicable to discriminations as to the delivery of freight shipped from another state; article 4580 providing that the act shall apply to and affect

only the transportation of freight and cars "between points within the state." Judgment (Civ. App. 1897), 42 S. W. 362, affirmed. *Fielder v. Missouri, K. & T. Ry. Co. of Texas*, 46 S. W. 633, 92 Tex. 176.

The statute fixes the maximum rate that can be charged in this state by a railway company. It prescribes a penalty for overcharge, and for unjust discrimination. This statute applies only to shipments between points within the state. *Texas, etc., R. Co. v. Clark*, 4 Tex. Civ. App. 611, 614, 23 S. W. 698.

"If we should limit the use of the word 'transportation,' to the actual moving of the goods from the point of shipment to the point of destination, still we should be of opinion that the law does not apply to a case of this character, for it can not be said that a regulation of the duties of the carrier as to the delivery of freight does not 'affect,' the contract of transportation." *Fielder v. Missouri, etc., R. Co.*, 92 Tex. 176, 179, 180, 46 S. W. 633, affirming 42 S. W. 362.

The broad meaning of the provision is that as to contract for a through shipment of goods from a point in the state to a point out of the state, or from a point out of a state to a point in the state, the act should in no manner apply; nor should it be construed to affect or regulate in any respect the rights of the parties to the contract. As to shipments not confined to the limits of the state, the intention was to leave them wholly to the common law and to the laws enacted by congress. *Fielder v. Missouri, etc., R. Co.*, 92 Tex. 176, 180, 46 S. W. 633, affirming 42 S. W. 362.

Discrimination between owners of coal yards in respect to delivery upon a private spur or track in their yards, was a part of the transportation under the contract, which was not performed until the delivery of the freight to the consignee. *Fielder v. Missouri, etc.,*

R. Co., 92 Tex. 176, 46 S. W. 633, affirming 42 S. W. 362.

Rev. St., art. 4258, prescribing a penalty against railroad companies for overcharges and unjust discrimination in the shipment of freight, has no application to interstate commerce. *Wright v. Howe* (Civ. App.), 24 S. W. 314.

No action lies under art. 4258, Rev. Stat., for overcharges and unjust discrimination in shipping freight as to property billed to another state. *Wright v. Howe* (Civ. App.), 24 S. W. 314; *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 129, 19 S. W. 455.

Rev. St. 1895, arts. 4574, 4575, providing for the recovery of a penalty against a railroad company for unjust discrimination in the transportation of freight, have no application to interstate commerce; and a judgment under this statute for discrimination on a through shipment from Goliad, Tex., to Chicago, Ill., will be reversed on appeal. *Gulf, W. T. & P. Ry. Co. v. Barry* (Civ. App.), 45 S. W. 814.

#### **Overcharge by Terminal Carrier.—**

A shipment of freight over connecting lines from Missouri to a point in Texas, by a bill of lading which provides that the receiving carrier shall only be liable for damage occurring on its own line, and which guaranties a through rate of freight to such point, is an interstate shipment, within the interstate commerce act; and, though the entire haul of the last connecting line is within the state of Texas, an overcharge by it on such shipment is a matter to be adjusted under the interstate commerce act, and not under the laws of Texas. *Texas & P. Ry. Co. v. Clark*, 4 Tex. Civ. App. 611, 23 S. W. 698.

In such case the carrier dealing with goods in Texas only is not liable for penalty for unjust discrimination. *Texas, etc., R. Co. v. Clark*, 4 Tex. Civ. App. 611, 614, 23 S. W. 698.

#### **c. Receivers.**

Receivers are not within the terms

of Sayles' Civ. St., art. 4258a, imposing a penalty on railroad companies for making excessive charges for passengers or freight. A receiver is not embraced within the terms of this statute, and can not be held liable for the penalty. *Campbell v. Wiess* (Civ. App.), 25 S. W. 1076, following *Bonner v. Franklin Co-Op. Ass'n*, 4 Tex. Civ. App. 166, 23 S. W. 317; *Missouri, etc., R. Co. v. Stoner*, 5 Tex. Civ. App. 50, 23 S. W. 1020; *Schloss v. Atchison, etc., R. Co.*, 85 Tex. 601, 22 S. W. 1014; *Turner v. Cross*, 83 Tex. 218, 18 S. W. 578.

#### **d. Connecting Carriers.**

Under Sayles' Civ. St., art. 4258, denouncing a penalty of \$500 against any railroad company exacting higher rates of freight than the maximum rates fixed by section 4257, a company which receives freight, and delivers it to a connecting carrier, is not liable to the penalty because of an overcharge by the latter company. *Gulf, C. & S. F. Ry. Co. v. Adair*, 4 Willson, Civ. Cas. Ct. App., § 36, 14 S. W. 1076.

**Interstate Shipments.**—See post, "Interstate and Foreign Shipments," VIII, B, 2, b, (8).

If, in an action against connecting carriers for the statutory penalty for overcharging it appear that defendants transacted their business and made their charges through a common agent, their actions would be joint and their liability equal. *I. & G. N. Ry. Co. v. Pichard*, 1 White & W. Civ. Cas. Ct. App., § 433.

Where the gist of an action against two railroad companies is an overcharge of freight, it is immaterial whether the action was the result of fraud, combination, or collusion, if they acted together in committing the injury. *International & G. N. R. Co. v. Pichard*, 1 White & W. Civ. Cas. Ct. App., § 432.

#### **3. Liability for Penalty.**

##### **a. Discrimination.**

Under Batts' Ann. Civ. St. 1895, art.

4577, providing that it is an unjust discrimination to subject any particular description of traffic to any undue or unreasonable prejudice, delay, or disadvantage in any respect whatsoever, the fact that the shipper has been compelled to sign contracts consenting to the shipment by a different route from that selected by him does not prevent him from recovering for the violation of the statute. (Civ. App.) *San Antonio & A. P. Ry. Co. v. Stribling*, 86 S. W. 374, judgment modified (Sup.). 89 S. W. 963.

Rev. St. 1895, art. 4575, provides that any railroad company guilty of extortion or discrimination shall pay to those injured thereby a specified penalty, "provided that such road may plead and prove as a defense to the action for said penalty that such overcharge was unintentional and innocently made through a mistake of fact." Held, that a shipper can recover the penalty for an unjust discrimination, though there has been no extortion or overcharge. *Houston & T. C. R. Co. v. Lone Star Salt Co.*, 48 S. W. 619, 19 Tex. Civ. App. 676.

The proviso of art. 4575, Rev. Stat., does not neutralize the preceding provision, which gives a party injured by unjust discrimination by a railroad company the right to recover a penalty, so as to restrict his right of recovery to cases of extortion, but the proviso refers to a suit for penalty based upon extortion in charges. *Houston, etc., R. Co. v. Lone Star Salt Co.*, 19 Tex. Civ. App. 676, 48 S. W. 619.

## **b. Overcharge and Extortion.**

### **(1) In General.**

Penalty for overcharge on freight can only be recovered in instances prescribed by act of April 10, 1883. *Dwyer v. G. C. & S. F. R. Co.*, 3 App. Civ. Cases, § 79.

The "overcharge" which is denounced by statute is a charge in excess of the maximum rate as fixed by

law. 2 Sayles' Civ. St., arts. 4257, 4258; *Murray & Bro. v. G. C. & S. F. R. Co.*, 63 Tex. 407; *Dwyer v. G. C. & S. F. R. Co.*, 3 App. Civ. Cases, § 79; *Woodhouse v. Rio Grande R. Co.*, 67 Tex. 416, 3 S. W. 323; *Texas, etc., R. Co. v. Langsdale* (Civ. App.), 30 S. W. 681, 683 (see 88 Tex. 513).

Where a shipper of freight paid the amount demanded by the initial carrier under the rate for an "emigrant outfit," and the terminal carrier discovered that there was included in the shipment an article which could not be included in such rate but for which a higher rate was fixed by the State Railway Commission, carriage having been entirely within the state, the terminal carrier, in demanding the established rate for such article, was not guilty of collecting an overcharge. *Texas Cent. Ry. Co. v. Kerns* (Civ. App.), 108 S. W. 187.

### **(2) What Constitutes Unjust Discrimination and Overcharge.**

#### **(a) Necessity for Concurrence of Discrimination and Overcharge.**

There may be an overcharge, by carriers, without discrimination, and there may be an unlawful discrimination without an overcharge, that is, without a charge higher than maximum fixed by law. *Woodhouse v. Rio Grande R. Co.*, 67 Tex. 416, 418, 3 S. W. 323.

#### **(b) Unjustness as Element.**

The discrimination alone does not subject the railway company to the statutory penalty. The discrimination must be unjust to come within the terms of the statute denouncing the penalty. Civ. St., art. 4258b, § 7. *Texas, etc., R. Co. v. Lanesdale* (Civ. App.), 30 S. W. 681, 683 (see 88 Tex. 513; *Woodhouse v. Rio Grande R. Co.*, 67 Tex. 416, 3 S. W. 323).

Const. 1876, art. 10, directing legislature to pass laws to prevent unjust discrimination and extortion in the rates of freight and passengers, etc., and the act of 1879 [Rev. St., art.

4257] prohibiting unjust discrimination in rates, do not prohibit mere discrimination, but prohibit unjust discrimination, and what is improper discrimination is a question of law and fact in a given case, and whether a discrimination is or is not unlawful must be ascertained by applying to the facts of the case the principles of the common law, and the general policy of the statutory law governing carriers and railroads. *Houston & T. C. Ry. Co. v. Rust & Dinkins*, 58 Tex. 98.

Under Rev. St., art. 4257, as amended by Act April 19, 1879, and the Act of April 10, 1883, it is only in cases of unjust discrimination by railroad companies that the penalty against them for such discrimination can be enforced. *Woodhouse v. Rio Grande Ry. Co.*, 67 Tex. 416, 3 S. W. 323.

Thus protected as railway companies are from liability for inadvertent discrimination in the management of their roads, there was no necessity for further protection, such as is given in the proviso to the tenth section of the act of April 10, 1883. *Woodhouse v. Rio Grande R. Co.*, 67 Tex. 416, 3 S. W. 323.

**Quantities of "Like Kind."**—To create unjust discrimination in freight charges, it is necessary only that quantities shall be "like" not that they shall be same. *New York, etc., R. Co. v. Gallaher*, 79 Tex. 685, 688, 15 S. W. 694.

Plaintiff's car load of lumber consisted of plank dressed on one side, and some scantling, while that of another shipper was of the same class of lumber, except that his plank had been prepared for making troughs, and were beveled on the edge, and called "knock-down troughs." Held, that the lumber was of the same kind. *New York, T. & M. Ry. Co. v. Gallaher*, 79 Tex. 685, 15 S. W. 694.

One car load of lumber is of "like quantity" with another, within the Texas statute forbidding railroad com-

panies to discriminate in their freight charges, though the two car loads are of different weight and dimensions. *New York, T. & M. Ry. Co. v. Gallaher*, 79 Tex. 685, 15 S. W. 694.

That lumber has been partly dressed furnishes no reason for charging a different rate than is charged on rough lumber. *New York, etc., R. Co. v. Gallaher*, 79 Tex. 685, 691, 15 S. W. 694.

**(c) Willfulness as Element—Unintentional Extortion.**

To subject a railway company to penalty for unjust discrimination in rates, the discrimination must be "willfully" made. *Woodhouse v. Rio Grande Ry. Co.*, 67 Tex. 416, 419, 3 S. W. 323; *Texas, etc., Ry. Co. v. Langsdale* (Civ. App.), 30 S. W. 681, 683 (see 88 Tex. 513).

A "willful" act of discrimination in freight charges is an act done "knowingly or intentionally, and without reasonable ground for believing it to be lawful." *Galveston, H. & S. A. Ry. Co. v. Bowman* (Civ. App.), 25 S. W. 140; *Woodhouse v. Rio Grande R. Co.*, 67 Tex. 416, 419, 3 S. W. 323.

To render a railroad liable to the penalty for discrimination in freight rates provided in Sayles' Civ. St., art. 4258b, § 7, the discrimination must be unjust and willfully made. *Texas & P. Ry. Co. v. Langsdale* (Civ. App.), 30 S. W. 681.

The laws giving penalties for receiving more than the maximum rates for transportation of passengers and freights by railway companies, in force prior to the passage of the act of April 10, 1883, did not make the willfulness of the charge a fact on which the right to recover depended. To relieve against this hardship, the proviso to the tenth section of that act was inserted. *Woodhouse v. Rio Grande R. Co.*, 67 Tex. 416, 3 S. W. 323.

**Unintentional and Innocent Extortion.**—The proviso of art. 4575, Rev. Stat., merely makes the fact that the

overcharge was unintentional a sufficient defense. *Houston, etc., R. Co. v. Lone Star Salt Co.*, 19 Tex. Civ. App. 676, 48 S. W. 619.

Sayles' Ann. Civ. St. 1897, art. 4575, provides that, in an action against a carrier for extortion, defendant may plead and prove as a defense that the overcharge was unintentional or innocently made. Held, that an unintentional and innocent extortion is a matter which must be pleaded and proved by defendant. *St. Louis Southwestern Ry. Co. of Texas v. Rutherford*, 43 Tex. Civ. App. 544, 96 S. W. 73.

In an action against a carrier to recover a penalty and \$52 overcharges in a local shipment of 8 cars, that under the same agreement the carrier had transported 146 interstate cars at \$6.50 a car, when it could have charged \$20, and that hence on the whole transaction plaintiffs were not overcharged in respect to the local cars, was not available as a defense under Rev. St. 1895, art. 4575, providing that as to a penalty, it shall be a defense that an overcharge was unintentionally and innocently made through a mistake of fact. *Timpson & N. W. Ry. Co. v. Sanford & Morris*, 46 Tex. Civ. App. 636, 103 S. W. 432.

A \$250 penalty and recovery of overcharges were properly awarded against carrier where, though it was under the state commission's jurisdiction, it demanded and received over plaintiffs' protest \$6.50 per car for eight cars, in violation of a known regulation of the commission, and the charge was not innocently or unintentionally collected. *Timpson & N. W. Ry. Co. v. Sanford & Morris*, 46 Tex. Civ. App. 636, 103 S. W. 432.

**(d) Charging Less for Delivery to One Consignee than Other.**

Rev. St., p. 4257, prohibiting unjust and unreasonable discrimination in freight charges, does not preclude a railroad company from charging less for delivering freight to a certain com-

pany in a certain city than for delivering it to any one else in the city. *Houston & T. C. Ry. Co. v. Stewart*, 1 White & W. Civ. Cas. Ct. App., § 1248.

This is the true rule, provided such discrimination applies to all shippers. *Houston, etc., R. Co. v. Stewart*, 1 App. Civ. Cases, § 1246.

**(e) Charging More than Specified : Bill of Lading.**

A violation of Gen. Laws 17th Leg. Call. Sess., p. 35, § 1, declaring it to be unlawful for a railroad company to charge more for freight than is specified in the bill of lading, will not make the company liable for the penalty prescribed by Act April 10, 1883 (Gen. Laws 17th Leg., p. 67, §§ 7, 10), for making overcharges on freight. *Dwyer v. Gulf, C. & S. F. Ry. Co.*, 3 Willson, Civ. Cas. Ct. App., § 79.

Under Sayles' Civ. St., art. 4258a, § 3, a railroad company is liable for a penalty where it collects greater freight charges than those stipulated in the bill of lading. *Gulf, etc., R. Co. v. Loonie*, 84 Tex. 259, 19 S. W. 385, following *Sabine, etc., R. Co. v. Cruse*, 83 Tex. 460, 18 S. W. 755.

**(f) Rate Allowed.**

Where weight of freight transported is below one hundred pounds, no penalty can be recovered, under article 4257, Rev. Stat., for overcharge. *Murray & Bro. v. G., C. & S. F. R. Co.*, 63 Tex. 407, 413; *G. C. & S. F. R. Co. v. Lamkin*, 3 App. Civ. Cases, § 80.

Under Rev. St., art. 4257, authorizing railroads to charge 50 cents per hundredweight per 100 miles, a railroad can charge 50 cents for carrying less than a hundredweight that distance. *Murray v. Gulf, C. & S. F. R. Co.*, 63 Tex. 407, 51 Am. Rep. 650.

Under Rev. St., art. 4257, a railroad can charge 50 cent per hundredweight for carrying freight less than 100 miles. *Missouri Pac. Ry. Co. v. Lybrand*, 3 Willson, Civ. Cas. Ct. App., § 337.

Rev. St., art. 4258, prescribing a penalty where a railroad company charges for freight more than 30 cents per 100 pounds for a distance of 50 miles or less, does not prescribe any penalty for an overcharge when the freight weighs less than 100 pounds. *Gulf, C. & S. F. Ry. Co. v. Lamkin*, 3 Willson, Civ. Cas. Ct. App., § 80.

Under statute, railroads may charge fifty cents per hundred pounds for freight per hundred miles, and they may charge at the same rate, or in the same proportion, for larger amounts and for longer distances. *G. C. & S. F. R. Co. v. Lamkin*, 3 App. Civ. Cases, § 80.

On through shipments over two lines of road, which are, in fact, but one, freight can only be charged as upon one line. *Missouri Pac. R. Co. v. Kuthman*, 2 App. Civ. Cases, § 463.

Under a through bill of lading executed by defendant railroad company, plaintiff shipped 700 pounds of freight from Mineola to Sherman, a distance of 102 miles. Defendant charged and received \$4.90 for carrying said freight said distance, being at the rate of 70 cents per 100 pounds, when the law allows but 50 cents per 100 pounds. The freight was shipped by way of Belles, a station on the Texas Pacific Railway. It is claimed by appellant that it transported the freight only from Minola to Belles, a distance of 89 miles, and for this distance was entitled to demand \$3.15, and that the Texas Pacific Railway, which transported the freight from Belles to Sherman, a distance of less than 50 miles, was entitled, under Rev. St., art. 4257, to demand 30 cents per 100 pounds, making \$2.10, thus making the legal charge for the entire distance \$5.25. The proof showed that the Texas & Pacific road was under the management and control of defendant. Held, that the two lines of road, being in fact but one, were only entitled to charge freight as upon one line, and

the charge made was therefore an overcharge, and a violation of the law, for which defendant was liable. *Missouri Pac. Ry. Co. v. Kuthman*, 2 Willson, Civ. Cas. Ct. App., § 465.

#### (g) Charge for Use of Car.

The act of a carrier in demanding and collecting from a shipper in addition to the freight \$1 a day for the use of a car prior to giving him the use thereof, for the 49 hours allowed by law for unloading, was extortion, under Sayles' Ann. Civ. St. 1897, art. 4573, making it extortion for any carrier to demand or receive a greater rate of compensation than that established by the railroad commission for the use of any car. *St. Louis Southwestern Ry. Co. of Texas v. Rutherford*, 43 Tex. Civ. App. 544, 96 S. W. 73.

#### (h) Estoppel to Deny Distance.

Where in an action against a railroad company for statutory penalty for overcharging on freight it appeared that the defendants had always charged as for a certain distance between the two stations, they were estopped from denying that as a true distance. *I. & G. N. Ry. Co. v. Pichard*, 1 White & W. Civ. Cas. Ct. App., § 435.

#### (3) Notice and Claim of Overcharge.

##### (a) In General.

One claiming penalty under statute against carrier for overcharge, must give notice to agent who demanded and received overcharge, or to successor, in such manner that he may identify transaction. *Sabine, etc., R. Co. v. Cruse*, 83 Tex. 460, 464, 18 S. W. 755. See, also, *Woodhouse v. Rio Grande R. Co.*, 67 Tex. 416, 3 S. W. 323.

A service of a notice of an overcharge for freight on the successor of the agent who received the overcharge is a sufficient compliance with the statute authorizing a recovery of a penalty for such overcharges after service of notice on the company making the overcharge. *Missouri Pac. Ry.*

*Co. v. Rains*, 3 Willson, Civ. Cas. Ct. App., § 67.

Under Rev. St., arts. 4257, 4258, and the acts of April 19, 1879, and April 10, 1883, amendatory thereof, limiting freight rates to be charged by railroads to 50 cents per 100 pounds per 100 miles, and giving the right to recover a penalty of \$500 from railroad companies for willful discrimination in freight charges after refusal for 20 days, upon notice, to refund the overcharge, a notice and refusal to refund are only required where a charge exceeding the 50-cent rate is made. *Woodhouse v. Rio Grande R. Co.*, 67 Tex. 416, 3 S. W. 323.

The proviso to the tenth section of the act of April 10, 1883, has application only in cases in which charges for freight or passengers, in excess of the maximum rates fixed by law, have been made. *Woodhouse v. Rio Grande R. Co.*, 67 Tex. 416, 3 S. W. 323.

Sayles' Civ. St., art. 4258b, § 10, provides that penalties for overcharges on freight shall not be recoverable unless the party aggrieved shall give notice thereof in writing "to the railway company, or to the agent demanding or receiving the same." Held, that a notice which was delivered to the successor of the local agent who received the overcharge, and which failed to give data from which the record of the shipment could be found on the company's books, was insufficient. *Sabine & E. T. Ry. Co. v. Cruse*, 83 Tex. 460, 18 S. W. 755.

The freight was consigned to Day Hooks. The account for overcharge was made out in favor of W. W. Cruse. A new station agent represented the railway company. The freight was delivered August, 1889; the claim for overcharge May 30, 1890. The agent could find no bill in name of Cruse, and the claim was rejected, the agent not knowing that it was for overcharge in the shipment for Day Hooks.

Held, the facts failed to show such notice to the defendant company as is required by statute prior to recovery of penalty. *Sabine, etc., R. Co. v. Cruse*, 83 Tex. 460, 18 S. W. 755.

The statute requires that notice be given to "the railway company or to the agent demanding or receiving the same," and when notice is given to a station agent at the place where the overcharge is claimed to have been demanded or received, then if not given to the agent who demanded or received it the necessity for identifying the transaction would be more apparent. One claiming a penalty given by statute should show at least that the facts exist which entitle him to the penalty, and it seems that when it is claimed that notice, in cases based on the statute in question, was given to an agent who is not to be deemed the agent of the railway company generally, it should be shown that the notice was given to the agent who demanded or received the overcharge; for the statute in plain words requires this, and declares that the penalty shall not be recoverable unless notice be given to the railway company; and by the latter is meant some officer of the company clothed with general powers. *Sabine, etc., R. Co. v. Cruse*, 83 Tex. 460, 18 S. W. 755.

Under Sayles' Civ. St., art. 4258b, § 10, providing that penalties for overcharges on freight shall not be recoverable unless the party aggrieved shall give notice thereof in writing to the railway company or to the agent demanding or receiving the same, if notice is given to a station agent at the place where the overcharge is claimed to have been demanded or received, if not given to the agent who demanded or received it, but to his successor, the necessity for identifying the transaction would be more apparent. One claiming the statutory penalty should show at least that the facts exist which entitle him to the penalty, and when it is claimed that

notice was given to an agent who is not to be deemed the agent of the railway company generally, it should be shown that the notice was given to the agent who demanded or received the overcharge, as the statute requires that notice be given to some officer of the company clothed with general powers. *Sabine & East Tex. Ry. Co. v. Cruse*, 83 Tex. 460, 18 S. W. 755.

The purpose of notice and of giving time for a railway company to refund an overcharge evidently was to enable the company to ascertain whether an overcharge had been made, and to enable it to do so the notice should so identify the transaction that it could be investigated. *Sabine, etc., R. Co. v. Cruse*, 83 Tex. 460, 463, 18 S. W. 755.

The notice required to be given by a shipper to a railroad company for "overcharge" for freight by *Sayles' Civ. St.*, art. 4258b, § 10, before he can bring suit for the penalty provided in articles 4257, 4258, limiting rates to be charged for freight, and prohibiting discrimination in rates, is required only where the overcharge results from charging more than the maximum statutory rate. *Texas, etc., R. Co. v. Langsdale* (Civ. App.), 30 S. W. 681 (see 88 Tex. 513).

Notice to a railroad company of an overcharge in freight rates need not be given as a prerequisite to recovery of statutory penalty for unjust discrimination, where the overcharge does not exceed the maximum rate fixed by law. *Texas, etc., R. Co. v. Langsdale* (Civ. App.), 30 S. W. 681 (see 88 Tex. 513).

The notice must be given in writing at least twenty days before instituting suit. *Missouri Pac. R. Co. v. Parkhurst*, 3 App. Civ. Cases, § 159.

**(b) Notice and Claim Unaccompanied by Original Bill of Lading.**

One may recover the penalty for overcharge on freight prescribed by

Rev. St. art. 4258, though his claim for overcharge was not accompanied by the original bill of lading and expense bill, as stipulated in the expense bill, as such a stipulation is unreasonable. *Missouri Pac. Ry. Co. v. Rains*, 3 Willson, Civ. Cas. Ct. App. § 68.

Provision in expense bill delivered by railroad to shipper, requiring claim for overcharge to be accompanied by original bills of lading and expense bill, is unreasonable; hence, service of notice and claim of overcharge on freight unaccompanied by such original bills of lading and expense, is sufficient under the statute. *Missouri Pac. R. Co. v. Rains*, 3 App. Civ. Cases, § 66.

**(4) Notice of Unjust Discrimination.**

No notice is required to be given to a railroad company in cases of unjust discrimination in freight charges. *Woodhouse v. Rio Grande R. Co.*, 67 Tex. 416, 419, 3 S. W. 323.

The word "willfully" carries the idea, when used in connection with an action forbidden by law, that the act must be done knowingly or intentionally—that with knowledge the will consented to, designed and directed the act. When intention, design or knowledge, at the time an act is done, is an element essential to liability for the act, to require notice subsequently to be given would be but to require the doing of a useless thing. That the law intends such a notice can never be presumed in the absence of language clearly so declaring. *Woodhouse v. Rio Grande R. Co.*, 67 Tex. 416, 419, 3 S. W. 323.

**(5) Change of Rates.**

Article 4258b, § 7, Rev. Stat., prohibiting discrimination in freight rates, was not designed to prevent changes in the freight rates. *New York, etc., R. Co. v. Gallagher*, 79 Tex. 688, 15 S. W. 694.

**4. Measure of Damages.**

In a suit for a penalty for overcharge



by a carrier, expenses of a trip with a dray wagon to the depot for the goods may be allowed as damages, but not the expense of a trip before the bill of lading had been properly indorsed. *Gulf, Colorado & S. F. Ry. Co. v. Loonie*, 84 Tex. 259, 19 S. W. 385.

As expenses naturally contemplated in the shipment of goods, should be included that of the consignee providing means for receiving the freight and taking it to his place of business. Expense of wagons and teams sent for freight and not delivered is properly included in damages, if the freight be unlawfully withheld; but it seems that expenses of but one journey by the wagons and teams to the depot of delivery should be allowed. *Gulf, etc., R. Co. v. Loonie*, 84 Tex. 259, 19 S. W. 385.

**Switching Charge.**—In an action against a carrier for local freight overcharges, it was proper to award plaintiffs recovery of switching charges the carrier paid another road in running over its yard to connect the cars with a third road over which they were to be shipped; it appearing that the charge was in excess of the prescribed rate on the shipment. *Timpson & N. W. Ry. Co. v. Sanford & Morris*, 46 Tex. Civ. App. 636, 103 S. W. 432.

## 5. Recovery.

### a. Jurisdiction and Venue.

Under Batts' Ann. Civ. St. 1895, art. 4577, declaring that the penalties provided in the chapter of which it is a part shall be recovered in suit brought in the proper court having jurisdiction thereof in Travis county, or in any county to or through which such railroad may run, etc., does not relate to jurisdiction, but to venue, and hence a court in a county other than Travis, and through which defendant railroad company does not run, has jurisdiction of an action for a penalty if defendant does not file a plea of privilege to be sued in some other county. (Civ. App.) *San Antonio & A. P. Ry. Co. v.*

*Stribling*, 86 S. W. 374, judgment modified (Sup.) 89 S. W. 963.

### b. Limitation of Actions.

Section 3203, Rev. Stat., declaring that actions for debt shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterwards, applies to a suit to recover the penalty of \$500 prescribed for an overcharge on freight. *Davidson v. Missouri Pac. R. Co.*, 3 App. Civ. Cases, § 173.

### c. Parties.

Under art. 4258, Rev. Stat., the party aggrieved has the right to sue for and recover a penalty for overcharge of freight in his own name. *Missouri, etc., R. Co. v. Parkhurst*, 3 App. Civ. Cases, § 159.

Article 4258, Rev. Stat., expressly gives the party aggrieved the right to sue for penalty for overcharge on freight. *Davidson v. Missouri Pac. R. Co.*, 3 App. Civ. Cases, § 173.

### d. Pleading.

#### (1) Petition.

In action to recover penalty for overcharge on freight prescribed by art. 4257, Rev. Stat., facts must be alleged which show such overcharge. *Dwyer v. G. C. R. & S. F. R. Co.*, 3 App. Civ. Cases, § 79.

A petition which substantially alleges that the carrier charged and collected a greater rate for the use of the car than was fixed or authorized by law, is sufficient as against a general demurrer. *St. Louis, etc., R. Co. v. Rutherford*, 43 Tex. Civ. App. 544, 545, 96 S. W. 73.

In an action to recover penalty for overcharge on freight petition which does not show that the amount of freight demanded and received was in excess of legal rates and which does not allege distance freight was carried, is insufficient. *Dwyer v. G. C. & S. F. R. Co.*, 3 App. Civ. Cases, § 79.

In an action against two railroads jointly to recover a forfeiture under

Rev. St. § 4258, for an overcharge of freight, an allegation that defendants' business relations were wholly within their knowledge, and that they had concluded to secrete the same to defraud plaintiff and other shippers of freight, is sufficiently full and specific. *International & G. N. R. Co. v. Pichard*, 1 White & W. Civ. Cas. Ct. App. § 431.

In such suit it is not necessary to charge that defendants bore any business relation to each other. *I. & G. N. R. Co. v. Pichard*, 1 App. Civ. Cases, § 427.

Where the gist of the action is an alleged overcharge of freight, and that defendants acted together in committing the injury, it is immaterial whether their action was the result of fraud, combination or collusion, and therefore allegations of these would be surplusage. *I. & G. N. R. Co. v. Pichard*, 1 App. Civ. Cases, § 427.

The allegations in the petition, and which were sufficient, were that the defendant company had charged plaintiff 12½ cents per 100 pounds freight for a carload of lumber from Houston to Wharton, Texas, while it charged one McCoy but 8 cents per 100 pounds for a carload of lumber at or about the same date. *New York, etc., R. Co. v. Gallaher*, 79 Tex. 685, 15 S. W. 694.

**Allegation That Shipments of "Like Quantity."**—In suit to recover penalty for discrimination in freight rates, allegation that freight shipped for each party named was "one car load of lumber," alleges that shipments were of "like" quantity. *New York, etc., R. Co. v. Gallaher*, 79 Tex. 685, 690, 15 S. W. 694.

**Allegation of Weight.**—In an action under Sayles' Civ. St. art. 4258b, § 10, to recover for overcharges on freight, the absence of an allegation of the weight of the freight was fatal to the petition. *Sabine & E. T. Ry. Co. v. Cruse*, 83 Tex. 460, 18 S. W. 755.

Sayles' Civ. St. art. 4258a, § 3, makes a railroad company liable for a penalty

where it collects greater freight charges than those stipulated in the bill of lading. Held, in an action for a penalty for such overcharge on a bill of lading, which provided, "weight and classification subject to correction," that plaintiff must allege and prove that the freight charges specified therein were based on the actual weight of the freight. *Gulf, C. & S. F. Ry. Co. v. Loonie*, 84 Tex. 259, 19 S. W. 385, following *Sabine & E. T. Ry. Co. v. Cruse* (1892) 83 Tex. 460, 18 S. W. 755.

**Conclusions of Law.**—An allegation in the petition, in an action against railroad companies for unlawful discrimination between shippers, "that defendants, being railroad corporations, were at the date hereinafter set out, and are now, under the constitution and laws of the state of Texas, prohibited from willfully and unjustly discriminating in their rates and charges for the transportation of any freight, against any person or place, and any such discrimination is unlawful, and subjects any railroad corporation so doing to a penalty of \$500," is not an allegation of fact, but a conclusion of law, and should have been stricken out as such, but the refusal to do so was harmless error. *New York, T. & M. Ry. Co. v. Gallaher*, 79 Tex. 685, 15 S. W. 694.

## (2) Answer.

**Unintentional Overcharge.**—See ante, "Liability for Penalty," VII, G, 3; "Willfulness as Element—Unintentional Extortion," VII, G, 3, b, (2), (c).

## e. Evidence.

### (1) Presumptions and Burden of Proof.

Suit for statutory penalty for withholding freight and overcharge. The bill of lading contained the clause, "Weight and classification subject to correction." Held, to entitle plaintiff to recover the penalty for overcharge he should have alleged and proved that the weight, etc., in bill of lading was correct, so as to negative the correctness of the demand for freight in ex-

cess of that named in the bill of lading. *Gulf, etc., Ry. Co. v. Loonie*, 84 Tex. 259, 19 S. W. 385.

In suit for penalty for overcharge by carrier for transporting animals, there can be no recovery in absence of testimony as to weight of animals. *Sabine, etc., R. Co. v. Cruse*, 83 Tex. 460, 462, 18 S. W. 755.

**Proof That Shipment Domestic.**—In a suit against a carrier to recover the penalty for overcharges consisting in the excess of the interstate rate over the commission rates of Texas, the burden of proving that the shipment was a domestic shipment was on the plaintiff. *Gulf, C. & S. F. Ry. Co. v. Fort Grain Co.*, 72 S. W. 419, 73 S. W. 845.

#### (2) Admissibility.

In a suit for penalty for discrimination in freight rates under art. 4258b, § 7, Rev. Stat., involving two shipments, evidence to show that between dates of such shipments there had been no change by company, was not irrelevant. *New York, etc., R. Co. v. Gallaher*, 79 Tex. 685, 689, 15 S. W. 694.

In an action against a railroad company under the statute, to recover the penalty for discriminating in freight charges, it appeared that, on December 12th, plaintiff shipped a car load of lumber, for which defendant charged him 12½ cents per 100 pounds, while the person in whose favor defendant was alleged to have discriminated was charged 8 cents per 100 pounds on a car load of lumber shipped by him on December 8th, from and to the same points. Held, that a letter, written on December 9th, by defendant's freight agent to plaintiff, in which the writer says, "As regards giving rebate on your shipments, I would say that we have published rates on lumber, copies of which are on file with the commissioner of the Texas Traffic Association. As we are obliged by agreement to maintain rates, you will see how utterly impossible it is for us to go into the rebate business,"—is relevant and

admissible, as tending to show that defendant had not changed its freight rates between December 8th and 12th. *New York, T. & M. Ry. Co. v. Gallaher*, 79 Tex. 685, 15 S. W. 694.

**Proof of Execution.**—In an action against two railroad companies for the statutory penalty for overcharging for freight, it was not error to admit in evidence a bill of lading and an expense bill or receipt for freight charges where the execution of the papers by the company's agent was denied under oath and plaintiff's petition was in part founded on them such papers being admissible under Rev. Sts. Art. 1265 without proof of execution. *I. & G. N. Ry. Co. v. Pichard*, 1 White & W. Civ. Cas. Ct. App. § 434.

**Weight and Sufficiency.**—Suit for statutory penalty against appellant railway company for exacting five dollars overcharge for carrying a cow and calf less than fifty miles. The estimated weight stated in bill of lading was 600 pounds. The waybill reserved the right to correct errors. On trial there was no testimony to the weight of the animal from which it could be ascertained whether an overcharge in fact had been made. In absence of such testimony, the penalty should not have been imposed. *Sabine, etc., R. Co. v. Cruse*, 83 Tex. 460, 18 S. W. 755.

#### f. Variance.

Under an allegation that defendant railroad company unjustly discriminated against plaintiff in charging him \$50 for a shipment, while it charged others for similar shipments its published rate, \$35, plaintiff can not recover for unjust discrimination, consisting in refusing plaintiff a rebate upon its established rate which it allowed others. *Texas & P. Ry. Co. v. Langsdale* (Civ. App.), 30 S. W. 681.

Under such allegation, he can not recover statutory penalty upon proof that company did not allow him a rebate on its established rate, as it did to others. *Texas, etc., R. Co. v. Langsdale* (Civ.

App.), 30 S. W. 681, 682 (see 88 Tex. 513).

#### g. Instructions.

In action against carrier for excess of freight above agreed rate, a charge that defendant could not charge more than its local rate could not have injured defendant where agreed rate and local rate were the same. *Galveston, etc., R. Co. v. Bowman* (Civ. App.), 25 S. W. 140.

In a suit for penalty for discrimination in freight rates, no injury can result to a carrier from failure to define "unjust." *New York, etc., R. Co. v. Gallaher*, 79 Tex. 685, 690, 15 S. W. 694.

In an action under the statute to recover a penalty against a railroad company for discrimination in rates, an instruction that if the jury believe that defendant charged plaintiff a greater rate than it did the other shipper, "for a like quantity of freight of the same class, from the same point to the same point, and in the same direction, and that such charge was unjust and willfully made, then such charge would be unlawful, and you will find for plaintiff," is not erroneous, in failing to define what would be an "unjust" charge as applied to the case. *New York, T. & M. Ry. Co. v. Gallaher*, 79 Tex. 685, 15 S. W. 694.

#### h. Verdict.

Where carriers sued jointly to recover a penalty for discrimination in rates do not attempt to deny joint liability, verdict in favor of plaintiff is against both jointly. Such a verdict is not indefinite and unintelligible. *New York, etc., R. Co. v. Gallaher*, 79 Tex. 685, 691, 15 S. W. 694.

### H. PENALTY FOR REFUSAL TO DELIVER FREIGHT.

#### 1. Statutory Provisions.

##### a. Constitutionality and Nature.

The statute imposing a penalty equal to the freight charges due, for every day freight is held after tender

of payment of charges as shown by the bill of lading, is constitutional. *Atchison, D. & F. S. R. Co. v. Roberts*, 3 Tex. Civ. App. 370, 22 S. W. 183; *Houston, etc., R. Co. v. Harry & Bros.*, 63 Tex. 256.

This act has been declared by the supreme court to be an exercise of the police power of the state, and that it is not in conflict with the federal constitution. *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 578, 583, 10 S. W. 1001; *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 551, 21 S. W. 554.

Gen. Laws, p. 35, entitling an owner of merchandise to recover the amount of freight charges for every day the railroad company refuses to deliver after tender of freight, is not repugnant to Const. art. 16, § 24, requiring fines and penalties to be appropriated for laying out public roads, as the section refers only to fines imposed as penalties for crimes or such as arise from forfeited bail bonds. *Houston & T. C. Ry. Co. v. Harry*, 63 Tex. 256.

The fact that Rev. Civ. Stat., art. 4258a, applies only to railroads, and not to other carriers, does not render it class legislation. *Gulf, etc., R. Co. v. McCown* (Civ. App.), 25 S. W. 435.

**Both Remedial and Penal.**—Act of May 6, 1882, denouncing penalty for refusal to deliver freight is both remedial and penal. *Schloss v. Atchison, etc., Ry.*, 85 Tex. 601, 603, 22 S. W. 1014. See *Houston, etc., R. Co. v. Harry & Bros.*, 63 Tex. 256.

The Act of May 6, 1882 (Sayles' Civ. Stat., arts. 4258a1, 4258a2, 4258a3, as to railway companies, is a penal statute. In the first section it declares certain acts to be unlawful; in the second, it enjoins a duty; and in the third, it denounces against the railway company a penalty for violating the previous sections. In the shipper's interest the act is remedial. *Schloss v. Atchison, etc., R. Co.*, 85 Tex. 601, 22 S. W. 1014.

**b. Repeal.**

Sayles' Civ. St., art. 4258a, prescribing a penalty for refusing to deliver goods upon payment, or tender of the freight charges due, as shown by the bill of lading, was not repealed by Act April 2, 1887 (Sayles' Civ. St. art. 4227), providing a penalty for failure to deliver property at the appointed time without reference to the payment or tender of freight charges. *St. Louis, A. & T. Ry. Co. v. McKee*, 4 Willson, Civ. Cas. Ct. App. § 8, 15 S. W. 45.

**c. Construction.**

This statute, Sayles' Civ. Stat., art. 4258a, must be construed like any other criminal statute, and unless a defendant sued for the penalty comes strictly within its terms he can not be an offender against it. *Gulf, etc., R. Co. v. McCrown* (Civ. App.), 26 S. W. 745.

There is no ambiguity in the act of May 6, 1882, and its meaning must be determined by its own language. There is no room for construction, and no need to resort to extraneous facts for its interpretation. *Schloss v. Atchison, etc., R. Co.*, 85 Tex. 601, 22 S. W. 1014.

**d. Statute Part of Contract.**

Where railway company and shipper contracted under the statute imposing a penalty for refusal to deliver goods after tender of the freight, etc., it will be held liable, in case of failure to comply with its terms, in a sum to be ascertained as provided by it, as if the statute had been made a part of the contract. *Houston, etc., R. Co. v. Harry & Bros.*, 63 Tex. 256.

Parties contract with reference to the law, and may discharge themselves from liability by complying with their contracts; and if they fail to do this, it may be held that they have agreed, in case of such failure, to pay the sum to be ascertained as provided by the statute, as fully as

though the provisions of the statute had been made, in express terms, a part of the contract. If, however, the statute could not be deemed strictly remedial, it would not alter the rule. *Houston, etc., R. Co. v. Harry & Bros.*, 63 Tex. 256.

**2. Liability for Penalty.****a. Carriers Liable.****(1) Carrier Issuing or Ratifying Bill of Lading.**

See post, "Issuance or Ratification of Bill of Lading," VII, H, 2, b, (1), (a).

**(2) Carriers of Interstate Commerce.**

The penalty affixed by the Texas statute for a refusal of a railroad company to deliver freight upon tender of the charges shown by the bill of lading applied as well to interstate as to domestic shipments, and it is not a usurpation of the power conferred to congress by the constitution of the United States to regulate commerce between the states. *Armstrong v. Galveston, etc., R. Co.*, 92 Tex. 117, 121, 46 S. W. 33, reversing 43 S. W. 614; *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 10 S. W. 1001.

The act of May 6, 1882, 2 Sayles' Civ. Stat., art. 4258a, is not a regulation of interstate commerce within the meaning of the prohibition contained in the federal constitution, but is more properly classed as a police regulation which the state has the power to make, is in the nature of a police regulation, and is not in conflict with the interstate commerce act. *Gulf, etc., R. Co. v. Nelson*, 4 Tex. Civ. App. 345, 23 S. W. 732, following *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 10 S. W. 1001; *Dillingham v. Fischl*, 1 Tex. Civ. App., 546, 21 S. W. 554; *Gulf, etc., R. Co. v. McCown* (Civ. App.), 25 S. W. 435, 436; *Ft. Worth, etc., R. Co. v. Lillard & Co.*, 4 App. Civ. Cases, § 83, 16 S. W. 654; *Texas, etc., R. Co. v. Clark*, 4 Tex. Civ. App. 611, 614, 23 S. W. 698.

The case of *Gulf, etc., R. Co. v.*

Dwyer, 75 Tex. 572, 10 S. W. 1001, it is true grew out of facts which occurred prior to the passage of the act of congress, but the opinion was not placed upon that ground; and in the case of *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 21 S. W. 554, it was followed as applying to a case originating since that time. *Gulf, etc., R. Co. v. Nelson*, 4 Tex. Civ. App. 345, 347, 23 S. W. 732.

**Conflict between Texas Statute and Interstate Commerce Act.**—In case of conflict between the Texas statute act of March 6, 1882, 2 Sayles' Civ. Stat., art. 4258a, prescribing a penalty for the refusal of a common carrier to deliver freight after the payment or tender of payment, of the charges due thereon, as shown by the bill of lading, and the interstate commerce act, the latter would prevail. *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 21 S. W. 554; *Gulf, etc., R. Co. v. Nelson*, 4 Tex. Civ. App. 345, 347, 23 S. W. 732; *Houston, etc., Railway v. Peters*, 15 Tex. Civ. App. 515, 519, 40 S. W. 429, affirmed in 93 Tex. 642, no op.; *St. Louis, etc., R. Co. v. Carden* (Civ. App.), 34 S. W. 145, 146. For former appeal, see *Gulf, etc., R. Co. v. McCown* (Civ. App.), 26 S. W. 745. But see *Gulf, etc., R. Co. v. McCown* (Civ. App.), 25 S. W. 435, 436.

When a carrier has entered into a contract with connecting lines for joint through rates in compliance with the interstate commerce law, and through the act of one of these lines has become a party to a contract for a less rate than that thus presented, the rate agreed upon under the act of congress should be collected by the delivering line, regardless of the bill of lading, and for so doing it could not be made liable under our statute. *Gulf, etc., R. Co. v. Nelson*, 4 Tex. Civ. App. 345, 349, 23 S. W. 732, following and approving *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 21 S. W. 554.

In an action against a carrier to recover the statutory penalty for refusing to deliver flour shipped from St. Louis, Mo., to Brenham, Tex., directed to plaintiff by the bill of lading, it appeared that the company of which the purchase was made, acting for plaintiff, delivered the car to the St. L., A. & T. road, a common carrier into Texas, making connections with the G., C. & S. F. road and defendant road, both leading to Brenham. The bill of lading stated that the freight was to be carried via the G., C. & S. F., on which the established rate on flour was 40 cents per 100 pounds, but it was turned over to the defendant, on which the established rate was 53 cents, and by defendant carried to Brenham. On the arrival of the car, plaintiff offered defendant the amount named in the bill of lading,—40 cents per 100,—which was declined, and the amount of its established rate demanded, which plaintiff refused to pay. Held, that the shipment was interstate commerce, and as defendant would have been answerable under the acts of congress requiring an established rate for freight, and making it a misdemeanor to accept more or less than such amount, if it had accepted less than 53 cents, the statute of Texas imposing a penalty for a refusal to deliver freight on tender of the charges specified in the bill of lading would not apply. *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 21 S. W. 554. See *Texas, etc., R. Co. v. Clark*, 4 Tex. Civ. App. 611, 614, 23 S. W. 698.

In such case the penalty provided by statute for a failure to deliver merchandise upon tender or payment of freight charges shown by the bill of lading, can not, in this case, be enforced against the railway. *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 21 S. W. 554.

It is immaterial whether the defendant company knew or did not know that the receiving carrier had con-

tracted to transport the freight at 40 cents per 100 pounds. It was required by statute to receive the cars of connecting roads, and under its contract with the connecting road was under obligation to carry its freight at an agreed rate, which rate could not be charged except by violating the federal statute. Therefore it could not be said to have adopted and ratified the 40 cents bill of lading, even if it knew that that was the rate agreed on. *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 21 S. W. 554.

The act of congress requires that the schedule of rates be agreed upon and published, and denounces penalties upon any carrier who receives more or less than schedule rates. The statute provides that any carrier who shall refuse to deliver freight upon tender of payment of the freight charges for each day's delay. This state law demands that the carrier should do a thing that is forbidden by a constitutional law of congress, and that law is paramount to any state law when the provisions of the latter are antagonistic to those of the former. *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 21 S. W. 554.

### (3) Connecting Carriers.

See ante, "Carriers of Interstate Commerce," VII, H, 2, a, (2); post, "Issuance or Ratification of Bill of Lading," VII, H, 2, b, (1), (a).

The statute of Texas (Act May 6, 1862), imposing penalty for failure to deliver freight on tender of charges specified in bill of lading, does not apply where the schedule freight rate of connecting line over which freight was actually shipped was different than rate agreed on in bill of lading and chargeable under rate of carrier named therein as connecting carrier. *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 552, 21 S. W. 554.

### (4) Carrier in Hands of Receiver.

Under the statute (2 Sayles' Civ. Stat., art. 4258a, § 3) imposing a penalty on

railways for the acts of their officers, agents, and employees, for the detention of freight after tender of the freight charges due, as shown by the bill of lading, a company is not liable to the penalty for such detention where it occurred while the road was in the hands of a receiver. *Missouri, etc., R. Co. v. Stoner*, 5 Tex. Civ. App. 50, 23 S. W. 1020.

### (5) Freight Detained by Connecting Line.

Rev. St. 1895, art. 4496, provides that, in case of the refusal to deliver property shipped, the carrier "shall pay the party aggrieved all damages sustained with costs of suit, and \* \* \* shall in addition pay to such party special damages at the rate of five per cent per month on the value of the same at the time of shipment for the negligent detention thereof beyond the time necessary for its transportation." Held, that the provision for special damages for detention does not apply in an action to recover the value of a consignment of property not delivered at all, but converted by the carrier. *Missouri, K. & T. Ry. Co. of Texas v. C. H. Rines & Co.*, 84 S. W. 1092, 37 Tex. Civ. App. 618.

### (6) Property Converted by Carrier.

A railroad company is not liable to the penalty prescribed by article 4258a, § 3, for detaining freight after payment or tender of the charges as shown by the bill of lading, when the freight is detained by a connecting line to which it has been delivered together with the bill of lading. *Gulf, etc., R. Co. v. Adair*, 4 App. Civ. Cases, § 36, 14 S. W. 1076.

### b. Facts and Conditions Imposing or Relieving from Liability.

#### (1) Respecting Bill of Lading.

##### (a) Issuance or Ratification of Bill of Lading.

This statute applies only to contracts which the defendant carrier has itself executed, or has voluntarily

made its own by authorization or adoption. *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 10 S. W. 1001; *Gulf, etc., R. Co. v. Dwyer*, 84 Tex. 194, 19 S. W. 470; *Miller & Co. v. Texas, etc., R. Co.*, 83 Tex. 518, 18 S. W. 954; *Gulf, etc., R. Co. v. Nelson*, 4 Tex. Civ. App. 345, 348, 23 S. W. 732.

The act "only applies when the railway company that is sought to be charged in damages has either itself executed the bill of lading or has authorized another company to execute, or has ratified it by some voluntary act on its part." *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 10 S. W. 1001; *Gulf, etc., R. Co. v. Dwyer*, 84 Tex. 194, 189, 19 S. W. 470.

Laws 17th Leg. Sess., p. 35, imposing a penalty on a railroad company for refusing to deliver freight on payment or tender of the charges as shown by the bill of lading, only applies to a railroad when it has itself issued a bill of lading or authorized another company to do so or has ratified a bill of lading issued by another road. *Gulf, Colorado & Santa Fe Railway Co. v. Dwyer*, 75 Tex. 572, 18 S. W. 109.

And unless the evidence shows that the carrier refusing to deliver goods to the consignee upon payment or tender of payment of the freight specified in the bill of lading, either executed the bill of lading or ratified it, no recovery can be had under the statute. *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 10 S. W. 1001; *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 552, 21 S. W. 554.

If the carrier at the point of destination has either executed the bill of lading or has authorized its execution, he is presumed to know its contents, and he can not shield himself from the penalty of the statute for a refusal to deliver the goods upon tender of the freight as shown by such bill, by claiming that there has been a mistake. But in a case in which the

bill of lading has been given without his authority mistakes are likely to occur, and it was not intended to punish the last carrier when he refuses to deliver the goods until he has the means of protecting himself from the consequences of such mistakes. *Gulf, etc., R. Co. v. Dwyer*, 84 Tex. 194, 200, 19 S. W. 470.

An acceptance of freight by a railway company from a connecting company, being compulsory under our statutes, could not be deemed a ratification of the bill of lading. *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 10 S. W. 1001; *Gulf, etc., R. Co. v. Dwyer*, 84 Tex. 194, 198, 19 S. W. 470.

Rev. St. art. 4251, obliges railroad companies, for a reasonable compensation, to draw over their road the merchandise and cars which may enter and connect with their railroad. Plaintiff showed that the bill for his goods was a through bill of lading, that the delivering company's line did not reach the place of shipment, but that rates were made over its line and connecting lines to and from that point; that said company issued an expense bill, when the goods arrived, for the exact amount called for by the bill of lading; that the car containing the goods came through from the place of shipment. Held, that these facts were not enough to prove conclusively a contract of agency or partnership between the companies, nor a ratification by the delivering company, so as to bind it to the freight rate named in the bill of lading. *Ft. Worth & D. C. Ry. Co. v. Johnson*, 5 Tex. Civ. App. 24, 23 S. W. 827, following *Gulf, etc., R. Co. v. Baird*, 75 Tex. 256, 265, 12 S. W. 530; *Miller & Co. v. Texas, etc., R. Co.*, 83 Tex. 518, 520, 18 S. W. 954; *Ft. Worth, etc., R. Co. v. Williams*, 77 Tex. 121, 125, 13 S. W. 637; *Ft. Worth, etc., R. Co. v. Fuller*, 3 Tex. Civ. App. 340, 22 S. W. 1006.

Under Rev. St. art. 4251, making it obligatory on a railroad company



in the state, without delay, to carry over its road cars, freight, etc., received from any connecting company, a connecting company it not bound by a through bill of lading, under which it receives freight, in ignorance of its terms, and issued by the original carrier, who had no authority to contract for it, and is therefore not liable upon its refusal to deliver goods on tender of payment of charges specified in such a bill of lading, under Laws 17th Leg. Sess., p. 35, imposing a penalty on railroad companies for refusing to deliver freight upon payment or tender of the charges shown in the bill of lading. *Gulf, C. & S. F. Ry. Co. v. Dwyer*, 75 Tex. 572, 12 S. W. 1001, 16 Am. St. Rep. 926.

In an action to recover the statutory penalty from a railroad company for refusing to deliver certain freight on tender of the charges shown in the bill of lading, it appeared that the freight was received for shipment, and the bill of lading executed by another road; that defendant, on receiving the goods from the connecting line, paid the charges as shown by the waybill, and that the charges on the bill of lading were less than those on the waybill, and that, when plaintiff demanded the goods, defendant's agent offered to deliver it on payment of the charges specified in the bill of lading, provided plaintiff would surrender the bill of lading, and execute a receipt to defendant for the overcharge, that defendant might collect it of the connecting line. Held, that the statute only applies to parties to the original bill of lading, and the evidence did not establish the authorization by defendant of the execution of the bill of lading or its subsequent ratification. *Gulf, C. & S. F. Ry. Co. v. Dwyer*, 84 Tex. 194, 19 S. W. 470.

The receipt of freight by one carrier from another, to forward to point of destination, does not bind the receiving carrier to the terms of the con-

tract made by the first carrier with the shipper, so as to make it liable to penalty for refusal to deliver the freight on such terms; such terms not being known by the receiving carrier, and there being no partnership relation between the carriers. *Missouri, K. & T. Ry. Co. v. Stoner*, 5 Tex. Civ. App. 50, 23 S. W. 1020.

In action against a railroad for penalty for failure to deliver freight on tender of charges, it is error to charge in effect that whenever one carrier receives goods from another destined to a point on its line without making a new contract, it thereby becomes party to and bound by contract made by initial carrier with shipper. *Missouri, etc., R. Co. v. Stoner*, 5 Tex. Civ. App. 50, 53, 23 S. W. 1020.

Where goods are received from a connecting carrier and petition in action to recover penalty for refusal to deliver freight charges partnership between original and connecting carrier, facts set forth in the charge are admitted in evidence to sustain this allegation and if the partnership be established, each of the carriers will be bound by the contract as made. *Missouri, etc., R. Co. v. Stoner*, 5 Tex. Civ. App. 50, 53, 23 S. W. 1020.

In a suit under Rev. Civ. St. art. 4258a, prescribing a penalty against carriers for withholding goods after tender of the freight due thereon, there can be no recovery from a connecting carrier in the absence of evidence that it was, in partnership or otherwise, connected with the initial carrier; and the fact that it received and transmitted the freight and collected the charges is not a ratification of the act of the initial carrier. *Wichita Val. Ry. Co. v. Nance*, 6 Tex. Civ. App. 34, 25 S. W. 47.

In action for penalty for withholding goods shipped over connecting lines of railroad after tender of freight due thereon, as shown by bill of lading, plaintiff must show that deliver-

ing carrier is in some way bound by act of initial carrier in executing bill of lading. *Wichita Val. R. Co. v. Nance*, 6 Tex. Civ. App. 34, 35, 25 S. W. 47; *Miller & Co. v. Texas, etc., R. Co.*, 83 Tex. 518, 18 S. W. 954.

An affirmance of the original contract of shipment by the connecting carrier can not be presumed where it is bound by statute to receive and transport goods without delay upon tender by connecting line. *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 582, 10 S. W. 1001. See the title **CONNECTING CARRIERS**.

Where, under the federal law, a carrier was bound to carry freight of connecting line at an agreed rate, and the Texas law required it to receive cars of such carrier when tendered, the receiving and delivering of freight under such conditions does not ratify the initial carrier's contract for through shipment at fixed rate. *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 552, 21 S. W. 554.

**(b) Form and Recitals of Bill of Lading.**

**aa. In General.**

The bill of lading to come strictly within the terms of the statute, must show both the rate of freight and the number of pounds, in order to show the amount of freight due. *Gulf, etc., R. Co. v. McCown* (Civ. App.), 26 S. W. 745. The reasoning of the supreme court of Texas in the case of *Schloss v. Atchison, etc., R. Co.*, 85 Tex. 601, 22 S. W. 1014, leads to the same conclusion; and the very question has been so decided by the court of civil appeals for the fourth supreme judicial district in the cases of *Texas, etc., R. Co. v. Wood* (Civ. App.), 23 S. W. 744; *Alderson v. Gulf, etc., R. Co.* (Civ. App.), 23 S. W. 617, affirmed in 93 Tex. 678, no op.; *Johnson v. Ft. Worth, etc., R. Co.*, 9 Tex. Civ. App. 619, 621, 30 S. W. 260; *Atchison,*

*etc., R. Co. v. Roberts & Co.*, 3 Tex. Civ. App. 370, 22 S. W. 183.

It must contain both factors of the operation, or state in some manner the freight charges due. This is so even if the number of pounds of freight was purposely omitted or erased in order to evade the statute. The statute is not violated. *Gulf, etc., R. Co. v. McCown* (Civ. App.), 26 S. W. 745.

The amount of the penalty is to be determined by the amount of freight charges due, as shown by the bill of lading, and when the bill of lading does not show that any freight charges are due, there can be no recovery. In this case, the plaintiff stated in her petition that all freight charges had been prepaid. *Alderson v. Gulf, etc., R. Co.* (Civ. App.), 23 S. W. 617, affirmed in 93 Tex. 678, no op.; *Schloss v. Atchison, etc., R. Co.*, 85 Tex. 601, 22 S. W. 1014.

The statute basing the amount of penalty to be recovered on the amount of freight designated in the bill of lading, the court can not extent the scope of its provisions. *Texas, etc., R. Co. v. Wood* (Civ. App.), 23 S. W. 744, 745.

**bb. Reference to Extraneous Evidence or Data.**

If the bill of lading contain data, or refer to some other instrument from which data could be obtained, by which the amount due could be determined, it would no doubt be sufficient. *Schloss v. Atchison, etc., R. Co.*, 85 Tex. 601, 22 S. W. 1014; *Johnson v. Ft. Worth, etc., R. Co.*, 9 Tex. Civ. App. 619, 621, 30 S. W. 260; *Gulf, etc., R. Co. v. McCown* (Civ. App.), 26 S. W. 745.

Amount of statutory penalty recoverable against a railroad company for detention of freight is based on amount of freight as per bill of lading, and extraneous evidence can not be resorted to unless the bill of lading re-

fers to it. *Texas, etc., R. Co. v. Wood* (Tex. Civ.), 23 S. W. 744.

A shipper can not recover penalty under art. 4258a, Rev. Stat., where the bill of lading states that the rates given are subject to correction and does not state the actual weight of goods. *Johnson v. Ft. Worth, etc., R. Co.*, 9 Tex. Civ. App. 619, 621, 622, 30 S. W. 260.

In action for statutory penalty for detention of freight, an expense account furnished by the company, which showed the amount of the freight, but which was not referred to in the bill of lading, being no part thereof, can not be looked to for evidence of the amount of freight. *Texas, etc., R. Co. v. Wood* (Civ. App.), 23 S. W. 744, following *Schloss v. Atchison, etc., R. Co.*, 85 Tex. 601, 602, 22 S. W. 1014; *Johnson v. Ft. Worth, etc., R. Co.*, 9 Tex. Civ. App. 619, 621, 30 S. W. 260.

Unless the bill of lading contains data or refers to some other instrument from which data can be obtained by which the amount due can be ascertained, such bill of lading can not be said to include the expense account. In absence of such data the expense account is not a part of the bill of lading. *Schloss v. Atchison, etc., R. Co.*, 85 Tex. 601, 22 S. W. 1014.

Bill of lading contemplated by § 280, Rev. Stat., is contract entered into between parties at time goods are delivered, and binds both parties equally. *Schloss v. Atchison, etc., R. Co.*, 85 Tex. 601, 602, 22 S. W. 1014.

The expense account made on the shipment of goods by the carrier, is a bill of particulars of services rendered and expenses paid under the bill of lading, made by the railroad company alone, and as the shipper has no part in making it he is not bound by it. *Schloss v. Atchison, T. & S. F. Ry. Co.*, 85 Tex. 601, 22 S. W. 1014.

The bill of lading must show not only rate per one hundred pounds, but the weight also in order to en-

title the owner or consignee to recover penalty for such refusal. *Gulf, etc., R. Co. v. McCown* (Civ. App.), 26 S. W. 745, reversing *Gulf, etc., R. Co. v. McCown* (Civ. App.), 25 S. W. 435; *Johnson v. Ft. Worth, etc., R. Co.*, 9 Tex. Civ. App. 619, 622, 30 S. W. 260.

A railroad company is liable for the statutory penalty for failure to deliver freight, when the consignee tenders the charges due, calculated on the charge per 100 pounds as stated in the bill of lading, and the "approximate weight" of the shipment as there stated, though this be much less than the real weight. *St. Louis Southwestern Ry. Co. v. Carden* (Civ. App.), 26 S. W. 747.

A bill of lading which, although specifying the rate per 100 pounds, and providing that the rates therein made are subject to correction, does not in terms purport to state the true weight, but merely refers by its number to the car in which the freight is shipped, does not contain sufficient data for a determination of the true freight charges, and will not support a suit by the shipper to recover the penalty prescribed by Rev. Civ. Stat., art. 4258a, where a carrier refuses to deliver goods upon the payment or tender of the freight due, "as shown by the bill of lading." *Johnson v. Ft. Worth & D. C. Ry. Co.*, 9 Tex. Civ. App. 619, 30 S. W. 260.

There can be no recovery of the statutory penalty for detaining goods after the amount of freight has been tendered, where there are no figures or data given in the bill, and none referred to, from which the amount of freight can be calculated. *Texas & P. R. Co. v. Wood* (Civ. App.), 23 S. W. 744.

A bill of lading which states the rate per 100 pounds only without giving the number of pounds of freight, does not show the freight charges due, within the meaning of *Sayles'*

Civ. St. art. 4258a, which imposes a penalty on a railway company if it or its agents refuse to deliver to the owner or consignee any freight on the tender of the "freight charges due as shown by the bill of lading." *Gulf, C. & S. F. Ry. Co. v. McCown* (Civ. App.), 26 S. W. 745, reversing (Civ. App. 1894), 25 S. W. 435; *Johnson v. Ft. Worth, etc., R. Co.*, 9 Tex. Civ. App. 619, 622, 30 S. W. 260.

**Reference to Published Tariff.**—In *Atchison, etc., R. Co. v. Roberts Co.*, 3 Tex. Civ. App. 370, 22 S. W. 183, the rate did not appear in terms upon the bill of lading, but stated therein to be "subject to the published tariff of the company and its connections." It was held that the published tariff, which was well known to the shipper, should be deemed a part of the bill of lading, which thereby showed the freight charges, within the statutory meaning. Approved by the supreme court in *Schloss v. Atchison, etc., R. Co.*, 85 Tex. 601, 602, 22 S. W. 1014, and see *Johnson v. Ft. Worth, etc., R. Co.*, 9 Tex. Civ. App. 619, 621, 30 S. W. 260.

**cc. Bill Subject to Correction.**

In a suit under Rev. St., art. 4258a, prescribing a penalty against carriers for withholding goods after tender of the freight due thereon, as shown by the bill of lading, where the bill stipulated that the weights named therein are subject to correction, plaintiff must plead and prove that the weights stated in the bill are correct. *Wichita Val. Ry. Co. v. Nance*, 6 Tex. Civ. App. 34, 25 S. W. 47; *Gulf, etc., R. Co. v. Loonie*, 84 Tex. 259, 19 S. W. 385; *Gulf, etc., R. Co. v. Nelson*, 4 Tex. Civ. App. 345, 23 S. W. 732; *Johnson v. Ft. Worth, etc., R. Co.*, 9 Tex. Civ. App. 619, 621, 30 S. W. 260.

A stipulation in a bill of lading, that the weights therein specified are "subject to correction," deprives it of its conclusiveness or finality as to the

sum to be paid. *Gulf, etc., R. Co. v. Loonie*, 84 Tex. 259, 262, 19 S. W. 385; *Gulf, etc., R. Co. v. Nelson*, 4 Tex. Civ. App. 345, 348, 23 S. W. 732; *Johnson v. Ft. Worth, etc., R. Co.*, 9 Tex. Civ. App. 619, 621, 30 S. W. 260; *Sabine, etc., R. Co. v. Cruse*, 83 Tex. 460, 18 S. W. 755.

The clause, "weight subject to correction," makes it necessary that the plaintiff suing for penalty for non-delivery because of additional charges show that he made tender on correct weight. *Gulf, etc., R. Co. v. Nelson*, 4 Tex. Civ. App. 345, 351, 23 S. W. 732.

In such case, it is necessary to allege and prove that the weight stated in the bill is the true weight; in order to establish the fact (the burden to prove which rests upon the plaintiff) that there was an overcharge. *Gulf, etc., R. Co. v. Loonie*, 84 Tex. 259, 262, 19 S. W. 385; *Johnson v. Ft. Worth, etc., R. Co.*, 9 Tex. Civ. App. 619, 621, 30 S. W. 260.

Where, in an action to recover the penalty authorized by Gen. Laws Called Sess. 17th 'Leg., p. 35, for failure to deliver freight on tender of the amount shown to be due by the bill of lading, it was admitted by both parties that the bill contained the words, "Weight subject to correction," and it was claimed by defendant that more was due than tendered, the court erred in charging that the jury could only consider evidence as to the true weight if they believed that such words were in the bill, as the burden of proof was on plaintiff to show that he tendered the full amount. *Gulf, C. & S. F. Ry. Co. v. Nelson*, 4 Tex. Civ. App. 345, 23 S. W. 732.

**dd. Contracts Procured by Fraud, Accident or Mistake.**

The statute of course does not apply to a contract invalid by reason of fraud, accident or mistake in its

procurement. *Gulf, etc., R. Co. v. Nelson*, 4 Tex. Civ. App. 345, 348, 23 S. W. 732.

**(2) Tender of Freight Charges and Demand.**

**(a) In General.**

**Tender under Protest.**—A person shipped goods at a certain through rate, stated in the bill of lading, in care of himself. Afterwards the carrier agreed to deliver to the shipper at an intermediate point, provided the latter would pay the local rate. The local rate was contained in the carrier's published tariff, while the bill of lading was expressly stated as having been made subject to such tariff. Held, that the freight demanded was "shown by the bill of lading," within the meaning of the statute, and that the carrier was therefore liable in damages for each day's retention of the goods after payment of the amount, or tender of payment. *Atchison, T. & S. F. R. Co. v. Roberts*, 3 Tex. Civ. App. 370, 22 S. W. 183.

The fact that such a tender was made under protest did not invalidate it, or excuse the carrier's failure to deliver. *Atchison, T. & S. F. R. Co. v. Roberts*, 3 Tex. Civ. App. 370, 22 S. W. 183.

The tender, though made under protest, was absolute. *Atchison, etc., R. Co. v. Roberts & Co.*, 3 Tex. Civ. App. 370, 377, 22 S. W. 183.

Freight was shipped at Chicago for the city of Mexico, consigned to owner at El Paso, Texas. When the freight reached El Paso the owners demanded it, tendering under protest the freight charges demanded by the railway company, which were as stated in the tariff of charges referred to in the bill of lading. The railway company refused, on the ground that the tender was made under protest. Held, that the bill of lading was for the city of Mexico, and for the balance of the distance at higher

rates, gave no rights to the railway company beyond the earned freights according to its published tariff of charges. *Atchinson, etc., R. Co. v. Roberts & Co.*, 3 Tex. Civ. App. 370, 22 S. W. 183.

**(b) Place.**

No depot was maintained at M., and it was the custom to deliver freight for that place from the depot at T., the conductors of freight trains acting as freight agents at M. Held, that tender of the charges, and demand for the goods by a consignee, could be made at T., where the goods were retained, and the penalty imposed by Sayles' Civ. St., art. 4258a, for refusing to deliver freight on tender of charges, was incurred by refusal to deliver at T. *St. Louis, A. & T. Ry. Co. v. McKee*, 4 Willson, Civ. Cas. Ct. App., § 8, 15 S. W. 45.

**(3) Offer of Third Person to Pay Overcharge.**

Where a carrier is liable for a penalty for refusing to deliver goods unless illegal freight is paid, consignee can not be deprived of his right to recover such penalty by the willingness of a third party to pay the difference between the legal and such illegal freight. *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 550, 21 S. W. 554.

Evidence offered by the defendant, that the shipper offered to hold plaintiff harmless, and to pay the difference between the 40 and 53 cents rate, was inadmissible. Had the difference been paid by the shipper, and then the goods tendered to the consignee upon the payment of the remainder, it may be that from the time of such tender he would have been relieved from liability, but consignee was under no obligation to assist him in relieving himself from liability that he had or might thereafter incur. *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 21 S. W. 554.

**(4) Production of Bill of Lading.**

It seems a fair inference of the statute that the bill of lading should be presented to the delivering carrier, that it might be satisfied of its authenticity as well as the correctness of the freight charges before paying them. *Dwyer v. Gulf, etc., R. Co.*, 69 Tex. 707, 709, 7 S. W. 504.

In an action under Laws 17th Leg. Sess. p. 35, imposing a penalty on a railroad company for refusing to deliver freight upon the payment or tender of the charges shown in the bill of lading, it is not necessary that the bill of lading shall be shown at the time, to make the tender of the charges effectual, unless its production is demanded. *Gulf, C. & S. F. R. Co. v. Dwyer*, 75 Tex. 572, 12 S. W. 1001; *Schloss v. Atchison, etc., R. Co.*, 85 Tex. 601, 22 S. W. 1014.

In such an action it is error to charge that in order to make the demand effectual the shipper must have at the time exhibited his bill of lading. *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 582, 583, 10 S. W. 1001.

Sayles' Civ. St. art. 4258a, § 1, provides that it shall be unlawful for any railroad company, its officers or employees, to demand or receive a greater sum for transporting freight than is specified in the bill of lading. Article 4258a, § 2, provides that it is the duty of railroad companies to deliver to the consignee goods transported by it on payment of the charges as shown in the bill of lading. Article 4258a, § 3, provides that if any such company shall, on tender of the freight charges "due as shown by the bill of lading," refuse to deliver any freight transported by it, and on which such charges are due, it shall be liable in damages to the owner of such freight in a sum equal to the amount of such freight charges for every day the goods are held after such payment or tender. Held that, in order to recover the penalty pre-

scribed in such statute, the shipper must bring himself strictly within its requirements, and that a consignee who tendered the amount of freight shown to be due by an expense account furnished by the carrier, which was no part of the bill of lading, could not maintain an action for such penalty. *Schloss v. Atchison, T. & S. F. Ry. Co.*, 85 Tex. 601, 22 S. W. 1014.

It seems that, in an action against a railway for penalty for the non-delivery of freight upon payment of charges shown in the bill of lading, where there is a dispute as to the amount named in the bill of lading and the shipper refuses to exhibit his bill of lading, he would be precluded from recovering. *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 582, 583, 10 S. W. 1001.

**(5) Surrender of Bill of Lading and Indemnity Bond.**

Under Gen. Laws 17 Called Leg. Sess. p. 35, § 2, requiring a railroad to deliver possession of goods to the owner or consignee on payment of freight charges as shown by the bill of lading, and prescribing a penalty for a refusal so to do, a railroad has no right to impose as a condition the surrender of the bill of lading, where the goods have been hauled over connecting roads, and the freight charges as shown by the waybill are greater than those in the bill of lading, any custom to the contrary notwithstanding. *Dwyer v. Gulf, C. & S. F. R. Co.*, 69 Tex. 707, 7 S. W. 504.

A failure to comply with Rev. Civ. St. art. 4258a, requiring railroad companies to deliver freight on tender by the owner of the freight charges, as shown by the bill of lading, is not excused by the refusal of the owner to surrender the bill of lading, or to give an indemnity bond in lieu of such surrender. *Gulf, C. & S. F. Ry. Co. v. McCown (Civ. App.)*, 25 S. W. 435.

A railroad company can not set up custom, in defense of refusal to deliver up freight to owner on tender of charges, that owner should surrender bill of lading or give indemnity. *Gulf, etc., Ry. Co. v. McCown* (Civ. App.), 25 S. W. 435, 436.

### 3. Measure of Damages.

The measure of damages, the penalty for each day's detention of freight, is the sum due as shown by the bill of lading. *Schloss v. Atchison, etc., R. Co.*, 85 Tex. 601, 22 S. W. 1014; *Alderson v. Gulf, etc., R. Co.* (Civ. App.), 23 S. W. 617, affirmed in 93 Tex. 678, no op.; *Texas, etc., R. Co. v. Wood* (Civ. App.), 23 S. W. 744.

**Determination of Amount of Penalty.**—See ante, "Form and Recitals of Bill of Lading," VII, H, 2, b, (1), (b).

### 4. Recovery of Penalty.

#### a. Nature of Action and Conditions Precedent.

The action to recover damages equal to the amount of freight charges for every day freight is held by a railway after payment or tender of payment of the charges due, as shown by the bill of lading, is strictly statutory. *Schloss v. Atchison, etc., R. Co.*, 85 Tex. 601, 22 S. W. 1014.

A plaintiff seeking to recover under the statute, against a railway for refusal to deliver freight must bring himself strictly within provisions of act. *Schloss v. Atchison, etc., R. Co.*, 85 Tex. 601, 604, 22 S. W. 1014; *Texas, etc., R. Co. v. Wood* (Civ. App.), 23 S. W. 744.

#### b. Pleading.

##### (1) Petition.

A petition failing to show the amount due by the bill of lading, in seeking a recovery of the penalty, does not show legal cause of action. *Schloss v. Atchison, etc., R. Co.*, 85 Tex. 601, 22 S. W. 1014.

An exception is properly sustained to that part of a petition which seeks

to recover of a railroad company the statutory penalty for failure to deliver freight at the place of destination, the penalty being fixed by the amount of charges due as shown by the bill of lading, when the petition alleges, and the bill of lading shows, that there were no charges due. *Alderson v. Gulf, C. & S. F. Ry. Co.* (Civ. App.), 23 S. W. 617.

In an action against a carrier for a penalty for withholding goods and overcharging, the carrier can not, under a general denial, prove a mistake in the weight or classification, though the bill of lading attached to the petition provides that they are subject to correction. *Ft. Worth & D. Ry. Co. v. Lillard*, 4 Willson, Civ. Cas. Ct. App., § 83, 16 S. W. 654.

Suing as he does for a penalty, the plaintiff should aver in his petition that the freight specified in the bill of lading was upon the actual weight of the shipment. *Gulf, etc., R. Co. v. Loonie*, 84 Tex. 259, 262, 19 S. W. 385; *Sabine, etc., R. Co. v. Cruse*, 83 Tex. 460, 18 S. W. 755; *Gulf, etc., R. Co. v. Nelson*, 4 Tex. Civ. App. 345, 351, 23 S. W. 732.

In an action for the statutory damages for the detention of freight after tender of freight charges due as shown by the bill of lading where the freight was shipped by one road which issued the bill of lading and delivered over another road, a petition which no ways alleges the partnership between the railway which executed the bill of lading nor the road which delivered the freight, nor that the bill of lading was executed by the authority of the delivering road or was its act does not require a denial under oath by the delivering road of its execution of the bill of lading or of there being a partnership with the company receiving the freight from the shipper. A petition which sets up the fact of the delivery to the receiving road and alleges that said company executed a through

bill of lading for said freight by which it agreed and bound itself to transport the same, and which is followed by an allegation that the said receiving road and also the delivering road, at the time said bill of lading was executed were engaged in the business of transporting freight for hire and that by virtue of said contract the said receiving and delivering road agreed and became liable to transport said car load of freight from the initial station to its destination, by virtue of said bill of lading, is not an allegation that the partnership existed or that the bill of lading was executed by the delivering road or its authority. *Miller & Co. v. Texas, etc., R. Co.*, 83 Tex. 518, 528, 28 S. W. 954. See the title CONNECTING CARRIERS.

### (3) Plea.

A plea of *non est factum* is not necessary, before the defendant can challenge the binding force of a bill of lading upon it where plaintiff's petition does not charge that the defendant executed the bill of lading, or authorized any one to execute the same, nor that there was a partnership between the defendant and the company that executed the bill of lading. *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 21 S. W. 554. See *Miller & Co. v. Texas, etc., R. Co.*, 83 Tex. 518, 528, 18 S. W. 954.

Plaintiff can not contend that defendant should not be permitted to challenge the binding force on it of the bill of lading, except under a plea of *non est factum*, when the petition does not charge that defendant executed the bill of lading, or authorized any one else to execute the same for it, or that there was a partnership between defendant and the company executing the bill of lading. *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 21 S. W. 554.

In the case of *International, etc., R. Co. v. Tisdale*, 74 Tex. 8, 11 S. W. 900, the petition charged the ex-

istence of a partnership between the defendant company and the connecting railway companies. *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 552, 21 S. W. 554.

### c. Charge of Court.

Where the bill of lading, as admitted by both parties, required plaintiff to show that he made the tender upon the correct weight, a charge which authorized an investigation as to the true weights only in case the jury found the additional words alleged by defendant were in the original bill when issued, is erroneous. *Gulf, etc., R. Co. v. Nelson*, 4 Tex. Civ. App. 345, 351, 23 S. W. 732.

### d. Evidence.

#### (1) Presumptions and Burden of Proof.

In an action brought under the provisions of 2 Sayles' Civ. Stats., art. 4258a, a plaintiff sues to recover a statutory penalty, and it is therefore incumbent upon him to prove a case clearly within the terms of the law. *Schloss v. Atchison, etc., R. Co.*, 85 Tex. 601, 22 S. W. 1014; *Gulf, etc., R. Co. v. Dwyer*, 84 Tex. 194, 19 S. W. 470. The penalty imposed by the statute is for the refusal to deliver after "payment or tender of payment of the freight charges due as shown by the bill of lading." *Gulf, etc., R. Co. v. Nelson*, 4 Tex. Civ. App. 345, 349, 23 S. W. 732.

Suing as he does for a penalty the burden of proof rests on a plaintiff suing for the statutory penalty for failure to deliver freight upon tender, etc., to show that the freight charges, specified in the bill of lading was upon the actual weight of the shipment. *Gulf, etc., R. Co. v. Loonie*, 84 Tex. 259, 262, 19 S. W. 385; *Sabine, etc., R. Co. v. Cruse*, 83 Tex. 460, 18 S. W. 755; *Gulf, etc., R. Co. v. Nelson*, 4 Tex. Civ. App. 345, 351, 23 S. W. 732.

**Execution of Bill of Lading Connecting Defendant with.**—Under a



plea, which is, in effect, a plea of "non est factum," and a verified denial of the partnership or association charged, the burden rests upon the plaintiff to connect the defendant with the execution of the bill of lading. *Fort Worth, etc., R. Co. v. Johnson*, 5 Tex. Civ. App. 24, 26, 23 S. W. 827, citing 1 Sayles' Civ. Stats., arts. 1265, 2262; *City Waterworks v. White*, 61 Tex. 536; *Fisher v. Bowser*, 1 Posey 346; and *International, etc., R. Co. v. Tisdale*, 74 Tex. 8, 11 S. W. 900.

In an action for a penalty for failure to deliver freight which was shipped over one road and delivered over another, a joint liability of the delivering road with the receiving road, will not be presumed from the fact that defendant received and hauled the car and collected the freight. *Miller & Co. v. T. & N. O. Ry. Co.*, 83 Tex. 518, 18 S. W. 954.

**Proof of Tender of Full Amount of Charge.**—See ante, "Bill Subject to Correction," VII, H, 2, b, (1), (b), cc. (2) **Admissibility.**

In an action by the consignee against a carrier to recover the statutory penalty for refusing to deliver the goods on tender of the charges fixed by the bill of lading given by a connecting carrier, where defendant claimed a higher rate than fixed by the bill of lading, evidence offered by defendant to show that the shipper offered plaintiff to pay the difference between the amount specified in the bill of lading and that demanded by defendant, which offer plaintiff rejected, was properly excluded. *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 21 S. W. 554.

**The original waybill is evidence of payment of accrued freight charges agreed on in bill of lading for transportation for the whole distance.** *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 582, 10 S. W. 1001.

**Judicial Notice.**—In an action for the penalty for the nondelivery of freight, where it was consigned to plaintiff

over the L road and was delivered at its destination over defendant's road, the evidence was properly excluded that the S railroad had an arrangement for through rates, as the court can not judicially notice that the defendant is a part of that system. *Miller & Co. v. T. & N. O. Ry. Co.*, 83 Tex. 518, 18 S. W. 954.

## 5. Remedies of Carrier.

If the carrier thinks he has made a mistake in issuing the bill of lading, against which he is entitled to be relieved, but is not willing to risk incurring the penalty imposed by the statute, there is nothing to prevent him from delivering the goods on tender of the amount due as shown by the bill of lading, and afterwards litigating for the balance; and there is no greater injustice in this than there would be to require the consignee to first yield to the demands of the carrier and then take the initiative in the subsequent litigation. *Gulf, etc., R. Co. v. Nelson*, 4 Tex. Civ. App. 345, 348, 23 S. W. 732.

## I. FAILURE TO STOP TRAIN.

The act of 1866, providing for five-minute stops at wayside stations by every passenger train, and providing for penalties upon conductors for its violation, is constitutional. *Davidson v. State*, 4 Tex. Crim. App. 545, 548; *Galveston, etc., R. Co. v. Le Gierse*, 51 Tex. 189.

## J. PENALTIES FOR FAILURE TO DELIVER TO CONNECTING CARRIER.

See the title **CONNECTING CARRIERS**.

## K. PENALTY FOR FAILURE TO REDEEM UNUSED TICKETS.

See the title **CARRIERS OF PASSENGERS**.

## L. PENALTY FOR FAILURE TO CONSTRUCT AND MAINTAIN WATER CLOSETS.

See the titles **CONSTITUTIONAL LAW; RAILROADS; STATUTES**.

### **M. PENALTY FOR FAILURE TO MAKE ANNUAL REPORTS.**

That the state has suffered no special damage from failure of a railroad to make its annual report to the comptroller within the time required by law, is no defense to an action by the state for statutory penalty. *H. & T. C. R. Co. v. State*, 61 Tex. 342, 344.

So long as the law remains on the statute book it is the office of the judicial department to enforce it, not to inquire into its wisdom. So long as it has never been declared invalid, it is enforceable until repealed. *H. & T. C. R. Co. v. State*, 61 Tex. 342, 344, 345.

### **VIII. Limitation of Carrier's Common-Law Liability.**

#### **A. DEFINITION AND PURPOSE.**

To protect themselves against the injustice and hardship of a rule of law which requires them to do a particular thing, whether or not that thing be possible to accomplish by the use of all diligence and every agency available to them, common carriers have adopted the custom of receiving and transporting freight under special contract. *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 95, 14 S. W. 913.

**Definitions of Words and Phrases in Texas Statute.**—See post, "General Rule," VIII, B, 2, a.

#### **B. POWER OF CARRIER TO LIMIT LIABILITY.**

##### **1. At Common Law.**

###### **a. General Rule.**

In absence of statute prohibiting it, common carriers may, by express or special contract with shipper, be exonerated from the rule of common law making them, in absence of contract, insurers of the safety of goods intrusted to them. *Pittman v. Pacific Exp. Co.*, 24 Tex. Civ. App. 595, 597, 59 S. W. 949; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 319, 4 S. W. 567.

In the absence of any statute prohibiting it, carriers may limit and re-

strict, by express contract, their common-law liability, to a reasonable extent. *Texas & P. Ry. Co. v. Davis*, 2 Willson, Civ. Cas. Ct. App., § 193.

A common carrier of goods may by contract limit its common law liability for damages not caused by its negligence. *Houston & T. C. R. Co. v. Park*, 1 White & W. Civ. Cas. Ct. App., § 334. See post, "Limitation of Loss Arising from Negligence," VIII, G, 1.

##### **b. Carriers of Interstate Commerce.**

See post, "Interstate and Foreign Shipments," VIII, B, 4.

Common carrier's liability as such on interstate shipment, is to be determined under the law applicable to character of commerce in which it may be engaged at time. *Houston, etc., Nav. Co. v. Insurance Co.*, 89 Tex. 1, 9, 32 S. W. 889, reversing 31 S. W. 560.

##### **2. Under Statute of Texas.**

###### **a. General Rule.**

Common carriers in this state can not limit or restrict their liability as it exists at common law in any manner whatever, and a special agreement made in contravention of this statutory inhibition is void. *Rev. Stats. 1895, art. 320. International, etc., R. Co. v. Parish*, 18 Tex. Civ. App. 130, 43 S. W. 1066; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 319, 4 S. W. 567; *Hendrick v. Walton*, 69 Tex. 192, 196, 6 S. W. 749; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749; *Missouri, etc., R. Co. v. Carter & Bro.*, 95 Tex. 461, 68 S. W. 159; *Texas, etc., R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 78 S. W. 548, affirmed in 98 Tex. 635, no op.; *Texas, etc., R. Co. v. Owens*, 36 Tex. Civ. App. 54, 81 S. W. 62; *Wooldridge & Son v. Ft. Worth, etc., R. Co.*, 38 Tex. Civ. App. 551, 86 S. W. 942; *International, etc., R. Co. v. Vandeventer*, 48 Tex. Civ. App. 366, 369, 107 S. W. 560, affirmed, no op.; *Texas, etc., R. Co. v. Stribling (Civ. App.)*, 34 S. W. 1002; *Texas, etc., R.*

*Co. v. Scrivener*, 2 App. Civ. Cases, § 328; *Houston, etc., R. Co. v. Burke*, 55 Tex. 323; *Pacific Exp. Co. v. Pitman*, 30 Tex. Civ. App. 626, 627, 71 S. W. 312; *G. C. & S. F. R. Co. v. McGown*, 65 Tex. 640, 646.

For reasons of public policy, and having regard, doubtless, to the "inequality of the parties; the compulsion under which the customer is placed, and the obligations of the carrier to the public," the legislation of this state, and the previous decisions of our courts, hold common carriers liable as at common law, and declare invalid any exceptions or special contract seeking to vary that liability. *Chevallier v. Straham*, 2 Tex. 115; *Arnold v. Jones*, 26 Tex. 335, 337. See, also, *Heaton & Bro. v. Morgan's La. & Tex. R. R. & S. S. Co.*, Court of Appeals, 4 Tex. L. J., p. 375; *Houston, etc., R. Co. v. Burke*, 55 Tex. 323, 333.

A common carrier is liable for all losses of, or injuries to, goods received by him for carriage, not occasioned by the act of God or public enemies, and this liability can not be limited by contract. *Texas Exp. Co. v. Scott*, 2 Willson, Civ. Cas. Ct. App., § 73.

Under Rev. St., art. 278, common carriers can not relieve themselves from liability by the terms of the bill of lading. *Houston & T. C. R. Co. v. Burke*, 55 Tex. 323.

Under Rev. St., art. 278, a common carrier may by special contract enlarge, but he can not limit, his common-law liability. By the common law he is liable for goods lost or destroyed while in his care, unless such loss or destruction was occasioned by the act of God, the public enemy, or the fault of the owner. *Texas Exp. Co. v. Dupree*, 2 Willson, Civ. Cas. Ct. App., § 318.

The word "limit" ordinarily means to fix the extent of the subject to which it is applied rather than to fix the duration of time within which a right growing out of the subject may

be enforced; and ordinarily it has much the same significance as the word "restrict" but in view of the use of both words in Rev. St., art. 278, prohibiting common carriers of goods from limiting or restricting their liability as it exists at common law the inference is that the words are not used as exact equivalents and the word "limit" as there employed may mean no more than that the carrier shall not relieve himself by contract from obligation to make such further compensation for breach of duty as the common law would impose under the facts in the given case. *Gulf, Colorado & Santa Fe Ry. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567.

The word "restrict" means "to restrain within bounds;" and, as used in the statute, in connection with the carrier's liability, before declared, was evidently used to prohibit the carrier from so contracting as to make his liability to depend on facts other than such as would fix liability under the settled rules of the common law. *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567.

The expression "liability as it exists at common law" as used in Rev. St., art. 278, prohibiting common carriers from limiting their "liability as it exists at common law" means such state and degree of liability as the common law fixes upon the carrier under a given state of facts. *Gulf, Colorado & Santa Fe Ry. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567.

Words "goods, wares and merchandise," as used in art. 278, Rev. Stat., do not limit or extend the class of property to be embraced by carriers undertaking to transport goods for hire. *Missouri Pac. R. Co. v. Harris*, 1 App. Civ. Cases, § 1257.

**Domestic Shipment.**—Our statute will not allow a contract which is to be wholly performed within this state to relieve the carrier of his common-law liability. Rev. Stat., art. 278. *Gulf, etc., R. Co. v. Levi (Sup.)*, 12 S. W.

677; *G. C. & F. S. R. Co. v. Maetze*, 2 App. Civ. Cases, § 631; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 318, 4 S. W. 567; *Gulf, etc., R. Co. v. Wood* (Civ. App.), 30 S. W. 715, 716.

Railways and other common carriers within this state on land are put, as to transportation, upon the same plane, so to speak, as boats or vessels on the waters entirely within the body of this state. As to transportation within the state, they are forbidden to limit their liability as it exists at common law. The limitation prescribed by the statute, if it be more extended as to railways than to boats or vessels, is so only in the sense that as to the former it is not confined to carriers operating exclusively within the state, while as to the latter it is restricted to carriers plying on waters wholly within the state. *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 133, 19 S. W. 455.

With reference to its domestic character, no discrimination was intended by the legislature between a shipment by water and by rail. The scope of the limitation is logically the same, whether applied to the carrier as a railway or as a steamboat. Transportation "within this state" is in either case the subject matter of the legislation. The legislature seems to have had in mind in the adoption of this statute, art. 1, § 8, of the federal constitution, investing congress with the power to regulate commerce among the states. *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 133, 19 S. W. 455.

Where carriers agreed to deliver money to a steamship company for shipment, shipment of money is not interstate, and bill of lading given consignor by steamship company excusing steamship company from loss by robbers or thieves, applies only to steamship company. *Rio Grande R. Co. v. Cross*, 5 Tex. Civ. App. 454, 459, 460, 23 S. W. 529, affirmed in 93 Tex. 648, no op.

## b. Scope of Statute.

### (1) In General.

The scope of Rev. St., art. 278, is to avoid agreements in contravention of a carrier's common-law liability; and hence it does not superadd any additional or more stringent liability than existed at common law, but simply maintains that liability intact, and exempt from the carrier's power to vary it by special agreement or otherwise. *Missouri Pac. R. Co. v. Harris*, 1 White & W. Civ. Cas. Ct. App., §§ 1257, 1259, 1262.

"The liability of a common carrier is twofold in its nature, and involves, when brought in question, two inquiries: 1. Do facts exist which impose upon the carrier an obligation to make compensation for an injury to or loss of freight while in his possession as carrier? The common law determines what facts will relieve a common carrier from liability, and in the absence of these facts, no other law regulating the matter, the carrier is held responsible or liable for loss or injury to goods while in his hands, and any contract which declares the carrier not responsible when that state of facts exists which fixes responsibility under the law, is a contract limiting the carrier's liability. 2. The liability or responsibility of the carrier has relation to the extent to which he is under obligation to make compensation for loss or injury to goods, as well as to the mere existence of obligation." *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 307, 12 S. W. 815.

The common-law duties and liabilities, and not those duties and liabilities as they may be affected by contracts, lawful under the common law, are the duties and liabilities of common carriers under the statutes of this state, and they can not be restricted or limited by any contract or agreement whatsoever, in cases to which the statute is applicable. The rule may

seem a harsh one, but be that as it may, the legislature of this state has established it, and courts have no power or right to refuse to enforce it, or to place a construction on the statute which its language does not authorize. *Gulf, etc., Ry. Co. v. Trawick*, 68 Tex. 314, 317, 4 S. W. 567.

The statute fixes the boundaries of fact which will impose liability on the carrier, by making it to depend on the facts sufficient to create it under the rules of the common law; and a contract which, if given effect, would defeat liabilities thus arising, would be invalid. *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 319, 4 S. W. 567.

In case of contract, the facts made necessary by it to the existence of legal obligation become restraints or restrictions on legal liability if, in the absence of contract, liability, under the settled rules of the common law, would be fixed by the existence of facts other than made requisite to liability by the contract. *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 319, 4 S. W. 567.

The duties and liabilities imposed on common carriers are inseverable. A failure of duty resulting in loss to the shipper fixes liability; and, if, by contract, duties imposed by the common law may be dispensed with, then a restriction or limitation of the common-law liability would necessarily follow to the extent to which duty existing without contract might be dispensed with by it. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 318, 4 S. W. 567.

A clause of a shipping contract entirely relieving the carrier from damages resulting from certain named risks and from "any and all other causes whatever," are contrary to public policy. *Pecos, etc., R. Co. v. Hughes*, 44 Tex. Civ. App. 135, 98 S. W. 410, 411. See *Pecos, etc., R. Co. v. Evans Snider Buel Co.*, 100 Tex. 190, 97 S. W. 466, affirming 42 Tex. Civ. App. 60.

**Liability for Negligence.**—Common carriers are liable in Texas as at common law for all losses caused by their negligence, regardless of any exceptions or special contracts avoiding such liability. *Houston, etc., R. Co. v. Burke*, 55 Tex. 323, 330; *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475, 479; *Ryan & Co. v. M. K. & T. R. Co.*, 65 Tex. 13; *International, etc., R. Co. v. Moody*, 71 Tex. 614, 617, 9 S. W. 465. See post, "Limitation of Loss Arising from Negligence," VIII, G, 1.

**Injuries to Live Stock.**—Railroad companies as common carriers have no right to restrict by contract their liability for injuries to stock received for transportation. *Gulf, etc., Ry. Co. v. Trawick*, 68 Tex. 314, 316, 4 S. W. 567; *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611, 612, 6 S. W. 312.

### (2) Reasonable Limitations.

Rev. St. 1895, art. 320, declaring that agreements made by carriers within the state limiting their common law liability are invalid applies to all such agreements without regard to whether they are reasonable. *Pacific Exp. Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 42 S. W. 795.

Under the statutes of this state such contracts, whether reasonable or not, can have no standing, for the simple reason that the common-law liability of the carrier, and not the liability as the carrier might fix it by contract under the common law, is by the statutes of this state imposed on the carrier. *Gulf, etc., Ry. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567. See, also, S. C. 80 Tex. 273, 15 S. W. 568, 18 S. W. 948.

### (3) Stipulations Legal at Common Law.

Such being "their liability as it exists at common law," the declaration of the statute that they "shall not limit or restrict their liability as it exists at common law in any manner whatever," and that "no special agreement made in contravention of the

foregoing provisions of this article shall be valid," deprives such carriers of the right to limit their liability by contract, even as to matters in reference to which they might legally contract under the common law. *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 317, 4 S. W. 567; §§ 277-278, Rev. Stat.

**(4) Stipulations Not Diminishing Common-Law Liability.**

Under Rev. St., art. 278, providing that carriers for hire within this state can not limit their liability as it exists at common law, any modification of its liability which may be made by a common carrier by special contract can only be such as will not diminish its common-law liability as a carrier, and it can not limit its liability against the negligence of its agents. *Texas & P. Ry. Co. v. Hamm*, 2 Willson, Civ. Cas. Ct. App., § 493. See post, "Limitation of Loss Arising from Negligence," VIII, G, 1.

**(5) Stipulations Enlarging Common-Law Liability.**

A carrier may enlarge his liability by special contract, though the law prohibits him from limiting it by contract. *Texas & P. Ry. Co. v. Schneider*, 1 White & W. Civ. Cas. Ct. App., § 122.

Under Rev. St., art. 278, a common carrier may, by special contract, enlarge, but he can not limit, his common-law liability. *Texas Exp. Co. v. Dupree*, 2 Willson, Civ. Cas. Ct. App., § 318.

**(6) Contracts for Indemnity against Loss.**

"There is a great difference between contracting for a limit of common-law liability and contracting to be fully liable as at common law, but to have the privilege of indemnifying against loss by reason of such liability." *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475, 480. See post, "Stipulations Respecting Insurance," VIII, G, 16.

**(7) Contracts Not in Character of Common Carrier.**

A railroad company when not contracting in its character of common carrier has the same right of contract as other corporations or persons, and in many instances may make contracts for immunity from liability on account of the negligence of itself and servants. *Missouri, etc., R. Co. v. Carter & Bro.*, 95 Tex. 461, 477, 68 S. W. 159; *Texas, etc., R. Co. v. Owens*, 36 Tex. Civ. App. 54, 55, 81 S. W. 62.

In order to bring the contract within the terms of the statutory prohibition, it must embrace property for which the railroad company would be liable, as common carrier, at the time of its destruction, where the terms of the contract do not embrace property for which the railroad company could be held liable as common carrier, it is not within the statutory inhibition. *Missouri, etc., R. Co. v. Carter & Bro.*, 95 Tex. 461, 476, 68 S. W. 159.

The statute prohibiting a carrier from limiting its liability by contract has no application to a contract by a railway company for exemption from liability for damage by fire to property not in its possession as carrier. *Missouri, etc., R. Co. v. Carter & Bro.*, 95 Tex. 461, 68 S. W. 159.

"In case of a failure to fence the right of way, when by contract released from damages on account of injury to or killing stock in consequence of such failure, the courts have held generally, that such contracts are valid to the extent of the interest of the adjacent land owner." *Missouri, etc., R. Co. v. Carter & Bro.*, 95 Tex. 461, 477, 68 S. W. 159; *Texas, etc., R. Co. v. Owens*, 36 Tex. Civ. App. 54, 55, 81 S. W. 62.

A contract by which a railway company establishing a switch and shipping point for the proprietor of a private business, at a point where its location is not demanded by the public interest, receives, upon that consideration, an agreement exempting it from

liability for fire negligently communicated from its locomotives to the property of such proprietor, is not unlawful as conflicting with general public policy or that of the state. *Missouri, etc., R. Co. v. Carter & Bro.*, 95 Tex. 461, 68 S. W. 159.

Likewise a railroad company may contract with an express company for exemption from liability for injuries to its goods or its agent in charge of them, although the injuries may be caused by the negligence of its servants; because the contract of carriage is not that of a common carrier. *Missouri, etc., R. Co. v. Carter & Bro.*, 95 Tex. 461, 477, 68 S. W. 159.

In *Missouri, etc., R. Co. v. Carter & Bro.*, 95 Tex. 461, 68 S. W. 159, it was held that a railroad company could lawfully contract for immunity against the negligence of its servants in communicating fire to property adjacent to its right of way. *Texas, etc., R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 225, 78 S. W. 548, affirmed in 98 Tex. 635, no op.

A railway company in contracting with reference to a private gate in its right-of-way fence and for immunity from damage resulting from the landowner allowing the gate to get out of repair, is not contracting in its capacity as a common carrier, and such contract is valid. *Texas, etc., R. Co. v. Owens*, 36 Tex. Civ. App. 54, 81 S. W. 62.

A railroad company, in leasing a part of its right of way to a third person for coal house purposes, does not act in its capacity as a common carrier, and hence may make a valid stipulation in the lease for exemption from loss or damage by fire communicated by sparks from its locomotives or otherwise. *Wooldridge & Son v. Ft. Worth, etc., R. Co.*, 38 Tex. Civ. App. 551, 86 S. W. 942.

An assignee of such lease would be bound by the stipulation therein exempting the company from liability for damage caused by fires set from

locomotives, but a subtenant would not be so bound. *Wooldridge & Son v. Ft. Worth, etc., R. Co.*, 38 Tex. Civ. App. 551, 86 S. W. 942.

Where the lessee from the railway company sold the coal house he had placed on the right of way to M., and later M. leased the house to H., no reference being made to the original lease, nor written consent to its assignment obtained as provided therein, and H. having no knowledge of such lease, but making his payments of rent to M., while the railway company made no objection to the occupancy of the successive parties and continued delivering cars of coal at the coal house, such facts showed that H. was a subtenant in no way bound by the covenants in the original lease. *Wooldridge & Son v. Ft. Worth, etc., R. Co.*, 38 Tex. Civ. App. 551, 552, 86 S. W. 942.

**Acting as Private Carrier.**—It would seem that a railroad company, in doing that which under the law it is not its business to do as a common carrier, has the right to act in the capacity of a private carrier, and to impose immunity from liability for negligence as a condition precedent to its engaging in such undertaking. *Texas, etc., R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 225, 78 S. W. 548, affirmed in 98 Tex. 635, no op., distinguishing *Missouri, etc., R. Co. v. Carter & Bro.*, 95 Tex. 461, 68 S. W. 159.

#### (8) Interstate and Foreign Shipments.

See post, "Under Texas Statutes," VIII, B, 4, b, (2).

### 3. What Law Governs.

#### a. General Rule.

As a general rule, the law of the place where the contract is entered into will govern, subject, however, to an apparent intention that the law of place of performance or of partial performance should apply; or subject to the exception that the state where it is performed and enforced will not apply the law of the state where ex-

executed when such law conflicts with statutory law or a settled rule of policy that prevails in the state where sought to be enforced. *International, etc., R. Co. v. Vandeverter*, 48 Tex. Civ. App. 366, 368, 107 S. W. 560, affirmed, no op. See, to the same effect, *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 403, 82 S. W. 346.

The validity of a provision in a contract by a common carrier limiting its liability at common law is determined by the law of the place where the contract is made, even though it affects the performance of the contract in another state. *Pittman v. Pacific Exp. Co.*, 24 Tex. Civ. App. 595, 59 S. W. 949.

**b. Contracts to Be Performed Partly within State Where Made.**

The safest rule to arrive at intention of parties, where there are no circumstances except execution, delivery and acceptance of bill of lading, is that which upholds, rather than that which defeats, the contract, and the laws of the state under which the contract is valid, where it is to be partly performed in state where made and partly in another, should be applied. *Ryan & Co. v. M. K. & T. R. Co.*, 65 Tex. 13.

It will not be presumed that the parties to a bill of lading intended to have the contract governed by different laws according as the loss might occur in one or in another state unless circumstances are proved showing such an intention. *Ryan v. Missouri, Kansas & T. Ry. Co.*, 65 Tex. 13.

Where a contract under which a common carrier seeks to limit his liability is made in Missouri for the carriage of goods from Missouri to Texas, and such a contract is valid under the Missouri law but not under the Texas law, the law of Missouri prevails. *Ryan v. Missouri, K. & T. Ry. Co.*, 65 Tex. 13.

In *St. Louis, etc., R. Co. v. Ham-*  
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*brick (Civ. App.)*, 97 S. W. 1072, and *Chicago, etc., R. Co. v. Thompson*, 41 Tex. Civ. App. 459, 93 S. W. 702, contracts were executed out of the state and loss occurred in another state, and the mere fact that suits were brought within this state did not require an application of the policy that prevails here. *International, etc., R. Co. v. Vandeverter*, 48 Tex. Civ. App. 366, 369, 107 S. W. 560, affirmed, no op.

While the Texas statute by reason of its peculiar language could not affect an interstate shipment, it may be looked to, with the decision of the Texas courts, as establishing a policy within that state restrictive of the right of the carrier by contract to avoid liability for its negligence. *International, etc., R. Co. v. Vandeverter*, 48 Tex. Civ. App. 366, 369, 107 S. W. 560, affirmed, no op.

When the contract was entered into it was contemplated that, in part, it should be performed in Texas; and it is shown that the injury occurred within this state by the negligence of the appellant in unloading the animal at the place of destination. *International, etc., R. Co. v. Vandeverter*, 48 Tex. Civ. App. 366, 369, 107 S. W. 560, affirmed, no op.

The liability of a common carrier who undertakes in Mexico to convey goods from the territory of that government into Texas, is to be determined according to the laws of Mexico. *Cantu v. Bennett*, 39 Tex. 304.

**c. Contracts to Be Performed Wholly within State Where Made.**

See ante, "Under Statute of Texas," VII, B, 2.

**d. Contracts to Be Performed Wholly without State Where Made.**

A railroad company may, in defense to an action on a contract of carriage to be performed wholly without the state, set up a reasonable provision of the contract limiting its common-law liability. *Atchison, T. & S. F. Ry. Co. v. Bryan (Civ. App.)*, 28 S. W. 98.



The carrier in such case must plead such express contract and show it to be reasonable. *Atchison, etc., R. Co. v. Bryan* (Civ. App.), 28 S. W. 98, 99, 100.

**e. Stipulations Affecting Only the Remedy.**

Stipulations in a shipping contract affecting the remedy only are controlled by the law of the forum. *St. Louis, etc., R. Co. v. Bryce*, 49 Tex. Civ. App. 608, 609, 110 S. W. 529; *Missouri, etc., R. Co. v. Godair Commission Co.*, 39 Tex. Civ. App. 298, 87 S. W. 871, affirmed in 101 Tex. 648, no op.; *St. Louis, etc., R. Co. v. Hambrick* (Civ. App.), 97 S. W. 1072, 1073. See, also, *Chicago, etc., R. Co. v. Thompson*, 41 Tex. Civ. App. 459, 93 S. W. 702; *Missouri, etc., R. Co. v. Cocreham*, 10 Tex. Civ. App. 166, 30 S. W. 1118.

The validity of stipulations in a contract of carriage limiting the time within which an action may be brought thereon is governed by the law of the forum. *Missouri, etc., R. Co. v. Godair Commission Co.*, 39 Tex. Civ. App. 298, 87 S. W. 871, affirmed in 101 Tex. 648, no op.

The stipulation in the shipping contract for the bringing of suit within six months was one affecting the remedy only and is controlled by the law of the forum, irrespective of the place of the contract. *St. Louis, etc., R. Co. v. Bryce*, 49 Tex. Civ. App. 608, 609, 110 S. W. 529; *St. Louis, etc., R. Co. v. Hambrick* (Civ. App.), 97 S. W. 1073. See, also, *Chicago, etc., R. Co. v. Thompson*, 41 Tex. Civ. App. 459, 93 S. W. 702.

Suit for damages for breach of freight contract made subsequent to the act of March 4, 1891, prohibiting contractual limitations for less time than the statute prescribes. The contract was made in Missouri, and required the shipment into Texas, and contained stipulations limiting the time within which suit might be brought.

Defense insisted that the contract was an interstate shipment. The law of Missouri, however, was not pleaded or proven. Held, the court not judicially knowing the laws of Missouri, the law of the forum will apply, and the contract limitation has no legal effect. *Missouri, etc., R. Co. v. Cocreham*, 10 Tex. Civ. App. 166, 30 S. W. 1118.

**f. Pleading and Proof of Foreign Laws.**

Where a shipping contract is made in a foreign state, a carrier, relying upon stipulations limiting its common-law liability, must aver and prove that such stipulations are not in contravention of the laws of that state. *International, etc., R. Co. v. Moody*, 71 Tex. 614, 618, 9 S. W. 465.

**Presumption as to Laws of Other States.**—In the absence of proof to the contrary, it is presumed that the law of another state prohibits common carriers from limiting their common-law liability as does the law of Texas. *Southern Pac. Co. v. Anderson*, 26 Tex. Civ. App. 518, 63 S. W. 1023, affirmed in 95 Tex. 686, no op.; citing *Houston, etc., R. Co. v. Baker*, 57 Tex. 419; *Abercrombie v. Stillman*, 77 Tex. 589, 14 S. W. 196; *James v. James*, 81 Tex. 373, 16 S. W. 1087 and *Tempel v. Dodge*, 89 Tex. 68, 32 S. W. 514, 33 S. W. 222, affirming 31 S. W. 686. See to the same effect *Southern Kansas R. Co. v. Curtis Bros.*, 44 Tex. Civ. App. 477, 479, 99 S. W. 566, affirmed in 102 Tex. 593, no op., and citing *Burgess v. Western Union Tel. Co.*, 92 Tex. 125, 46 S. W. 794, reversing 43 S. W. 1033.

The court is not permitted by any known rule of law to indulge the presumption that a limitation of the liability of the common carrier stipulated for in the bill of lading was lawful under the statutes of another state. *International, etc., R. Co. v. Moody*, 71 Tex. 614, 617, 9 S. W. 465.

A stipulation in a bill of lading exempting the carrier from liability for

loss "by fire while in depot," being illegal under laws of Texas, can not be assumed, in absence of averment and proof, to have been valid under the laws of another state where the contract was signed. *International, etc., R. Co. v. Moody*, 71 Tex. 614, 617, 9 S. W. 465.

In an action on a Missouri contract for shipment to Texas, Missouri laws being neither pleaded nor proved, the law of the former applies. *Missouri, etc., R. Co. v. Cocreham*, 10 Tex. Civ. App. 166, 167, 30 S. W. 1118.

In a suit against a railroad company for injury to goods in transit, the contract of carriage having been made in California, the laws of such state will be presumed to forbid a carrier limiting its common-law liability for loss occasioned by its negligence, in the absence of any proof as to the California statutes. *Southern Pac. Co. v. Anderson*, 26 Tex. Civ. App. 518, 63 S. W. 1023, affirmed in 95 Tex. 686, no op.

It will not be presumed that the laws of any foreign state permit a sleeping-car company to contract against its own negligence. *Stevens v. Pullman Palace Car Co. (Civ. App.)*, 32 S. W. 335.

In the absence of evidence to the contrary, the presumption arises that under the laws of New Mexico, as under those of Texas, a provision requiring notice of a claim for damages to be filed within ninety-one days must be reasonable or the same will not be enforced. *Southern Kansas R. Co. v. Curtis Bros.*, 44 Tex. Civ. App. 477, 479, 99 S. W. 566, affirmed in 102 Tex. 593, no op.

#### 4. Interstate and Foreign Shipments. a. In General.

Stipulation in interstate contract of affreightment limiting carrier's common-law liability, if valid where made and reasonable, is valid in this state. *Texas, etc., R. Co. v. Davis*, 2 App. Civ. Cases, § 191; *Texas, etc., R. Co.*

*v. Richmond*, 94 Tex. 571, 575, 63 S. W. 619, reversing 61 S. W. 410; *I. & G. N. R. Co. v. Watt*, 2 App. Civ. Cases, § 781; *Cross v. Graves*, 4 App. Civ. Cases, §§ 100, 158, 16 S. W. 102.

Right of carrier to limit liability on interstate shipments is to be determined by federal law, or in absence of such law, by common law. *Houston, etc., Nav. Co. v. Insurance Co.*, 89 Tex. 1, 9, 32 S. W. 889, reversing 31 S. W. 560.

Common carriers engaged in interstate traffic may limit to a reasonable extent common-law liability, but can not exempt themselves from loss or damage caused by their own negligence. *Texas, etc., R. Co. v. Davis*, 2 App. Civ. Cases, § 191.

A shipment from Missouri to Texas is an interstate shipment. Hence a railway company may contract against liability for loss not caused by its own negligence. *Texas, etc., R. Co. v. Payne*, 15 Tex. Civ. App. 58, 38 S. W. 366; *Houston, etc., Nav. Co. v. Insurance Co.*, 89 Tex. 1, 32 S. W. 889, reversing 31 S. W. 560.

#### b. Under State Statutes.

##### (1) In General.

State statutes prohibiting carriers from making stipulations limiting their common-law liability are valid even as to interstate shipments. *Pacific Exp. Co. v. Pitman*, 30 Tex. Civ. App. 626, 71 S. W. 312.

The validity of such a stipulation depends on the law of the state where the contract was made, as construed by the courts of such state. *Pacific Exp. Co. v. Pitman*, 30 Tex. Civ. App. 626, 71 S. W. 312.

State statutes prohibiting common carriers from limiting their common-law liability by stipulation in the contract of shipment are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce. And so long as congress has not

legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce. *Mexican Nat. R. Co. v. Ware* (Civ. App.), 60 S. W. 343 (see 94 Tex. 706, no op.); *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161; *Fittman v. Pacific Exp. Co.*, 24 Tex. Civ. App. 595, 598, 59 S. W. 949.

## (2) Under Texas Statutes.

The provision of the Texas statute, which prohibits common carriers from limiting their liability, as it exists at common law, by stipulations in the bill of lading, is valid as applied to contracts for interstate transportation of property. *Armstrong v. Galveston, etc., R. Co.*, 92 Tex. 117, 46 S. W. 33, reversing 43 S. W. 614; *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 10 S. W. 1001; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565; *Missouri, etc., R. Co. v. Withers*, 16 Tex. Civ. App. 506, 40 S. W. 1073, affirmed in 93 Tex. 691, no op.; *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161; *Pittman v. Pacific Exp. Co.*, 24 Tex. Civ. App. 595, 598, 59 S. W. 949. See to the same effect, *Galveston, etc., R. Co. v. Fales*, 33 Tex. Civ. App. 457, 77 S. W. 234, affirmed in 98 Tex. 617, no op.; *Gulf, etc., R. Co. v. State*, 97 Tex. 274, 78 S. W. 495, affirming 73 S. W. 429; *State v. Gulf, etc., R. Co.* (Civ. App.), 44 S. W. 542, affirmed in 93 Tex. 696, no op.

The cases of *Houston, etc., Nav. Co. v. Insurance Co.*, 89 Tex. 1, 32 S. W. 889, reversing 31 S. W. 560, and *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 133, 19 S. W. 455, as to the right of railway companies in interstate shipments to make contracts exempting themselves from liability, have been overruled by the later cases of *Railway v. Solan*, 169 United States, 133, and *Armstrong v. Galveston, etc., R. Co.*, 92 Tex. 117, 46 S. W. 33, reversing 43 S. W. 614; *Texas*,

*etc., R. Co. v. Walker*, 25 Tex. Civ. App. 216, 60 S. W. 796.

A special charge stating the converse of this principal was correctly refused. *Galveston, etc., R. Co. v. Fales*, 33 Tex. Civ. App. 457, 77 S. W. 234, affirmed in 98 Tex. 617, no op.

**Rev. Stat., Art. 278.**—Rev. St., art. 278, prohibiting domestic carriers on land within the state, or on waters entirely within the body of the state, from limiting their common-law liability by contract, does not affect interstate carriage or traffic. *Missouri Pac. Ry. Co. v. Harris*, 1 White & W. Civ. Cas. Ct. App. § 1260; *Pacific Exp. Co. v. Darnell* (Sup.), 6 S. W. 765, 766.

By reason of the peculiar language in which it is framed, it has been definitely settled that Rev. Stat., art. 278, applies only to the local business of the carrier within this state. *Texas, etc., R. Co. v. Richmond*, 94 Tex. 571, 575, 63 S. W. 619, reversing 61 S. W. 410. It is apparent from the opinion delivered in that case that it was not the purpose to disturb *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 10 S. W. 1001; *Armstrong v. Galveston, etc., R. Co.*, 92 Tex. 117, 46 S. W. 33, reversing 43 S. W. 614; *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161, and other like cases, where it was held that such statute was applicable to interstate shipments. *International, etc., R. Co. v. Vandeventer*, 48 Tex. Civ. App. 368, 369, 107 S. W. 560, affirmed, no op. See, also, *Pacific Express Co. v. Darnell* (Sup.), 6 S. W. 765, 766; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

A contract with an express company for a shipment beyond the state is not within the local statute prohibiting a common carrier from limiting its liability at common law. *Pacific Exp. Co. v. Darnell* (Sup.), 6 S. W. 765.

Where a contract with an express company for the interstate transporta-

tion of goods, which limits the liability to the value of the goods as disclosed in the contract, is made in Illinois, where a statute exists prohibiting a common carrier from limiting its common-law liability as to goods received for carriage, it will not limit the company's liability for a loss of the goods without the company's negligence while the goods are in transit in Texas, since the validity of the contract is to be determined by the laws of Illinois. *Pittman v. Pacific Exp. Co.*, 59 S. W. 949, 24 Tex. Civ. App. 595.

A condition contained in a contract made in Arkansas, for the shipment of sheep from Arkansas to Texas, that, "should damage occur for which the carrier may be liable, the value of the sheep at the date and place of shipment shall govern the settlement," is valid, the condition being valid in Arkansas. *Texas & P. Ry. Co. v. Davis*, 2 Willson, Civ. Cas. Ct. App. § 194.

A condition contained in a contract made in Arkansas, for the shipment of sheep to be transported from that state to Texas, that "the business of the carrier shall not be delayed by the detention of trains to unload and reload the sheep for any cause whatever," is valid, the condition being valid in Arkansas. *Texas & P. Ry. Co. v. Davis*, 2 Willson, Civ. Cas. Ct. App. § 194.

A condition contained in a contract, made in Arkansas, for the shipment of sheep, the sheep to be transported from that state to Texas, that "the carrier is released from all injury, loss, and damages, or depreciation, which the animals, or either of them, may suffer in consequence of either of them being weak, or escaping, or injuring themselves or each other, or in consequence of overloading, heat, suffocation, fright, viciousness, or of being injured by fire, or the burning of any material, while in the possession of

the carrier," is valid, the condition being valid in Arkansas. *Texas & P. Ry. Co. v. Davis*, 2 Willson, Civ. Cas. Ct. App. § 194.

Rev. St., art. 278, provides that common carriers, entirely within the body of the state, shall not limit their common-law liability by exceptions in the bill of lading, or in any manner whatever, and no special agreement made in contravention to the provisions of the article shall be valid. Held, that such statute does not apply to an interstate or foreign shipment, but only to shipments beginning and ending within the state. *Missouri Pac. Ry. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643; *Missouri Pac. R. Co. v. International, etc., Ins. Co.*, 84 Tex. 149, 152, 19 S. W. 459; *Missouri Pac. R. Co. v. Harris*, 1 App. Civ. Cases, § 1257; *Texas, etc., R. Co. v. Hamm*, 2 App. Civ. Cases, § 491; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 682, 685, 29 S. W. 565. See, also, *Ryan & Co. v. M. K. & T. R. Co.*, 65 Tex. 13; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 171, 2 S. W. 574, and *Missouri Pac. R. Co. v. China Mfg. Co.*, 79 Tex. 26, 14 S. W. 785.

Rev. St., art. 278, prohibiting carriers within the state from limiting their common-law liability by contract or otherwise, was never intended to affect interstate traffic, and hence does not apply to a contract restricting a carrier's liability, which was to have effect in another state. *Missouri Pac. R. Co. v. Harris*, 1 White & W. Civ. Cas. Ct. App. § 1260.

Rev. St., art. 278, providing that common carriers within the state shall not limit or restrict their liability, as it exists at common law, in any manner whatever, was never intended to apply to, or affect interstate carriage or traffic. *Texas & P. Ry. Co. v. Davis*, 2 Willson, Civ. Cas. Ct. App. § 192.

Article 452, § 1, Pas. Dig., ap-

plies only to carriers within the state, and not to interstate shipments. *H. & T. C. R. Co. v. Park*, 1 App. Civ. Cases, § 332.

**Domestic and Foreign Shipment Distinguished.**—By a contract of domestic shipment is understood one which contemplates the shipment of goods from one point in a state to another point therein. By a contract of foreign or interstate shipment is understood one which contemplates the transportation of goods from within the state to a foreign country or to a point within another state. Where a railroad extends beyond the limits of the state but goods are carried from one point to another within the state the railroad is a carrier within the state but if the railway by itself or by its connecting lines transports goods from within the state to another state it is an interstate carrier. *M. P. Ry. Co. v. Sherwood, Thompson & Co.*, 84 Tex. 125, 19 S. W. 455.

Rev. St. art. 278 prohibiting common carriers within the state from limiting their liability, does not prevent a railroad company, a part of whose line is operated in this state and a part in other states, from limiting its liability by contract for carrying cotton into another state. *Missouri Pac. Ry. Co. v. International Marine Ins. Co.*, 84 Tex. 149, 19 S. W. 459.

Plaintiff, in a suit for the value of cotton lost in transitu, alleged that defendant railroad, a Texas corporation, accepted the cotton at G., Tex., and agreed by bills of lading, in consideration of 136 cents per 100 pounds, to carry the cotton upon its lines, and to deliver it to its connecting lines, to be carried to the city of New Orleans, there to be delivered to the W. Steamship Company, to be transported to Liverpool, and there delivered to M. Held, that the contract was for a foreign shipment, and was

therefore not within Rev. St. art. 278, forbidding carriers to limit their liability. *Missouri Pac. Ry. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643.

Plaintiffs delivered a car load of cotton to defendant in Texas for transportation to Rhode Island. The shipping receipt provided that neither the defendant nor the connecting carrier handling the cotton should be liable for destruction of the cotton by fire, nor for any damage thereto by causes beyond their control. The cotton burned in the car while being transported. Held, that such condition of the contract of defendant was not prohibited by Rev. St. art. 320, providing that railroad companies and other common carriers of goods for hire "within this state" shall not limit their liability as it exists at common law, by inserting exceptions in the bill of lading or receipt of the goods for transportation, or otherwise, and no special agreement made in contravention of the provisions of such article shall be valid, since the statute by its language purports to apply only to carriers engaged in carrying goods for hire "within this state," and does not prohibit carriers of interstate commerce from limiting their common-law liability. Judgment (Civ. App.), 61 S. W. 410, reversed. *Texas & P. Ry. Co. v. Richmond*, 63 S. W. 619, 94 Tex. 571, citing *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 133, 19 S. W. 455.

A contract for shipment from a point in one state to a point in another, over connecting lines, is a contract of interstate shipment, in which the carrier may limit its liability for loss not due to its own negligence. *Texas & P. Ry. Co. v. Payne*, 38 S. W. 366, 15 Tex. Civ. App. 58.

**Effect of Bill of Lading Limiting Liability to Carrier's Line.**—A bill of lading purporting to be a foreign bill of lading, and was an undertaking by

defendant railroad to transport plaintiff's cotton from G., Tex., to Liverpool, for 136 cents per 100 pounds between those points. It contained a provision limiting defendant's liability to its own line, terminating at G., Tex., where the cotton was to be delivered to a steamship company, whose liability therefor should then and there commence. The bill was signed by D., as agent, severally but not jointly, for the railway and steamship companies. Held, that the limitation of defendant's liability did not make the instrument a domestic bill. *Missouri Pac. Ry. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643.

### C. MANNER OF LIMITING LIABILITY.

#### 1. By Special Contract.

##### a. Form and Requisites.

##### (1) In General.

A mere notice of limitation upon a railway company's liability, displayed in the company's office, or printed on the bill of lading, will not bind the owner of the goods shipped, although brought to his knowledge; but his consent will be conclusively presumed to the conditions inserted in the body of the bill of lading if he has had an opportunity to know the contents of the bill which was received at the time of shipping the goods, and the company has resorted to no unfair means of deception. *Ryan v. Missouri, K. & T. Ry. Co.*, 65 Tex. 13, 57 Am. Rep. 589.

##### (2) Printing.

The fact, too, that the conditions are printed in small type is of not such importance as to render them void for that reason alone. It would have this effect only when from fraud, or undue advantage on the part of the carrier, or other circumstances, the shipper was prevented from acquainting himself with the conditions. *Ryan*

& Co. v. M. K. & T. R. Co., 65 Tex. 13, 18.

The mere fact that the stipulation was placed upon the margin instead of in the body of the contract of carriage does not forbid its consideration as part of the contract. *Brown v. Adams*, 3 App. Civ. Cases, § 390.

##### (3) Authority of Agent of Owner to Stipulate for Terms of Transportation.

As a general rule, the consignor, as the agent to whom the owner entrusts his goods to be delivered to the carrier, must be regarded as having authority to stipulate for the terms of transportation. Having the power to make the delivery, he is to be presumed to have all the power necessary to carry it into effect. The carrier is authorized to act upon this presumption in contracting with the agent, and need not inquire into his authority to make the particular shipment. *Ryan & Co. v. M., K. & T. Ry. Co.*, 65 Tex. 13, 15.

An agent of a nonresident firm who bought cotton for the firm and shipped it to his principal would be presumed to have authority to make any kind of a lawful freight contract upon shipment of such cotton. *Missouri Pac. R. Co. v. International, etc., Ins. Co.*, 84 Tex. 149, 19 S. W. 459, citing *Ryan & Co. v. M. K. & T. R. Co.*, 65 Tex. 13.

##### (4) Mutuality—Meeting of Minds of Parties.

##### (a) In General.

It must appear that the parties to the contract mutually understood, intended and agreed upon the stipulation limiting the carrier's common-law liability. *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 82 S. W. 346; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 684, 29 S. W. 565.

The rule "that the shipper is not bound by such regulations or the

terms of the bill of lading that restricts the carrier's common-law liability, unless he knew of their terms and conditions and assented to be bound by them, ought to in reason find application in a case where it is shown that the shipper, although he signed the contract, did so under circumstances that show that he did not know of its terms, and had not a reasonable opportunity to so inform himself before he was required to sign it. The want of assent exists as much in one case as in the other; and when we consider the legal effect of a bill of lading as showing *prima facie* the contract between the parties, and that the acceptance of such a contract by one of the parties to it, although he did not sign it, is as equally binding upon him as it is upon the one that formally executed it (*Ryan & Co. v. M. K. & T. R. Co.*, 65 Tex. 13, 17; *Schloss v. Atchison, etc.*, R. Co., 85 Tex. 601, 602, 22 S. W. 1014); and when, as we have seen, it is steadily held that although this fact may appear to exist it may be shown differently, we see no reason why a written instrument signed by the shipper would not be subject to the same rules, and why it may not be explained by evidence showing the true situation of the parties and the true contract under which the shipment was made. If it is permissible in the one case to prove what was the real contract, reason suggests that such procedure is also admissible in the other case. The primary inquiry is one of assent, and when it is shown that the shipper relied upon a parol agreement of shipment and upon the common law liability of the carrier, a written contract restricting the liability of the carrier differently from that actually made or created by common law should not prevail when the shipper did not know its contents and assent to its terms. In such a case, the assumption of assent that springs from the fact that

he signed it may be rebutted. The issue then becomes one of fact as to which contract is binding." *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 686, 29 S. W. 565.

#### (b) Denial of Knowledge of Contents.

Shipper in absence of fraud is bound by stipulations contained in contract of shipment and is not permitted to say that he accepted, signed, and executed it without knowing its contents, in absence of fraud. *Texas, etc., R. Co. v. Scrivener*, 2 App. Civ. Cases, § 328.

Where a shipper accepts and executes a contract of shipment without reading it or knowing its stipulations, he is conclusively presumed, in the absence of fraud and imposition, to have assented thereto, and is bound thereby. *Texas & P. Ry. Co. v. Scrivener*, 2 Willson, Civ. Cas. Ct. App., § 331.

Where a shipper of live stock accepts a bill of lading limiting the carrier's common-law liability, he can not, in an action against the carrier to recover for injuries to the stock, avoid the effect of the limitation, by showing that he did not know its contents. *Texas & P. Ry. Co. v. Scrivener*, 2 Willson, Civ. Cas. Ct. App., § 331.

#### (5) Duress or Fraud.

Common carriers can not avoid usual consequences of undertaking to carry freight by requiring shipper to sign written contract under circumstances of duress, or without consideration. *Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 292, 58 S. W. 846.

The shipper, under circumstances shown in this case, was in some respects under duress as affecting his property when he was forced to the alternative of signing such a contract, or being denied transportation to the desired market, by the carrier. It was the duty of the carrier to give the opportunity to ship under terms such as would hold the carrier to its common-

law duties in the premises, or of the verbal contract under which the cattle were delivered. Duress may apply to property as well as to the person. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

**(6) Reasonableness.**

Stipulation for limitation of carrier's common-law liability must be reasonable. A carrier can not place unreasonable restrictions on its common-law liability. *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 46, 33 S. W. 109, affirming 29 S. W. 806; *San Antonio, etc., R. Co. v. Dolan* (Civ. App.), 85 S. W. 302; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 684, 29 S. W. 565; *Galveston, etc., R. Co. v. Williams* (Civ. App.), 25 S. W. 311; *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354; *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 403, 82 S. W. 346; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 169, 2 S. W. 574; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Houston, etc., R. Co. v. Williams* (Civ. App.), 31 S. W. 556; *Sanger v. French Piano, etc., Co.*, 21 Tex. Civ. App. 523, 52 S. W. 621; *Building, etc., Ass'n v. Griffin*, 90 Tex. 480, 39 S. W. 656; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 319, 4 S. W. 567; *Pittman v. Pacific Exp. Co.*, 24 Tex. Civ. App. 595, 59 S. W. 949.

The duty of railroads to the public and the shipper requires that obligations and engagements which they enter into for transportation shall be based upon contracts that are essentially fair, just, and reasonable, not only to the carrier but to the shipper. The unequal positions of the parties in their contractual relations to each other commends the wisdom of the rule that requires the carrier to deal fairly with the shipper, and prevents it from imposing unfair contracts upon him. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

The unequal position of the carrier

and shipper, and the public nature of the carrier's business, furnish the grounds on which their right to contract as to them seems proper, in the absence of a statute regulating the matter, ought to be denied, and the only grounds on which the reasonableness of their contracts ought to be inquired into. *Gulf, etc., Ry. Co. v. Trawick*, 68 Tex. 314, 320, 4 S. W. 567.

The state courts interpose their remedial relief to the operation of unreasonable stipulations that the carrier, by the terms of the contract of shipment, seeks to impose upon the shipper. *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 124, 26 S. W. 161.

**Interstate Shipment.**—A limitation on the common law liability of a carrier for the proper delivery of articles to a point beyond the limits of the state to be recognized must be reasonable. *Missouri Pacific Ry. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574. *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 403, 82 S. W. 346.

A common carrier can not contract against its own negligence, nor place unreasonable restrictions on its common-law liability, though the contract be for the interstate shipment of goods. *San Antonio & A. P. Ry. Co. v. Dolan* (Civ. App.), 85 S. W. 302.

Conceding that the statute of Texas, forbidding any limitation of liability of common carriers, by contract, applies only to contracts of carriage within the state, question of reasonableness of such limitation applies to carriage going beyond limits of the state. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 171, 2 S. W. 574.

A limitation on common-law liability of a carrier for transportation of cattle to a point outside of state, will not be recognized unless it is reasonable, and such reasonableness appears from answer. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 171, 172, 2 S. W. 574.

A stipulation in a contract of shipment that the shipper will be estopped, when no element of estoppel in fact



may exist, is unreasonable in the eye of the law, when such a stipulation is urged in defense of a claim for damages arising from the negligence of the carrier. It would be unreasonable and unjust for a carrier to contract away its liability for its negligence in any such manner. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 681, 29 S. W. 565.

**(7) Consideration.**

**(a) In General.**

It may now be considered as settled in this state that common carriers can not avoid the usual consequences of an undertaking to carry freight, by requiring the shipper to sign a written contract under circumstances of duress, or without consideration. *Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 292, 58 S. W. 846; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 679, 29 S. W. 565; *Missouri, etc., R. Co. v. Darlington* (Civ. App.), 40 S. W. 550; *Missouri, etc., R. Co. v. Withers*, 16 Tex. Civ. App. 506, 40 S. W. 1073, affirmed in 93 Tex. 691, no op.; *Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. 399; *Texas, etc., R. Co. v. Klepper* (Civ. App.), 24 S. W. 567; *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 82 S. W. 346; *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 897, affirmed in 93 Tex. 673, no op.

A carrier being required to have a reasonable rate at which it will transport freight on a common-law liability contract, a contract of limited liability, for a shipment for which the shipper paid the regular tariff rate, is unenforceable for want of consideration. *St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1137.

If the rate paid by plaintiffs was the regular tariff rate which the appellant had established for, and did carry such freight without limitation upon its common-law liability, then this contract was without consideration. But, if the amount contracted for and paid

was the rate established and used for contracts wherein the carrier was by agreement with the shipper relieved from some of its common-law liabilities, and this was less than the former rate, then the consideration based upon transportation is sufficient. The carrier is required to have a rate, reasonable in its terms, at which those who do not choose to release it from its common-law liabilities may have their goods transported. If in compliance with this requirement it fixes and publishes such a rate, then there must be some consideration in the way of a concession or reduction from this rate, in order to support contracts releasing it from some of those liabilities imposed by common law. *St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1137, citing *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

A written contract relieving a carrier of its liability under a prior verbal contract, being without consideration, is properly disregarded. *St. Louis, etc., R. Co. v. Warren* (Civ. App.), 80 S. W. 537; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

Where, as against a written contract of shipment improperly exacted by the carrier, the shipper proves that the consideration expressed therein was wanting, this is sufficient, unless the carrier proves a different or additional consideration, and the words "and other considerations" recited in the contract are immaterial. *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 897, affirmed in 93 Tex. 673, no op.

**(b) Execution after Goods Received.**  
**aa. In General.**

Where an oral contract of shipment had been made and the railroad requires the signing of a written contract limiting liability, there is no considera-

tion for the execution of the written contracts, and the verbal contract must be looked to in determining the rights of the parties. *San Antonio, etc., R. Co. v. Wright*, 20 Tex. Civ. App. 136, 137, 49 S. W. 147; *Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. 286, affirmed in 93 Tex. 699, no op.; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565; *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 897, affirmed in 93 Tex. 673, no op.; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 613, 18 S. W. 716; *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806; *Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 58 S. W. 846; *San Antonio, etc., R. Co. v. Williams (Civ. App.)*, 57 S. W. 883; *Texas, etc., R. Co. v. Gallagher (Civ. App.)*, 70 S. W. 97.

After a common carrier has received property for transportation, a contract limiting its common-law liability is illegal. *Gulf, C. & S. F. Ry. Co. v. Wood (Civ. App.)*, 30 S. W. 715, citing *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567; *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 273, 15 S. W. 568, 18 S. W. 948.

In the case of *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716, there was a verbal contract for shipment of cattle, and the shipper was afterwards required to sign a written contract, and it was held that it was void, and the terms of the verbal contract should prevail. In the case of *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806, the supreme court said: "If, after the cattle were placed upon the train, the plaintiff and his agent had signed them (contracts of shipment) without knowing their contents and without any new consideration, it may be that they should have been held void." In *Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. 286, affirmed in 93 Tex. 699, no op., it was said: "Neither is there any merit in the

fourth assignment, which attacks that portion of the charge which instructs the jury that if they believe that appellant and appellee made a verbal contract, and that the hogs were received, and the journey was begun, and a written contract was presented to appellee, and he signed it with a knowledge of the contents, or that he had sufficient time to have read its contents, and was not induced to sign it by any false representations of appellant's agent, or that he signed the same under circumstances that he should have read the same, then the jury should find for the appellant. There was nothing objectionable in this charge. The verbal contract would not be merged into a written contract obtained by fraud or misrepresentation." See, also, *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565; *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 897, affirmed in 93 Tex. 673, no op.; *San Antonio, etc., R. Co. v. Wright*, 20 Tex. Civ. App. 136, 49 S. W. 147; *Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 58 S. W. 846. The case of *International, etc., R. Co. v. True & Co.*, 23 Tex. Civ. App. 523, 57 S. W. 977, affirmed in 94 Tex. 705, no op., decided by the appellate court, was quite similar to this, and the railroad company was held bound by the verbal contract and a writ of error was refused by the supreme court. *Southern Pac. R. Co. v. Anderson*, 26 Tex. Civ. App. 518, 519, 63 S. W. 1023, affirmed in 95 Tex. 686, no op.

A contract signed by a shipper, after he had placed his cattle on the cars of a railway company, limiting the liability of the company, and induced by the refusal of the company to carry the cattle unless it was signed, is void. *Missouri, K. & T. Ry. Co. of Texas v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

The shipper agreed with an agent of the railroad company upon terms for carrying his cattle from Maxwell,

Texas, to East St. Louis, Ill. The cattle were delivered for carriage, and were loaded upon the train under and in accordance with the parol contract. When the train was about starting, a written contract was presented to the shipper for his signature. He examined so far as to know that the rate was as agreed upon, and then signed it, not knowing that it contained onerous conditions against him. There was no consideration for his signing the written contract. Held, that such writing did not supply the place of the parol contract, and was not binding upon the shipper. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

Where, after a shipper had made parol contract for the shipment of his cattle and loaded them, he signed a written contract at the agent's request, only looking to see if the rate was as agreed, whereas it limited carrier's liability, carrier could not enforce the written contract. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 687, 688, 29 S. W. 565.

"The carrier by virtue of such an agreement receives a benefit, but could it in reason for a moment be urged that such subsequent release of the carrier from its lawful obligation to pay the contract price of the cattle was supported by a consideration? The statement of such an illustration is argument sufficient as an answer to the question. Such in effect is the case we have before us. It is clear under the facts that the contract in question is not supported by a consideration. *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 609, 18 S. W. 716." *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 688, 29 S. W. 565.

**Misrepresentation of Nature of Instrument.**—Where a shipper made a verbal contract with a railway company to transport certain live stock, and after the stock had been loaded on the cars the company's agent presented several contracts for signature,

stating they were vouchers to be shown the conductors, and the shipper signed them without examination, having no opportunity to do so, the written contracts were void and the verbal contract would control. *Southern Pac. R. Co. v. Anderson*, 26 Tex. Civ. App. 518, 63 S. W. 1023, affirmed in 95 Tex. 686, no op.

**Stipulation Increasing Rate and Limiting Liability.**—A railroad company whose agent has orally, and without limitation of its common-law liability, contracted to transport cattle at a specified rate per car, on the faith of which agreement the cattle are loaded on the cars, can not, as a condition of transporting the cattle, afterwards require the shipper to execute a written contract increasing the price of the cars and diminishing the carrier's liability. *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 897, affirmed in 93 Tex. 673, no op.

**Free Pass.**—A common carrier can not claim that a written shipping contract, demanded of the shipper after loading his cattle on its cars under an oral contract, is binding on the shipper because there was included as part of such contract a free pass over the road with the cattle, where the shipper was required by the contract, in consideration of such free pass, to have charge of loading, unloading, watering, and feeding the cattle, and otherwise discharging the duties of the carrier toward them. *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 897, affirmed in 93 Tex. 673, no op.

Such a written contract, executed by the shipper when the train was ready to start with the cattle, and because the railroad agent refused to transport them until it was signed, is without consideration and void because executed under duress. *Texas, etc., Ry. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 897, affirmed in 93 Tex. 673, no op.

**Question for Jury.**—Where carrier accepted cattle for shipment under

parol contract with shipper, and after they were on its cars, and just before the train started procured a shipper to sign a written contract limiting its liability, which the shipper signed at its request, without reading, for want of time, held properly submitted to jury as to which contract controlled carrier's liability. *Missouri, etc., R. Co. v. Withers*, 16 Tex. Civ. App. 506, 511, 40 S. W. 1073, affirmed in 93 Tex. 691, no op.

This is the same shipment of cattle that was passed upon by the appellate court in the case of *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565, and the controlling facts of this case are almost identical with that case, and the principles of law there stated are controlling and applicable here. This case was also before the court, and is reported in 32 S. W. 906, in which the doctrine of the *Carter* case was approved. *Missouri, etc., R. Co. v. Withers*, 16 Tex. Civ. App. 506, 511, 40 S. W. 1073, affirmed in 93 Tex. 691, no op.

Such facts held to warrant a verdict in favor of the cattle shipper disregarding the provision of the written contract of shipment and based upon the oral agreement. *Missouri, etc., R. Co. v. Withers*, 16 Tex. Civ. App. 506, 40 S. W. 1073, affirmed in 93 Tex. 691, no op.

See charges treating the oral agreement as merged in the subsequent writing, held properly refused. *Missouri, etc., R. Co. v. Withers*, 16 Tex. Civ. App. 506, 40 S. W. 1073, affirmed in 93 Tex. 691, no op.

#### bb. Knowledge of Rule Requiring Written Contract.

Where plaintiffs had been engaged in shipping cattle over other lines for years, and had been executing limited liability contracts therefor, they were bound by the legal provisions of a similar contract entered into with defendants for the shipment in question. *Texas & P. Ry. Co. v. Byers Bros.* (Civ. App.), 84 S. W. 1087.

Where, in an action for damages to cattle shipped on defendant's railway, plaintiff alleged that the shipment was under an oral contract with defendant's agent, and that the written contract afterwards signed by him, limiting defendant's liability to its own line, was executed under circumstances constituting duress, but it appeared that at the time of the alleged oral contract he had knowledge of a rule of defendant requiring all its shipments to be made under written contract, he was not entitled to recover on the oral contract. *Texas Mexican Ry. Co. v. Gallagher* (Civ. App.), 70 S. W. 97.

Where the shipper knows of the restriction on the authority of the agent, he is in no position to contend that he, in good faith to the carrier, made the oral contract of shipment. He either must have contemplated shipping the cattle under the required written contract, or he must have contemplated a fraud on the carrier by procuring their shipment through a contract with the agent contrary to what he knew was required of the agent. *Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 58 S. W. 846; *San Antonio, etc., R. Co. v. Williams* (Civ. App.), 57 S. W. 883. The theory upon which these written contracts are held not to bind the shipper as against a preceding oral contract of shipment is that the agent had ostensible authority to make the oral contract. Such theory, however, is without force when the shipper knows what is required of the agent by the company, as plaintiff admits was his knowledge at the time he claims to have loaded these cattle on appellant's cars. *Texas, etc., R. Co. v. Gallagher* (Civ. App.), 70 S. W. 97.

In action against a carrier for damages under oral contract of shipment, where defendant pleads written contract and plaintiff's agent claims that written contract was signed without being read, stipulations limiting the liability of the carrier are binding when the shipper knew, from previous deal-

ings, contents of written contract to be signed. *Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 292, 293, 58 S. W. 846.

If, therefore, in contracting for the transportation of the horses, the shipper contemplated the signing by his agent of a written contract containing what has long been held by our supreme court to be a reasonable provision, that of limiting the carrier's liability to its own line, the contention that the written contract was without consideration, or that it had been executed under circumstances of duress, could not be sustained; and it should have been left to the jury to determine whether or not the execution of the written contract was contemplated by the parties when the preliminary oral contract was made. *Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 292, 58 S. W. 846.

Plaintiff sued for damages on an oral contract made by him with defendant's agent for the shipment of plaintiff's horses from Texas to Alabama over connecting lines, and defendant having pleaded a written contract of shipment limiting its liability to its own lines, plaintiff's agent in charge of the horses testified that the written contract was signed by him without knowing its contents, as he did not have time to read it before the train carrying the stock left the depot. There was also evidence to the effect that the prior oral contract was a mere inquiry by plaintiff and an answer thereto by the carrier's agent stating the through rate, and that plaintiff and his agent had made such shipments before, and had always signed written contracts such as the one in this case. Held, that the court erred in refusing a charge requested by defendant to the effect that if the shipper, from former dealings with the defendant, knew that it was the regular rule for the shipper to sign such written contract as the one in this case, and that when he inquired of the carrier's agents as to the

best rate to Alabama he contemplated entering into the written contract when the horses should be shipped, and that he knew, or could have known, from previous dealings, what stipulations were in the contract, the verdict should be for the defendant. *Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 58 S. W. 846.

Where in signing a written contract of shipment, which limited the liability of the carrier to damages occurring on its own line, the shipper merely carried out an agreement which was implied when he made a previous oral negotiation with the carrier's agent, the signing was but the consummation of such negotiation or oral contract, and the shipper was not in a position to avoid the binding force of the written contract, which took away none of the rights he would have had in the absence of any contract, oral or written. *Chicago, etc., R. Co. v. Halsell*, 36 Tex. Civ. App. 522, 81 S. W. 1243. The case is not to be distinguished from that of *Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 58 S. W. 846.

After the loading of a shipment one of the shippers, knowing a written contract would be required, went to the office and signed one without reading it, and without knowing that it contained a clause limiting the company's liability to damages occurring on its own road. The shippers took a copy of the contract with them, did not ask for time to read it before signing, and it did not appear that had they done so the train would not have been held for such purpose. Held, that their failure to read the contract was their own fault, and not chargeable to duress. *Houston & T. C. R. Co. v. Smith*, 97 S. W. 836, 44 Tex. Civ. App. 299.

The evidence shows that the shipment was made on the written contract and that the contract is not without consideration, but a valid contract and it being admitted that the cattle were not damaged as a result of injuries oc-

curing on the Houston & Texas Central Railroad, the judgment must be reversed and here rendered for appellant. *Houston, etc., R. Co. v. Smith*, 44 Tex. Civ. App. 299, 303, 97 S. W. 836, citing, in support of these conclusions, *Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 292, 58 S. W. 846; *Chicago, etc., R. Co. v. Halsell*, 36 Tex. Civ. App. 522, 81 S. W. 1243; *Texas, etc., R. Co. v. Gallagher* (Civ. App.), 70 S. W. 97; and *San Antonio, etc., R. Co. v. Williams* (Civ. App.), 57 S. W. 883.

### (c) Pleading and Proof.

Want of consideration may be pleaded and proved. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

The liability of the carrier had become fixed under the parol contract for shipment; its duty was to ship the cattle and safely deliver them. A written contract subsequently signed materially advantageous to the carrier without consideration would not revoke the parol contract. These facts may be shown in avoidance of such written contract when invoked as defense against liability under the parol contract. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

**Presumption of Consideration.**—A limited liability shipping contract being in writing, a valuable consideration will be presumed, but not conclusively. *St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1137.

Under proper pleadings, evidence was admissible to rebut the presumption that a carrier's limited liability contract was based on a consideration and show that none in reality existed. *St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1137.

A written instrument signed by the shipper may be explained by evidence showing the true situation of the parties and the true contract under which the shipment was made. When it is

shown that the shipper relied upon a parol agreement of shipment and upon the common law liability of the carrier, a written contract changing the liability of the carrier should not prevail, when the shipper did not know its contents or assent to its terms. In such cases, the presumption arising from the fact that he signed it may be rebutted, and want of assent and mutuality shown. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

**On Final Petition.**—Upon an issue as to whether the through shipment of plaintiff's live stock was on a verbal contract without limitation of liability, or was on a written contract limiting defendant's liability to injuries occurring on its own line, an abandoned original petition by plaintiff, alleging that a written contract had been executed, was relevant and material evidence by admission, whether such petition was verified or not. *Ft. Worth, etc., R. Co. v. Wright*, 27 Tex. Civ. App. 198, 64 S. W. 1001. See *Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 58 S. W. 846.

**Authority of Agents.**—Where contracts of shipment were signed by agents, who, as the plaintiff himself testified, were authorized to do so, and where it does not appear when and under what circumstances they so signed, it can not be said that they were executed without consideration. *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 46, 33 S. W. 109, affirming 29 S. W. 806.

### 2. Custom and Usage.

Custom and usage can not limit the common law liability of a common carrier. *Trice v. Miller*, 3 App. Civ. Cases, § 440; *Texas Exp. Co. v. Dupree*, 2 App. Civ. Cases, §§ 318, 320.

A custom can not require that the shipper shall expressly agree to a limitation of his right to damages. The law of the land regulates such matters and fixes liability upon failure to perform duties and obligations of

carriers, and when so fixed a custom can not extinguish it or require the injured party to limit it by agreement. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749.

A usage can not be a good usage if it is contrary to law or public policy. The defendant offered to show a custom of railroads not to receive for transportation any live stock unless under certain conditions modifying their common-law liability. Such a custom would be bad because railroads can not legally refuse to ship live stock. If such a custom should be ever so common and uniform it could not be sustained because it, the custom, would be against the law. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 131, 9 S. W. 749.

A common carrier has no right to demand of a shipper a waiver of his rights as a condition precedent to receiving freight. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 131, 9 S. W. 749.

As a custom must be legal before being admissible in evidence, it was not error to exclude testimony that it was the universal custom of railroads not to ship any live stock or receive any for shipment unless upon the owner's agreeing to numerous stipulations which are not allowed to be the subject of contract. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749.

It was error to admit a witness to testify "it was customary for railroad companies to turn over stock at shipping stations and at destination of stock, just as his were turned over to Jones & Co. at Memphis," it being shown that at Memphis Jones & Co. took the stock in question from the cars to a stock yard and held them for the railroad for the freight—there being no other testimony to the extent of the custom nor to the means of knowledge of the witness. The object of the evidence was not to establish any obligation on the part of the company by proof of a custom, or to show

that it was the duty of the carrier, fixed by usage in the course of business, to hold the horses at the place of destination, upon which plaintiffs seek to recover in this action; but the object was, to show that because of such usage the stock was not in fact delivered. The fact of delivery or not was susceptible of positive proof, and there was positive proof upon the question. It seems hardly probable that the company would deliver the horses until the freight had been paid, and it is not claimed that they did. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 130, 9 S. W. 749.

**Custom as to Mode of Shipping Money.**—Where an express company received a valise for shipment, knowing that the contents were valued at \$500, and contracted to deliver it at a certain place, its liability, as a common carrier, attached, under the contract, and could not be limited by a custom of express companies to ship money only through the money department, or even by special contract. *Texas Exp. Co. v. Dupree*, 2 Willson, Civ. Cas. Ct. App., § 320.

**Measure of Damage.**—A custom requiring the shipper to agree, as a condition to the right to ship his stock on a railroad, that in case of total loss of stock, the measure of damages should not be more than the cash value of the same at the place of shipment, is illegal. The carrier can not require that the shipper should make such a special contract. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749, citing *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567.

**Requiring Owner to Feed and Water Stock.**—The custom proposed in this case, required the owner to go along on the same train with his stock, to feed and water them at his own risk and expense. The law imposes this duty on the carrier, and the carrier can not transfer it to the shipper by custom. The shipper might agree to

go with his stock and to feed and water them at his own expense, but he could not be compelled to do so by custom because the law requires this duty of the carrier. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 131, 9 S. W. 749.

**Delays.**—A custom which required the owner of the stock to hold the railroad harmless against ordinary delays in taking up freight is void. If the law held the railroad harmless for such delays, a custom would not be necessary; if the law held it liable, a custom could not repeal or suspend the law. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749.

#### D. CONSTRUCTION AND OPERATION.

This subject is treated in connection with the particular stipulations. For instance, as to construction and operation of stipulations requiring notice of loss, see post, "Construction, Operation and Effect," VIII, G, 2, c.

The rule that, if a written contract, when viewed as a whole and in the light of the attendant circumstances, reasonably admits of two constructions, that one is to be adopted which is least favorable to the party whose language it is, has been applied to no class of cases with more stringency than to those in which common carriers seek to limit their liability as it exists at common law. In general not only are the bills of lading drawn by the carrier and tendered to the shipper to be accepted by him without alteration, but they are also executed upon forms prepared for the purpose of protecting the interest of the carrier, with all the care and ability which experience in the business and professional skill can bring to bear upon the subject. The rule does not require that a strained construction should be put upon the contract of shipment, in order to favor the shipper; but rather, that in case of a reasonable doubt as to which of two con-

structions best accords with the intent of the parties, that should prevail which is least favorable to the carrier. *Amory Mfg. Co. v. Gulf, etc., R. Co.*, 89 Tex. 419, 425, 37 S. W. 856.

The phrase "unavoidable accidents," in a bill of lading, is equivalent to "inevitable accidents." *Fowler v. Davenport*, 21 Tex. 626.

**"Willful Negligence."**—See post, "Limitation of Loss Arising from Negligence," VIII, G, 1.

#### E. WAIVER, FORFEITURE AND ESTOPPEL TO SET UP.

Where contract made in Arkansas for the shipment of sheep from that state to Texas contained conditions limiting the common-law liability of the carrier, and the carrier refuses to perform his part of the contract, he has no right to claim the advantage of the restrictions and limitations in his favor, but becomes liable to the full extent of the law, the same as if there had been no special contract. *Texas & P. Ry. Co. v. Davis*, 2 Willson, Civ. Cas. Ct. App., § 195.

On through contract of shipment, agent of connecting lines over which shipment passes may, for some purposes, be agent of the other carrier; but station agent of connecting carrier, solely by virtue of that position, has not authority to waive provision of contract between initial carrier and shipper. *Gulf, etc., R. Co. v. Clarke*, 5 Tex. Civ. App. 547, 548, 24 S. W. 355.

If act of agent of connecting carrier is relied upon as waiver of provision of contract between initial carrier and shipper, his authority to so act for other carrier must be shown. *Gulf, etc., R. Co. v. Clarke*, 5 Tex. Civ. App. 547, 548, 24 S. W. 355.

#### F. PLEADING AND PROOF.

In an action to recover for injury to live stock based on the carrier's common-law liability, the existence of a special contract limiting the carrier's liability is a matter of



defense to be shown by the carrier. *Missouri Pac. R. Co. v. Nicholson*, 2 Willson, Civ. Cas. Ct. App., § 169; *Galveston, etc., R. Co. v. Efron* (Civ. App.), 38 S. W. 639; *Ryan & Co. v. M. K. & T. R. Co.*, 65 Tex. 13; *Galveston, etc., R. Co. v. Horne*, 69 Tex. 643, 9 S. W. 440; *Missouri Pac. R. Co. v. China Mfg. Co.*, 79 Tex. 26, 14 S. W. 785.

Where the breach of the common-law duty of a common carrier is made the ground of recovery, the burden of proof is on the carrier, not only to allege and prove the contract thus limiting its liability but the facts showing noncompliance therewith on the part of the shipper. *St. Louis, etc., R. Co. v. Bryce*, 49 Tex. Civ. App. 608, 610, 110 S. W. 520. See, also, *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. 78; *Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302, 21 S. W. 78; *St. Louis, etc., R. Co. v. Hays*, 13 Tex. Civ. App. 577, 35 S. W. 476.

Where a carrier to a point outside of the state pleads a special contract limiting its liability for damages, such plea must show that the contract was reasonable. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 171, 2 S. W. 574.

If the answer does not show that, under the facts existing, the limitation on the carrier's liability sought to be imposed by the special contracts was reasonable in its character, then the answer was not sufficient, and the court below properly sustained the demurrer. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 171, 2 S. W. 574.

If the contract were even valid, whether reasonable or not, the shipper would be bound by its terms; but where its validity depends upon its being reasonable, the party who asserts its validity must allege the facts which make it so. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 172, 2 S. W. 574.

**Must Plead Specifically.**—A railroad company can not, in defense to an ac-

tion on a contract, prove that, by the contract, its common-law liability was limited, unless it specifically pleads that provision of the contract. *Atchison, T. & S. F. Ry. Co. v. Bryan* (Civ. App.), 28 S. W. 98.

In the absence of a special plea setting up such contract as a defense, a court is warranted in charging the jury that the railroad is deemed in law a common carrier and responsible as such for the discharge of its duties. *Atchison, etc., R. Co. v. Bryan* (Civ. App.), 28 S. W. 98.

#### **Presumption and Burden of Proof.**

—The burden is upon the carrier claiming that, by reason of an exception in the bill of lading, it is not liable for the loss sued for, to show, not only that the cause of the loss was within the exception, but that there was no negligence on its part. *Galveston, H. & S. A. Ry. Co. v. Efron* (Civ. App.), 38 S. W. 639.

Even when the shipment is under a contract limiting the common-law liability of the carrier, an injury, when shown to have been received during transportation, puts upon the carrier the burden of showing, not only that the injury comes within the exemptions to which it is entitled under the contract, but that it was inflicted without its negligence or that of its servants. *St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1137; *Ryan & Co. v. M. K. & T. Co.*, 65 Tex. 13; *Texas, etc., R. Co. v. Richmond*, 94 Tex. 571, 63 S. W. 619, reversing 61 S. W. 410; *Houston, etc., R. Co. v. Bath & Co.*, 17 Tex. Civ. App. 697, 44 S. W. 595, affirmed in 93 Tex. 731, no op.; *Texas, etc., R. Co. v. Payne*, 15 Tex. Civ. App. 58, 60, 38 S. W. 366; *St. Louis, etc., R. Co. v. Martin* (Civ. App.), 35 S. W. 28; *Galveston, etc., R. Co. v. Efron* (Civ. App.), 38 S. W. 639.

Where a common carrier relies on the stipulations of the bill of lading to secure immunity from liability for the loss of goods intrusted to his care, the

burden is on him to prove that the loss was occasioned without his fault. *Houston & T. C. Ry. Co. v. McFadden*, 40 S. W. 216, 42 S. W. 593, 91 Tex. 194.

Where a mule was delivered to a carrier in sound condition for transportation, under a contract limiting the carrier's common-law liability, and arrived with a cut on the shoulder, the burden was on the carrier to show, not only that the injury resulted from a cause within the exemptions in the contract, but that it was inflicted without any negligence of the carrier or its servants. *St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1137.

**Reasonableness.**—See ante, "Reasonableness," VIII, C, 1, a, (6).

**Consideration.**—See ante, "Consideration," VIII, C, 1, a, (7).

## G. PARTICULAR STIPULATIONS CONSIDERED.

### 1. Limitation of Loss Arising from Negligence.

A common carrier can not, by contract or stipulation in a bill of lading, relieve itself from liability for the loss or injury arising from its own negligence or that of its servants. Such contract or stipulation is against public policy and void, and will not be enforced. *Texas, etc., R. Co. v. Richmond*, 94 Tex. 571, 576, 63 S. W. 619, reversing 61 S. W. 410; *Building, etc., Ass'n v. Griffin*, 90 Tex. 480, 39 S. W. 656; *Ft. Worth, etc., R. Co. v. Great-house*, 82 Tex. 104, 110, 17 S. W. 834; *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 605, 16 S. W. 441; *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607; *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 12 S. W. 815; *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611, 8 S. W. 312; *Missouri Pac. R. Co. v. Ivy*, 71 Tex. 409, 414, 9 S. W. 346; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 169, 2 S. W. 574; *G. C. & S. F. R. Co. v. McGown*, 65 Tex. 640; *International, etc., R. Co. v.*

*Campbell*, 1 Tex. Civ. App. 509, 512, 20 S. W. 845; *International, etc., Ry. Co. v. Foltz*, 3 Tex. Civ. App. 644, 22 S. W. 54, affirmed in 93 Tex. 687, no op.; *Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 684, 26 S. W. 286, affirmed in 93 Tex. 699, no op.; *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 121, 26 S. W. 161; *Gulf, etc., R. Co. v. Wilson*, 7 Tex. Civ. App. 128, 130, 26 S. W. 131; *Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 27, 31 S. W. 308, affirmed in 88 Tex. 593; *Pacific Exp. Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 105, 42 S. W. 795; *Houston, etc., R. Co. v. Bath & Co.*, 17 Tex. Civ. App. 697, 710, 44 S. W. 595, affirmed in 93 Tex. 731, no op.; *Ft. Worth, etc., R. Co. v. Rogers*, 21 Tex. Civ. App. 605, 53 S. W. 366; *Sanger v. French Piano, etc., Co.*, 21 Tex. Civ. App. 523, 52 S. W. 621; *Pittman v. Pacific Exp. Co.*, 24 Tex. Civ. App. 595, 597, 59 S. W. 949; *Atchison, etc., R. Co. v. Bryan (Civ. App.)*, 28 S. W. 98; *Texas, etc., R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 225, 78 S. W. 548, affirmed in 98 Tex. 635, no op.; *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 402, 82 S. W. 346; *International, etc., R. Co. v. Vandeventer*, 48 Tex. Civ. App. 366, 107 S. W. 560, affirmed, no op.; *H. & T. C. R. Co. v. Park*, 1 App. Civ. Cases, § 332; *G. C. & S. F. R. Co. v. Wilhelm*, 3 App. Civ. Cases, § 458; *St. Louis, etc., R. Co. v. Robbins*, 4 App. Civ. Cases, § 43, 14 S. W. 1075; *Texas, etc., R. Co. v. Montgomery*, 4 App. Civ. Cases, §§ 238, 240, 16 S. W. 178; *Pacific Exp. Co. v. Darnell (Sup.)*, 6 S. W. 765, 766; *Taylor, etc., R. Co. v. Sublett (Civ. App.)*, 16 S. W. 182; *Gulf, etc., R. Co. v. Vaughan*, 4 App. Civ. Cases, § 182, 16 S. W. 775; *Missouri Pac. R. Co. v. Smith (Sup.)*, 16 S. W. 803; *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354; *Houston, etc., R. Co. v. Williams (Civ. App.)*, 31 S. W. 556, 558; *Gulf, etc., R. Co. v. Dunman (Civ. App.)*, 81 S. W. 789; *San Antonio, etc., R. Co. v. Dolan*

(Civ. App.), 85 S. W. 302; *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, 13 S. W. 191; *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 95, 14 S. W. 913; *Harris v. Howe*, 74 Tex. 534, 538, 12 S. W. 224.

Any agreement with a carrier that diminishes or destroys its liability as to either its duty to safely carry the goods or to make reparation in damages to the fullest extent is contrary to public policy and void, if the loss is attributable to the negligence of the carrier. *Galveston, Harrisburg & S. A. Ry. Co. v. Ball*, 80 Tex. 602, 16 S. W. 441.

The law holds the carrier to a diligent and careful transportation of its freight, and public policy forbids that it may throw off this obligation by stipulation for exemption from the consequences of its negligence. *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 121, 26 S. W. 161, citing *Pacific Exp. Co. v. Darnell* (Sup.), 6 S. W. 765, 766; and *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354.

A stipulation in a bill of lading releasing the carrier from liability for its negligence is void as against public policy. *Southern Kansas Ry. Co. of Texas v. J. W. Burgess Co.* (Civ. App.), 90 S. W. 189.

A stipulation in the contract of a carrier, for immunity against his own negligence, is against public policy and void. *Texas & P. Ry. Co. v. Davis*, 2 Willson, Civ. Cas. Ct. App., § 193.

**Unreasonable.**—Such a contract would be unjust and unreasonable in the eye of the law. *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 121, 26 S. W. 161, citing *Pacific Exp. Co. v. Darnell* (Sup.), 6 S. W. 765, 766; and *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354. See post, "Reasonableness," VIII, G, 2, b, (4).

In an action against a railroad company for injuries to stock shipped, an instruction that "so much of the writ-

ten contract of shipment as seeks to relieve the defendant from liability as common carrier, and to relieve it from the consequences of negligence on the part of its agents or employees, is unreasonable and void," is not erroneous. *Atchison, T. & S. F. Ry. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. 286, affirmed in 93 Tex. 699, no op.; *Missouri Pac. R. Co. v. Hains*, 67 Tex. 166, 2 S. W. 524.

**At Common Law.**—This was the rule at common law. *Ft. Worth, etc., R. Co. v. Rogers*, 21 Tex. Civ. App. 605, 53 S. W. 366.

This is the rule that prevails in this state, and is recognized by the supreme court of the United States, qualified, however, by the decisions of the latter court to the effect that an agreement as to the value of the article shipped, if reasonable and fairly entered into, will be enforced, but that in such a case no federal question arises, as congress has not legislated upon that subject and brought it within the purview of that provision of the constitution which authorizes congress to legislate concerning commerce between the states; and, for this reason, the federal courts will follow the decisions of state courts where the question is to be determined. *International, etc., R. Co. v. Vandeventer*, 48 Tex. Civ. App. 368, 107 S. W. 560, affirmed, no op.

Provisions of the Revised Statutes do not indicate the policy or disposition to favor railroad companies, or other carriers, in the matter of their liability for negligence, but rather the contrary. They are generally held, in this respect, to a rigid accountability and are expressly prohibited by statute from restricting by contract their liability at common law. (Rev. Stat., art. 278.) It is not consistent with the policy thus manifested to render all others liable for the ordinary neglect of their agents and to exempt common carriers under like circumstances. Hen-

*drick v. Walton*, 69 Tex. 192, 196, 6 S. W. 749.

Since the constitution (art. 10, § 2) declares all railway companies common carriers, and the statute (Rev. Stat., art. 319) provides that the duties and liabilities of carriers in this state shall be the same as at common law, and also (art. 320) that railway companies shall not in any manner whatever limit or restrict their liability as it exists at common law, a railway company can not, by a release taken in advance and in consideration of permitting one to be carried as a passenger on a freight train, exempt itself from liability for damages resulting from its own negligence. *Ft. Worth, etc., R. Co. v. Rogers*, 21 Tex. Civ. App. 605, 53 S. W. 366.

**Connecting Lines.**—Carrier can not lawfully contract for immunity from loss of or injury to property shipped, which is occasioned by its wrongful acts or omissions while on its line of railroad. *International, etc., R. Co. v. Campbell*, 1 Tex. Civ. App. 509, 512, 20 S. W. 845. See *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 121, 26 S. W. 161.

**Duty Can Not Be Shifted to Another.**—This court has before held, that the care and duty imposed upon the carrier to safely carry and care for the animals intrusted to its custody for shipment can not by contract be shifted to some one else so as to relieve the carrier from the consequences of its negligence; and especially is this so when it appears, that the negligence of the servants of the carrier was the direct cause of the loss. *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 122, 26 S. W. 161.

**Interstate and Domestic Shipments.**—A stipulation by a common carrier for exemption from the consequences of its negligence will not be enforced in either a domestic or interstate shipment. *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 121, 26 S. W. 161;

*St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 82 S. W. 346; *International, etc., R. Co. v. Vandeventer*, 48 Tex. Civ. App. 368, 107 S. W. 560, affirmed no op.; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 169, 2 S. W. 574; *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 303, 12 S. W. 815; *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 605, 16 S. W. 441; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 110, 17 S. W. 834; *Texas, etc., R. Co. v. Richmond*, 94 Tex. 571, 63 S. W. 619, reversing 61 S. W. 410; *Southern Kansas R. Co. v. Burgess Co.* (Civ. App.), 90 S. W. 189, 191, 193, affirmed in 101 Tex. 659, no op.; *Pacific Exp. Co. v. Darnell* (Sup.), 6 S. W. 765, 766; *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354; *St. Louis, etc., R. Co. v. Moon*, 47 Tex. Civ. App. 209, 103 S. W. 1176.

A contract whereby a railroad company agreed to transport a number of carloads of cattle from Talpa, Tex., a certain distance over its own line, and deliver same to its connecting lines for transportation to Chicago, at a fixed rate per carload for the whole distance, is a through bill of lading; a stipulation in such bill of lading that the railroad shall not be liable for loss caused by negligence beyond its own line is void. *Gulf, etc., R. Co. v. Vaughn*, 4 App. Civ. Cases, § 182, 16 S. W. 775.

Common carriers can not limit their liability for goods shipped within the body of the state, as it exists at common law, in any way whatever. *Pacific Express Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 105, 42 S. W. 795.

**Conflict of Laws.**—The rule that a contract valid where made is valid everywhere is subject to the exception that where the contract contravenes the settled policy of the law of the state where it is sought to be enforced, its terms will not be upheld, as in case of a contract operating to exempt a common carrier in part from liability

for loss of goods resulting from its own negligence. *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 82 S. W. 346. See, also, *Pecos, etc., R. Co. v. Hughes*, 44 Tex. Civ. App. 135, 98 S. W. 410, 411; *St. Louis, etc., R. Co. v. Moon*, 47 Tex. Civ. App. 209, 103 S. W. 1176; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 169, 2 S. W. 574; *Ft. Worth, etc., R. Co. v. Great-house*, 82 Tex. 104, 17 S. W. 834; *Houston, etc., R. Co. v. Williams* (Civ. App.), 31 S. W. 556; *Sanger v. French Piano, etc., Co.*, 21 Tex. Civ. App. 523, 52 S. W. 621; *Building, etc., Ass'n v. Griffin*, 90 Tex. 480, 39 S. W. 656; *Texas, etc., R. Co. v. Davis*, 2 App. Civ. Cases, § 191; *International, etc., R. Co. v. Vandeventer*, 48 Tex. Civ. App. 366, 107 S. W. 560, affirmed, no op.; *Texas, etc., R. Co. v. Davis*, 2 App. Civ. Cases, § 191, distinguishing *St. Louis, etc., R. Co. v. Hambrick* (Civ. App.), 97 S. W. 1072; *Chicago, etc., R. Co. v. Thompson*, 100 Tex. 185, 97 S. W. 459, reversing 41 Tex. Civ. App. 459; *Missouri Pac. R. Co. v. Harris*, 1 App. Civ. Cases, § 1257.

**Limiting Liability to That of Forwarder.**—Plaintiffs sued defendant for damages for loss of cattle shipped by plaintiffs over defendant's railroad. Defendant interposed to plaintiffs' petition special pleas that, under the terms of the contract of shipment sued on, it did not act as a common carrier for hire, but only as a mere forwarder or private carrier for hire, and was released from liability, etc.; and that, under the terms of said contract of shipment, plaintiffs agreed to accept, and did accept, for the transportation of the cattle, the cars tendered them by defendant, and agreed to see that they were in safe condition, and that they were securely fastened, so as not to permit the escape of said stock therefrom, and that they would not hold defendant liable for any neglect or failure on their part, etc. Held, that these pleas presented no defense, as, under the Texas stat-

ute, the modification which may be made by special contract, and which is to operate within the limits of Texas, can only be such as can not diminish the common-law liability of a railroad as a common carrier. *Texas & P. Ry. Co. v. Hamm*, 2 Willson, Civ. Cas. Ct. App. § 493.

**Negligence of Employees.**—A provision in a contract of shipment that, when the carrier furnishes the shipper with laborers to assist in loading and unloading his goods, they shall be deemed the shipper's servants while so engaged, and that the carrier shall not be responsible for their acts, is void, as an attempt to release the carrier from responsibility for the negligence of his own servants. *Missouri Pac. Ry. Co. v. Smith* (Sup.) 16 S. W. 803.

**Limitation of Liability to Such as Arose from "Willful Negligence."**—Under Rev. St. art. 278, prohibiting the limitation or restriction of the liability of a carrier as it existed at common law, a contract relieving the carrier of all liability for loss or damage, except such as arose from the willful negligence of its servants, is invalid. *Gulf, C. & S. F. Ry. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567. *Texas, etc., R. Co. v. Hamm*, 2 App. Civ. Cases, §§ 491, 493.

Under the Texas statute a special contract which by its terms purports to exempt a railway from liability for injury in the transportation of cattle, except such as might result from the willful negligence of a railway company, can not be enforced. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

**Negligence of Less Degree than Intended by Terms Used.**—A common carrier can not, by contract, relieve itself from liability for an injury to live stock resulting from negligence of itself or servants, though such negligence be of a degree less than was intended by the term used. *Missouri*

Pac. R. Co. v. Harris, 67 Tex. 166, 169, 2 S. W. 574.

**Negligence, "Though Not Willful."**

—A common carrier can not by contract be exempted from liability for an injury resulting from negligence, though not willful, of itself or its servants. *Missouri Pac. Ry. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

**The words, by "willful negligence,"** in a special contract by which a carrier sought to limit its liability to such injury as resulted from the "willful negligence" of its agents, means some gross omission of duty involving intentional or willful misconduct. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 169, 2 S. W. 574.

**Delay.**—See post, "Stipulations against Liability for Delay," VIII, G, 11.

Carriers can not limit their liability for damages resulting from their negligence in failing to transport cattle to their destination within a reasonable time. *Gulf, C. & S. F. Ry. Co. v. Dunman* (Civ. App.), 81 S. W. 789.

A railroad company is liable for delay in transporting cattle accepted by it for carriage, regardless of a special contract made with the shipper limiting its liability to injuries resulting from willful negligence. (1886) *Missouri Pac. Ry. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; (1888) *Same v. Cornwall*, 70 Tex. 611, 8 S. W. 312; *Gulf, etc., R. Co. v. Vaughn*, 4 App. Civ. Cases, § 182, 16 S. W. 775.

**Loss by Fire.**—See post, "Loss by Fire," VIII, G, 7.

**2 Notice of Loss or Filing Claim.**

**a Power to Stipulate and Validity.**

**(1) In General.**

It has been held in many cases that a carrier may make a contract which will relieve him from liability for loss or injury to property received for transportation, unless claim be made within a named period after the loss occurred. *Gulf, etc., Ry. Co. v. Trawick*, 68 Tex. 314, 320, 4 S. W. 567;

*Texas, etc., R. Co. v. Jackson*, 3 App. Civ. Cases, § 41.

A common carrier may, by stipulation in writing, require the party seeking to recover for injuries sustained to give notice in writing as to the nature of such damage, at time of the occurrence. *International, etc., R. Co. v. Underwood*, 62 Tex. 21, 22.

A stipulation that a shipper of cattle shall give notice in writing or his claim for damages before he shall recover is valid. *Texas Cent. R. Co. v. Morris*, 1 App. Civ. Cases, § 374; *Texas, etc., R. Co. v. Jackson*, 3 App. Civ. Cases, § 41.

**(2) Under Texas Statutes.**

**(a) In General.**

**Rev. Stat., art. 278.**—Under Rev. St. art. 278, providing that carriers for hire within this state can not limit their liability as it exists at common law, a stipulation in a contract of shipment, to be wholly performed within the state, providing that all damages for loss of freight should be considered as waived, if not made in writing within three days after delivery of freight, is invalid, since it is a limitation on the common-law liability of the carrier. *Gulf, C. & S. F. Ry. Co. v. Maetze*, 2 Willson, Civ. Cas. Ct. App., § 631.

Under Rev. St. art. 278, which forbids the limitation or restriction of the liability of a carrier as it exists at common law, a contract providing that, as a condition precedent to his right of recovery, the shipper shall give notice in writing of his claim at a certain place and within a certain time, is invalid. *Gulf, C. & S. F. Ry. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567.

A railway company in a suit to recover damages against it for negligence in failing to deliver cattle within a reasonable time, set up a special contract in its answer by which it was agreed that as a condition precedent to the plaintiff's right to recover dam-

ages for loss or injury to the cattle, the shipper should give notice in writing of his claim to the officers of the company or its nearest station agent before the cattle were removed from their place of destination, and before they were mingled with other stock. The line of railway did not extend to the point of destination, and both contracting parties understood that the carrier would transport the cattle from its own road over a connecting road. Held, the contract was a limitation on the liability of the carrier at common law. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

Such a contract would seem necessarily to operate as a limitation on the carrier's common-law liability, for under the rules furnished by that system of laws for the determination of the liability of a common carrier to a shipper for an injury done to the property of the latter while in course of transportation, a cause of action arises at once upon the infliction of the injury, and the requirement of an additional fact before a cause of action exists, and may be enforced, restricts or limits the right which the shipper would have at common law. In the absence of the special contract relied upon, when an unnecessary delay occurred and injury resulted therefrom, the shipper's cause of action was complete, and to require notice, as does the special contract, as a condition precedent to the accruing of the cause of action, is but to say that the contract limits the liability of the carrier, in that it makes its liability depend on the existence of a fact not necessary to fix liability at common law. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 171, 2 S. W. 574. And see *Galveston, etc., R. Co. v. Williams* (Civ. App.), 25 S. W. 1019; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 111, 17 S. W. 834.

**Act March 4, 1891, Rev. Stat. 1895, Art. 3397.**—Since the passage of the

act, art. 3379, *Sayles' Civ. Stat.*, it is permissible and lawful for the parties to enter into a contract, provided it is reasonable, requiring a notice not less than 90 days after injury of the presentation of a claim for damages, and upon failure to do so, suit will be barred. *Houston, etc., R. Co. v. Mayes*, 44 Tex. Civ. App. 31, 35, 97 S. W. 318. See, also, *Houston, etc., R. Co. v. Davis*, 88 Tex. 593, 594, 32 S. W. 510, affirming 31 S. W. 308, 11 Tex. Civ. App. 24, 32 S. W. 163.

Section 2, Act of March 4, 1891, requires stipulations for notice of a claim of damage to be reasonable and provides that a stipulation of carrier's contract requiring less than ninety days' notice of injury to freight shall be void. *Galveston, etc., R. Co. v. Williams* (Civ. App.), 25 S. W. 311, 312; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 681, 29 S. W. 565; *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161; *Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 27, 31 S. W. 308, affirmed in 88 Tex. 593; *St. Louis, etc., R. Co. v. Hays*, 13 Tex. Civ. App. 577, 579, 35 S. W. 476; *Missouri, etc., R. Co. v. Cocreham*, 10 Tex. Civ. App. 166, 167, 30 S. W. 1118; *Gulf, etc., R. Co. v. Gann*, 8 Tex. Civ. App. 620, 623, 28 S. W. 349.

State courts have exercised the power to enforce the rights of shippers to have reasonable time within which to make claim of loss, and have refused to enforce stipulations in freight contracts held to be unreasonable. Such power may be exercised by the legislature, as has been done in chapter 17, acts 22d Leg., p. 20 (March 4, 1891). *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161.

A stipulation in a freight contract, that notice of claim for damages should be presented within thirty days after the injury, must yield to the law of March 4, 1891 (Laws Twenty-second Legislature, page 20), then exist-

ing, and forbidding such limit. The stipulation was unlawful and void. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

A contract for the carriage of freight, requiring notice of claim for damages to be given within one day after delivery of the property, is void under Act March 4, 1891 (Rev. St. 1895, art. 3379), declaring that any such stipulation fixing the time within which such notice shall be given at a less period than 90 days shall be void. *St. Louis S. W. R. Co. of Texas v. Hays*, 13 Tex. Civ. App. 577, 35 S. W. 476.

A clause in a carrier's contract for the shipment of live stock which requires notice of claims for injuries to the stock to be delivered before the stock is removed, "as a condition precedent to his right to recover," is violative of Act March 4, 1891. *Gulf, C. & S. F. Ry. Co. v. Yates* (Civ. App.) 32 S. W. 355.

A stipulation in a contract for the shipment of stock that the shipper shall give notice in writing of any claim for damages before the stock are removed from the station, is void under Gen. Laws 1891, p. 20, providing that "fixing the time within which such notice shall be given at a less period than 90 days, shall be void." *Gulf, Colorado & Sante Fe Ry. Co. v. Gann*, 8 Tex. Civ. App. 620, 28 S. W. 349; *Gulf, etc., R. Co. v. Yates* (Civ. App.), 32 S. W. 355.

Under acts 22nd Leg., p. 20, c. 17, § 2, forbidding any contract for an interstate shipment requiring notice of claim for damages within less than 90 days, a provision in the contract for the carriage of live stock over several connecting lines of railroad, requiring notice of claim of damages to be made "before the stock is removed from the station," is void. *Houston & T. C. Ry. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308.

Under Rev. Stat. 1895, art. 320, for-

bidding the restriction of the common-law liability of a common carrier, a provision in a contract of shipment of cattle that no recovery could be had for damages to the cattle unless notice in writing should be given of the claim for damages before removal of the cattle from the cars, was void. *Missouri, etc., R. Co. v. Allen*, 39 Tex. Civ. App. 236, 87 S. W. 168; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

A contract for the carriage of live stock from one point to another in the same state which is the end of the line of the receiving carrier, is not an interstate contract, though the freight is consigned and billed to a destination in another state, and the freight contract stipulates for protection of a through rate named therein. *Houston & T. C. Ry. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308; *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455.

#### (b) Interstate Shipments.

Act March 4, 1891, § 2, requiring stipulations for notice of claim of damage to be reasonable, and avoiding such as require notice at a less period than 90 days, does not apply to interstate shipments. *Galveston, H. & S. A. Ry. Co. v. Williams* (Civ. App.), 25 S. W. 311; *Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 27, 31 S. W. 308, affirmed in 88 Tex. 593. But see *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 124, 26 S. W. 161; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 682, 29 S. W. 565.

Act March 4, 1891, § 2, requiring stipulations for notice of claim of damage to be reasonable, and avoiding such as require notice at a less period than 90 days, does not apply to interstate shipments, but in such cases it is for the carrier to satisfy the jury that the notice required was reasonable. *Galveston, H. & S. A. Ry. Co. v. Williams* (Civ. App.), 25 S. W. 311.



Under Rev. St. 1895, art. 3379, providing that no stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon shall be valid unless such stipulation is reasonable, and any such stipulation fixing the time within which such notice shall be given at a less period than 90 days shall be void, a stipulation allowing 91 days for the giving of notice can not be declared unreasonable and void as a matter of law, but the question is one of fact for the jury. *St. Louis, etc., R. Co. v. Honea* (Civ. App.), 84 S. W. 267. And see post, "Question for Jury," VIII, G, 2, b, (4), (k).

The act prescribing minimum time for stipulated notice, etc., may be considered a statute of limitation, and as simply affecting the remedy and not attempting to effect the rights of parties, or to control or regulate in any manner interstate commerce. Such legislation by the states has been recognized as constitutional and valid by the supreme court of the United States. *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161; *Armstrong v. Galveston, etc., R. Co.*, 92 Tex. 117, 46 S. W. 33, reversing 43 S. W. 614.

**(c) Effect of Custom.**

Custom can not require that a shipper agree to give notice of claim to officer of railroad before stock is removed from point of shipment or destination as condition precedent to right to damages for loss or injury to stock, since custom can not require agreement of limitation of right to damages. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749.

**(3) What Law Governs.**

A stipulation in a contract, made in Texas, for the shipment of live stock from a point in Texas to a point in another state, that in case of injury to the stock the shipper should give

notice to the carrier within one day after the delivery of the stock at destination, or a recovery for the injury would be barred, is invalid, because in conflict with the statutes of Texas, which control. *Chicago, R. I. & P. Ry. Co. v. Mitchell* (Civ. App.), 85 S. W. 286.

A stipulation whereby the shipper of live stock was required, as a condition precedent to any recovery for loss or injury to the live stock, to give notice in writing of such injuries, before removal of the stock from the place of destination and before the mingling of the same with other stock, such notice to be served within one day after the delivery of the stock at destination, being valid under the law of Arkansas, was enforceable in Texas, the same not being a limitation clause. *St. Louis, I. M. & S. Ry. Co. v. Hambrick* (Civ. App.), 97 S. W. 1072. But see *St. Louis, etc., R. Co. v. Moon*, 47 Tex. Civ. App. 209, 103 S. W. 1176; *Missouri Pac. Ry. Co. v. Harris*, 1 App. Civ. Cases, § 1257.

**b. Form and Requisites.**

**(1) Stipulation Placed on Margin.**

The fact that a stipulation requiring notice of claim for loss or damage is placed on the margin instead of in the body of the contract does not forbid its consideration as a part thereof, the shipper being bound to take notice of it. *Brown v. Adams*, 3 Willson, Civ. Cas. Ct. App. §§ 390, 392.

Such stipulation is part of contract and binding on parties. *Brown v. Adam*, 3 App. Civ. Cases, § 390.

**(2) Signature of Consignor or Consignee.**

In *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 605, 16 S. W. 441, the bill of lading was not signed by either the consignee or his consignor. Below the signature of the receiving carrier's agent on the receipt or bill of lading, and as a foot note, the

following was printed: "Claims for loss or damage must be presented to the delivering line within thirty-six hours after the arrival of the freight." *Quere*, if this can be evidenced as any part of the contract.

### (3) Consideration.

A written agreement for notice of any claims for damages to a shipment of freight within a specified time must be upon a valid consideration. *St. Louis, etc., R. Co. v. Boshear* (Civ. App.), 108 S. W. 1032; *Pecos, etc., R. Co. v. Evans-Snyder-Buel Co.*, 100 Tex. 190, 97 S. W. 466, affirming 42 Civ. App. 60; *Gulf, etc., R. Co. v. Wright*, 1 Tex. Civ. App. 402, 406, 21 S. W. 80.

In an action to recover for loss by negligent delay in transporting cattle to market, where the contract of transportation provided that notice of any claim for damage should be given before the cattle were unloaded for destination as a condition precedent to recover, and recited that the freight rate was less than the usual rate for carrying cattle, the stipulations were not binding unless there was an actual reduction from the ordinary freight rate; and there being evidence tending to show that the cattle were shipped on a verbal contract in which nothing was said about a reduction in freight rate and no reduction made, a charge that the written stipulations were not binding if the shipment was made on a verbal contract, and no reduction in the freight rate was made under either contract, was proper. *St. Louis, etc., R. Co. v. Boshear* (Civ. App.), 108 S. W. 1032, 1033.

### (4) Reasonableness.

#### (a) General Rule.

A stipulation in a contract requiring that notice of a claim for damages shall be given within a specified time to be valid, it must be reasonable, and adapted to the circumstances

of the particular case. *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 111, 17 S. W. 834; *Brown v. Adams*, 3 App. Civ. Cases, § 390; *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806; *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354; *Texas, etc., R. Co. v. Jackson*, 3 App. Civ. Cases, § 41.

When such provisions of a carrier's contract are enforced, it is upon the assumption that such agreement is reasonable when considered in the light of the subject-matter of the contract and the circumstances and surroundings of the parties. *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 111, 17 S. W. 834, citing *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, and *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 167, 2 S. W. 574. See, to the same effect, *Missouri Pac. R. Co. v. Childers & Co.*, 1 Tex. Civ. App. 302, 305, 21 S. W. 78; *Galveston, etc., R. Co. v. Thompson* (Civ. App.), 23 S. W. 930, 931; *Galveston, etc., R. Co. v. Williams* (Civ. App.), 25 S. W. 1019.

Periods ranging from five to sixty days have been held reasonable. *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 320, 4 S. W. 567.

#### (b) Interstate Shipments.

Even in a foreign bill of lading, evidencing a contract for an interstate shipment, and therefore not subject to the statute of Texas, the stipulation requiring written notice, as a condition precedent to a right to sue and recover damages, to be valid, must be reasonable. *Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 28, 31 S. W. 308, affirmed in 88 Tex. 593, and citing *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 167, 2 S. W. 574; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749; and *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834.

In construing provisions in freight

contracts limiting the time within which claims for damages must be presented, the doctrine of reasonableness is applied to interstate shipments, as well as to those that are domestic. *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 541, 24 S. W. 354.

Right of parties to interstate shipments to incorporate in their contracts a provision limiting the time within which claims for damages must be presented is admitted upon the ground that it must be reasonable in order to be binding upon the shipper. *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 541, 24 S. W. 354.

Such a contract stands upon the same footing as a regulation or rule of the carrier regarding shipments over its line. Although the contract is in a certain sense a voluntary and mutual act of the parties to it, as a fact, the unequal standing of the parties in their relation to each other over the matter of shipment and the terms and conditions that shall govern it, is as great in the matter of providing the terms of the contract as in making the regulations and rules by the carrier. The carrier has it in its power to force upon the shipper such provisions and terms in the contract of shipment as the exercise of its will or pleasure may dictate. The unequal position occupied by the shipper in making such contract, and his weakness in this respect, are relieved by a rule of public policy that imposes upon the carrier the authority to exercise its great power in this respect in contracting with reference to shipments only when the stipulations agreed upon are reasonable. The fact that the shipment may be interstate does not accord the carrier the right to impose upon the shipper a contract that is unreasonable in its terms. The law does not undertake to define when a provision of a contract is reasonable, but the determina-

tion of that fact must be gathered from the facts of each particular case. Such being true, it must be ascertained by the jury. *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 541, 24 S. W. 354, citing *Pacific Exp. Co. v. Darnell* (Sup.), 62 Tex. 639; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 105, 17 S. W. 834, and *Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463, 465, 21 S. W. 399.

**Power of State Court to Determine.**—State courts have power to determine and adjudicate the question whether the time limited in a carrier's contract, within which to sue and of giving notice, is reasonable or unreasonable, and the exercise of such jurisdiction does not regulate or interfere with interstate commerce. *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 125, 26 S. W. 161.

(c) **Under Act of March 4, 1891, Rev. Stat. 1895, Art. 3397.**

It is provided by an act of the legislature, that "no stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon shall ever be valid unless such stipulation is reasonable, and any such stipulation fixing the time within which such notice shall be given at a less period than ninety days shall be void," etc. *Gen. Laws 1891*, p. 20. *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161; *Gulf, etc., R. Co. v. Gann*, 8 Tex. Civ. App. 620, 623, 28 S. W. 349; *Houston, etc., R. Co. v. Mayes*, 44 Tex. Civ. App. 31, 97 S. W. 318.

A provision in a contract between a shipper of cattle and a carrier, requiring notice of a claim for damages to be filed within 91 days, will not be enforced unless that time is a reasonable one. *Southern Kansas Ry. Co. of Texas v. Curtis Bros. & Davidson*, 44 Tex. Civ. App. 477, 99 S. W. 566.

A stipulation, in a cattle transportation contract, requiring written notice of any claim for damages to be given to the carrier within 91 days, was reasonable and valid. *International & G. N. R. Co. v. Heittner*, 42 Tex. Civ. App. 617, 94 S. W. 189.

So held where the plaintiff's own testimony shows that before half of the time had expired he presented another claim to defendant's agent with whom the contract was made, and there is no reason why he could not at the same time have presented his claim in writing for damages to his horses. *International, etc., R. Co. v. Heittner*, 42 Tex. Civ. App. 617, 620, 94 S. W. 189.

**(d) Respecting Officer or Agent to Be Notified.**

**Necessity for Agent at or Near Place of Delivery.**—If a carrier sets up a claim to notice of a given fact, as a condition upon which its liability to a shipper is to depend, that it is incumbent upon it, when the notice was to be given to one of its own officers or agents, to show that it had an officer or agent at or near the place where the notice is to be given, in any case in which the shipper, by the terms of the contract through which notice is claimed, is to hold the property shipped at the place of delivery, at his own expense and risk, until it can be inspected by some agent of the carrier. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 172, 2 S. W. 574; *Good v. Galveston, etc., R. Co.* (Sup.), 11 S. W. 854, 855.

This would be especially true when the property to be inspected is intended for immediate sale at the place of destination, is perishable in character, likely to deteriorate in value by holding and expensive to keep. If in such case the carrier has not an officer or agent at or near the place where the property to be inspected is delivered, so that notice may be

promptly given and an inspection, if desired, speedily made, then a contract requiring notice to be given to an officer or agent of the carrier is not reasonable in its character. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 172, 2 S. W. 574.

Whether an agreement between a railroad company, accepting cattle for shipment beyond its line, and the shipper, requiring the latter, as a condition precedent to his right to recover for any loss or injury, to give notice to some agent of the company before the removal of the cattle, is reasonable, depends on whether the company had an agent to whom notice could be given near the place of delivery. *Missouri Pac. Ry. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Same v. Cornwell*, 70 Tex. 611, 8 S. W. 312.

No presumption can be indulged that the carrier had an officer near the place of destination. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

A contract for carriage of cattle provided, as a condition precedent to the right to recover damages, that written notice should be given to some officer of the carrier, or the nearest station agent, of any loss or injury to the cattle, before they were removed from the place of delivery or mingled with other stock. The cattle were shipped December 13th, and were bruised and injured by improper transportation so that they lost 25 per cent in value. They reached their destination December 18th. In an action for damages, held, that the carrier should show that it had an officer or agent near the place where the notice was to be given; that the limitation of liability in such case was unreasonable, and no ground for sustaining a demurrer to the evidence of the above facts. *Good v. Galveston, H. & S. A. Ry. Co.* (Sup.), 11 S. W. 854, 4 L. R. A. 801, following *Missouri Pac. R.*

*Co. v. Harris*, 67 Tex. 166, 172, 2 S. W. 574.

A shipper of cattle made a contract with a railroad company which recited that, "as a condition precedent" to his right to damages for loss of stock in transit, he should give notice in writing of his claim therefor to a general officer of the company, or its nearest station agent, or to the agent or a general officer of the road carrying the stock to destination, within one day after delivery at the destination, and a failure to comply with these terms should bar recovery, but the contract did not name any person to whom notice should be given, or where he might be found. Held, that a finding that the contract was unreasonable would not be disturbed. *Missouri Pac. Ry. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. 78.

It was not error to find that a contract requiring notice of a claim by a shipper of live stock to be given the carrier in writing within one day after delivery of stock at its destination was unreasonable and void, when it appeared that there was no officer or agent of the company at the point of destination, even if the company did have a general office at another station two miles across a river, in another state. *St. Louis, A. & T. Ry. Co. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. 1008.

It seems that a clause in a shipping contract would be unreasonable which required a shipper to leave his cattle and cross the Mississippi river into an adjoining state to search for an officer or agent of the carrier on whom to give notice of damages to his stock in transitu. *St. Louis, etc., R. Co. v. Turner*, 1 Tex. Civ. App. 625, 633, 20 S. W. 1008.

A provision in a contract for the shipment of live stock was unreasonable where it required, as a condition precedent to the recovery of damages

for injury to the stock, that notice of the damages claimed should be given to an agent of the carrier before the stock could be removed from the pens at the destination, and the names of the agents at the place of shipment and destination did not appear in the contract. *Galveston, H. & S. A. Ry. Co. v. Short* (Civ. App.), 25 S. W. 142.

**Specification of Officer or Agent.**—Contracts requiring the shipper to give notice of his claim for damage which fail to give the name and location of the agent to whom the notice is to be given, are prima facie unreasonable, and it devolves upon the carrier to allege and prove the necessary facts to show their validity. *Missouri Pac. R. Co. v. Childers & Co.*, 1 Tex. Civ. App. 302, 21 S. W. 78, S. C., second appeal, 29 S. W. 560. See post, "Pleading and Proof," VIII, G, 2, b, (4), (1).

A contract requiring the shipper to give notice is unreasonable and can not be enforced unless it be made to appear that the person to be notified is so conveniently accessible to the person who is to give the notice as that the latter can reasonably discharge that duty within the time limited by the contract. The burden rests upon the carrier to show that this condition exists, either by the terms of the contract indicating that the requisite information is thus furnished to the shipper, or that the latter is in fact possessed of such information, from what source soever it may come. *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 623, 21 S. W. 78. See *Missouri Pac. R. Co. v. Childers & Co.*, 1 Tex. Civ. App. 302, 21 S. W. 78.

Where the carrier pleads such a contract, in which the name of the agent or officer upon whom notice is to be served is not given, the pleading should be held bad, unless there be an additional allegation from which the jury might be authorized

to find such contract to be reasonable as applied to the facts of that particular case; but when such allegations are made, it then becomes a question for the jury to decide as to whether or not the contract, under the evidence, is a reasonable one. *Missouri Pac. R. Co. v. Childers & Co.*, 1 Tex. Civ. App. 302, 306, 21 S. W. 78.

If a carrier seeks to make its liability to depend on notice to its officer or agent of a claim for damages, it would seem that the responsibility of determining who is an officer or agent of the carrier, within the meaning of the contract, should not be cast upon the shipper, but that the person and his locality to whom the notice must be given ought to be made certain by the contract itself, and especially so when the carrier is a corporation and the property is to be delivered beyond the line of its road through another carrier. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 173, 2 S. W. 574; *Missouri Pac. R. Co. v. Childers & Co.*, 1 Tex. Civ. App. 302, 305, 21 S. W. 78; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749; *Galveston, etc., R. Co. v. Williams* (Civ. App.), 25 S. W. 1019; *Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 29, 31 S. W. 308, affirmed in 88 Tex. 593, no op.; *Good v. Galveston, etc., R. Co.* (Sup.), 11 S. W. 854.

The contract to give notice was not the entire contract; the notice was required to be given to an officer or the nearest station agent of the carrier, and the situation of such officer or agent, with reference to the place from which the notice must necessarily come, and at which an inspection, if desired, would necessarily have to be made, would largely determine whether the contract was reasonable or not. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 172, 2 S. W. 574.

In *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749, it is said: "If

the shipper should make a contract to give such notice, it might be binding under our law if it was shown that there was such officer or agent at the point of destination, upon whom the notices could be conveniently served." *Missouri Pac. R. Co. v. Childers & Co.*, 1 Tex. Civ. App. 302, 305, 21 S. W. 78.

A contract between a common carrier and a shipper, for transportation of cattle to a point outside of the state, and which seeks to make the carrier's liability depend on notice to its officers or agent of a claim for damages, ought to specify who is its officer or agent to whom notice shall be given. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 172, 173, 2 S. W. 574.

Where a carrier has a large number of agents at the destination of shipment, a shipping contract requiring a shipper to give notice to an agent of loss is unreasonable unless it designates the name and residence of such agent. *Missouri Pac. R. Co. v. Childers & Co.*, 1 Tex. Civ. App. 302, 306, 21 S. W. 78.

It would be unreasonable to require the shipper to take the responsibility of deciding which one of these is the authorized station agent, or which one of these is a general officer, within the meaning of a contract using these general terms. *Missouri Pac. R. Co. v. Childers & Co.*, 1 Tex. Civ. App. 302, 306, 21 S. W. 78.

A clause in a contract in regard to notice of damages as a condition precedent to recovery is not reasonable, where the name of neither the agent at the point of destination nor at the point of shipment is given, although a name is given, but the testimony shows that it was not the name of the agent at point indicated. It would look rather unreasonable, as prescribed in the contract, that demand should be made to an agent at point of shipment, before horses could be removed

from the pens at destination. *Galveston, etc., R. Co. v. Short* (Civ. App.), 25 S. W. 142, 143.

A stipulation in a live stock shipping contract, making it "a condition precedent" to action for damages to give notice of claim within one day after delivery of stock at destination, and not naming the officer to whom to be given, is unreasonable. *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. 78.

Where delivery of live stock is to be made at a place where a carrier has only one agent, who is easily to be found, stipulation in a shipping contract requiring notice of loss to station agent at such place, may not be unreasonable. *Missouri Pac. R. Co. v. Childers & Co.*, 1 Tex. Civ. App. 302, 306, 21 S. W. 78.

In absence of a plea of want of consideration therefor, a stipulation in a contract for cattle shipment releasing a carrier from all liability for delay and making it a condition precedent for recovery for injury to the cattle to give notice thereof to station master of last-named station, is valid. *Gulf, etc., R. Co. v. Wright*, 1 Tex. Civ. App. 402, 406, 21 S. W. 80.

The stipulation in a contract of carriage, authorized, when reasonable, by Sayles' Ann. Civ. St. 1897, art. 3379, that the shipper give the carrier a 90 days' notice of claim of damages as a condition to the right to sue, notice to any local agent being enough, is reasonable; the shipper knowing that at the place where the contract was made there was an agent who had signed his name to the contract. *Houston & T. C. R. Co. v. Mayes*, 44 Tex. Civ. App. 31, 97 S. W. 318.

**(e) Time Running from Date of Contract.**

A clause in the contract of shipment, providing that the carrier should not be liable for any claim arising from the contract unless presented within 60 days from its date, no refer-

ence being made to the time of loss, is unreasonable. *Pacific Exp. Co. v. Darnell* (Sup.), 6 S. W. 765.

Where a contract of shipment provided that "said company should not be held liable for any claim arising from contract, unless it be presented within sixty days of date of contract," held, that though claim was not presented as required, plaintiff's right of recovery for delay in shipment was not barred, restriction for presentment of claim without reference to time of loss being unreasonable. *Pacific Exp. Co. v. Darnell* (Sup.), 6 S. W. 765.

**(f) Statement of Nature and Place of Injury.**

A provision in a freight contract that required the shipper to give notice to the conductor or station agents of the nature and place of the injuries received by the cattle, is unreasonable. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

From the character of the shipment and the nature of the injuries sustained by the cattle, it could not with any degree of certainty be ascertained what was the character of the injuries and their extent until the cattle had arrived at the point of destination. The injuries in the main consisted of a loss in weight of the cattle and a deterioration in their value by reason of failure to expeditiously transport them and to properly care for them. In the nature of things this could not be well determined until the cattle had reached their final destination, as this effect was produced not at any particular place, but was the result of the general treatment that they received all along the line. A stipulation requiring a notice of the injuries to be given short of the point of destination, and before those injuries are fully developed and could in their extent and nature with reasonable diligence be ascertained, is unreasonable. *Missouri, etc., R. Co. v. Carter*,

9 Tex. Civ. App. 677, 682, 29 S. W. 565.

**(g) Notice before Removal from Destination.**

Defendant railroad company pleaded as a defense a special contract requiring owner of cattle shipped to give notice of claim for damages before removing cattle from place of destination; held defendant could not so limit its liability. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 169, 173, 2 S. W. 574; *Gulf, etc., R. Co. v. Vaughn*, 4 App. Civ. Cases, § 182, 16 S. W. 775. But in *Texas Cent. R. Co. v. Morris*, 1 App. Civ. Cases, § 374, a stipulation in a contract for shipments of live stock that the owner shall first give notice in writing of his claim for such damages to some officer of the railroad or near station agent, before the stock were moved from the place of destination for delivery and before being mingled with other stock, was held to be valid.

**(h) Amount of Damage, etc., on Reshipment.**

It has been held that a condition to recovery that the shipper give notice of amount of damages, etc., on reshipment is not reasonable. *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806.

At the time the cattle were re-shipped, the plaintiff, according to his own testimony, knew that his cattle had been crowded in pens and had suffered for the want of food and water, but did not know the extent of his damages. Under the circumstances, he could at most have made only a vague complaint, which would have subserved no useful purpose to either party. It was by no means certain that any serious loss would ensue, and, if the contract is to be construed as requiring notice in such a case, it must be held unreasonable. *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 46, 33 S. W. 109, affirming 29 S. W. 806.

**(i) Statement of Full Amount of Claim.**

Stipulation in contract for shipment of live stock, requiring the shipper to give written notice not only of his claim for damages but to state therein the full amount of such loss or damage, is unreasonable. *Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 29, 31 S. W. 308, affirmed in 88 Tex. 593.

**(j) Notice to Delivering Carrier.**

Stipulation in contract of carriage requiring notice of claim for damages to be given to delivering carrier, is valid if reasonable. *Brown v. Adams*, 3 App. Civ. Cases, § 390; *Texas, etc., R. Co. v. Jackson*, 3 App. Civ. Cases, § 41.

**(k) Question for Jury.**

The reasonableness of a stipulation in a shipping contract as to the time in which a claim for damages should be presented is a question for the jury, when raised by the testimony. *Missouri, K. & T. Ry. Co. of Texas v. Leibold* (Civ. App.), 55 S. W. 368; *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806; *Southern Kansas R. Co. v. Curtis Bros.*, 44 Tex. Civ. App. 477, 479, 99 S. W. 566, affirmed in 102 Tex. 593, no op.; *Galveston, etc., Ry. Co. v. Williams* (Civ. App.), 25 S. W. 311.

Reasonableness of a clause in a shipping contract requiring a written notice of damage to be given within the specified time, is for the jury to determine. *Texas, etc., R. Co. v. Barber* (Civ. App.), 30 S. W. 500, 501.

Where a carrier pleads a shipping contract stipulating that notice of loss should be served on certain of its officers within a certain time, it is for the jury on the allegations and evidence of each particular case to determine reasonableness of such stipulation. *Missouri Pac. R. Co. v. Childers & Co.*, 1 Tex. Civ. App. 302, 306, 21 S. W. 78.

Whether a rule requiring that no-



tice of damage to freight be given at place of delivery within a stipulated time thereafter is reasonable, is properly submitted to jury instead of its being decided as a question of law by the court. *Texas, etc., R. Co. v. Adams*, 78 Tex. 372, 374, 14 S. W. 666.

A bill of lading providing that claims for loss or damage must be presented to the delivering line in 36 hours after the arrival of the freight. The consignee resided a short distance from the depot, and received the goods Saturday afternoon, but did not open them until Monday morning, having been sick in the interval. Held, that the reasonableness of the stipulation was a question for the jury. *Texas & P. Ry. Co. v. Adams*, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56. See, also, *Missouri Pac. R. Co. v. Childers & Co.*, 1 Tex. Civ. App. 302, 305, 21 S. W. 78.

**Live Stock Shipments.**—The question whether a stipulation in a shipment contract, requiring notice of injuries to the stock shipped to be given within a certain time, to render the carrier liable, is reasonable, is for the jury. *Texas & P. Ry. Co. v. Barber* (Civ. App.), 30 S. W. 500.

A shipper of cattle made a contract with a railroad company, which recited that, as a condition precedent to his right to recover damages for injury to cattle in transit, he should give notice of his claim therefor to some agent or officer of the company, or to its nearest station agent, within one day after delivery of the cattle at destination. Held that, where the cattle are to be delivered at a place where defendant alleges it had a station agent whom plaintiff knew and saw, whether the contract was unreasonable when it did not give the name of the agent or officer on whom notice is to be served was for the jury. *Missouri Pac. Ry. Co. v. Childers*, 1 Tex. Civ. App. 302, 21 S. W. 78.

The reasonableness of a contract of shipment of stock which requires the shipper, as a condition precedent to a recovery of damages for any injury to his stock, to give notice of his claim therefor to some general officer of the carrier, or its nearest station agent, before the stock is removed from the place of destination or mingled with other stock, and within one day after its arrival, is for the jury when the contract is for an interstate shipment, as well as when it is for a domestic one. *International & G. N. R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354.

**Reasonableness Question for Jury under Act March 4, 1891, § 2 and Rev. Stat. 1895, Art. 3379.**—See ante, "Under Texas Statutes," VIII, G, 2, a, (2); "Interstate Shipments," VIII, G, 2, b, (4), (b).

In *Southern Kansas R. Co. v. Curtis Bros.*, 44 Tex. Civ. App. 477, 479, 99 S. W. 566, affirmed in 102 Tex. 593, no op., the question of whether or not ninety-one days was a reasonable time under the circumstances of this case was submitted to the jury. The court said: "For this reason, if for no other, the summary instruction was properly refused."

**Shipper's Information as to When to Notify.**—Where the plea of a carrier sets up such a contract and contains allegations from which the jury might be authorized to find such contract to be reasonable as applied to the facts of the particular case, it becomes a question for the jury to decide as to whether or not the contract, under the evidence, is a reasonable one. *Missouri Pac. R. Co. v. Childers & Co.*, 1 Tex. Civ. App. 302, 306, 21 S. W. 78.

#### (1) Pleading and Proof.

##### aa. Necessity and Burden of Proof.

Where a carrier in a suit for damages for injuries to goods shipped relies on a stipulation providing for notice of loss or damage as defense, it

must allege and prove reasonableness of such stipulation in the particular case. *G. H. & S. A. R. Co. v. Boothe*, 3 App. Civ. Cases, §§ 364, 434, 435.

Stipulations of this nature in contracts of this character are enforced against the shipper only when it appears from the facts averred and those proven that they are reasonable. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 682, 29 S. W. 565; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 172, 2 S. W. 574; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 111, 17 S. W. 834; *Missouri Pac. R. Co. v. Childers & Co.*, 1 Tex. Civ. App. 302, 305, 21 S. W. 78; *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 623, 21 S. W. 78; *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354; *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 162.

To prove that such conditions in a contract are reasonable is a burden resting upon the carrier, who must show by proper pleadings and evidence the existence of facts that call for the enforcement of the conditions. *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 111, 17 S. W. 834; *Missouri Pac. R. Co. v. Childers & Co.*, 1 Tex. Civ. App. 302, 305, 21 S. W. 78; *Galveston, etc., R. Co. v. Thompson* (Civ. App.), 23 S. W. 930, 931; *Galveston, etc., R. Co. v. Williams* (Civ. App.), 25 S. W. 1019; *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. 78; *St. Louis, etc., R. Co. v. Bryce*, 49 Tex. Civ. App. 608, 610, 110 S. W. 529; *St. Louis, etc., R. Co. v. Hays*, 13 Tex. Civ. App. 577, 35 S. W. 476; *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Brown v. Adams*, 3 App. Civ. Cases, § 390.

The circumstances to sustain such a contract must be set forth in the pleading and evidence of the carrier.

*Missouri Pac. R. Co. v. Childers & Co.*, 1 Tex. Civ. App. 302, 306, 21 S. W. 78.

The reasonableness of the limitation must appear from the matters set forth in the answer. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

In the case of *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 172, 2 S. W. 574, the court said: "If the contract were even valid, whether reasonable or not, the shipper would be bound by its terms; but where its validity depends upon its being reasonable, the party who asserts its validity must allege the facts which make it so." *Houston, etc., R. Co. v. Davis*, 88 Tex. 593, 594, 32 S. W. 510, affirming 11 Tex. Civ. App. 24, 31 S. W. 308, 32 S. W. 163.

In an action by a shipper of cattle against a carrier for damages resulting from defendant's negligence in transporting them, a provision in the contract of shipment requiring the shipper, in case of loss or injury, to give the carrier notice of his claim therefor before removing the cattle from the place of delivery, so that the claim may be investigated, will not be enforced against plaintiff, in the absence of pleading and proof, on the part of defendant, of facts showing that the provision is reasonable. *Ft. Worth & D. C. Ry. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834, citing *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749, and *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 167, 2 S. W. 574.

Stipulations in a contract for the carriage of cattle making recovery by the shipper for delay or for injury to the cattle dependent upon his giving notice of such claim within a certain time after the delivery of the stock must be shown to be reasonable both by pleading and proof on the part of the carrier. *St. Louis & S. F. R. Co. v. Bryce*, 110 S. W. 529, 49 Tex. Civ. App. 608.

Where the validity of a carrier's contract depends upon the reasonableness of a provision that in case of injury to stock the shipper must give notice of his claim therefor, in writing, to the agent, before it is delivered to any connecting line, or taken from the station, the carrier must, in order to avail itself of this provision as defense in an action by the shipper for damage so suffered, allege in its answer a state of facts showing that the shipper had failed to give the notice before defendant delivered to its connecting line, and that he had the opportunity to do so. *Houston & T. C. Ry. Co. v. Davis*, 88 Tex. 593, 32 S. W. 510.

Where a contract for shipping cattle requires the shipper to give notice of any claim for damages within a certain time, the burden of showing that such stipulation is reasonable is upon the carrier. *Saint Louis, Arkansas & T. Ry. Co. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. 1008.

A stipulation in a contract of carriage that claims for loss or damage must be presented to the delivering line within 36 hours after the arrival of the freight can not be held, as a matter of law, to be reasonable, and to make it operate as a valid defense; the facts must be proven which show it to be reasonable. *Brown v. Adams*, 3 Willson, Civ. Cas. Ct. App., § 392.

A railroad company can not escape liability for loss of cattle by the shipper's failure to notify it of the loss according to a stipulation in the bill of lading, where it does not prove facts showing that the stipulation was reasonable. *Galveston, H. & S. A. Ry. Co. v. Boothe*, 3 Willson, Civ. Cas. Ct. App., § 364.

A contract with a railway company for the shipment of cattle contained a stipulation that as a condition precedent to the shipper's right to any damages occasioned in the transportation, he should give notice in writing of his

claim therefor to the station agent, or a general officer of the road carrying the cattle to their destination, within one day after they arrived there; and that a failure to give such notice should bar any recovery for such damage. Held, that on its face the stipulation was unreasonable and invalid, and that it devolved on the railway company to show that it was reasonable in fact. *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. 78.

**Respecting Officer or Agent to Be Notified.**—When a carrier sets up a shipping contract, requiring notice of loss, which fails to give the name and location of the agent to whom the notice is to be given, it devolves upon such carrier to allege and prove the necessary facts to show its validity. *Missouri Pac. R. Co. v. Childers & Co.*, 1 Tex. Civ. App. 302, 21 S. W. 78; *Missouri Pac. R. Co. v. Childers* (Civ. App.), 29 S. W. 559, second appeal; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 682, 29 S. W. 565; *Houston, etc., R. Co. v. Davis*, 88 Tex. 593, 32 S. W. 510, affirming 31 S. W. 308, 11 Tex. Civ. App. 241, 32 S. W. 163. See ante, "Respecting Officer or Agent to Be Notified," VIII, G, 2, b, (4), (d).

Where the facts pleaded do not show that there was any agent at that place to whom notice could be given, and do not show that the shipper could by the exercise of reasonable diligence have ascertained who was the proper person to receive such notice, and that he was accessible for such purpose, the plea is defective. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 682, 29 S. W. 565.

The burden rested on defendant to prove such facts, either by the terms of the contract itself, or by evidence aliunde showing that plaintiff in fact possessed the necessary information. *Galveston, etc., R. Co. v. Thompson* (Civ. App.), 23 S. W. 930.

The allegations of the answer do not

show such a state of facts, where it does not appear at what time the stock arrived, at the places of transfer to a connecting line, whether day or night, whether or not the agent to whom notice was to be given was convenient to the place of transfer, nor that the stock was stopped over in such place, before transfer to the connecting line, for a sufficient length of time to enable the shipper to comply with the terms of his contract. *Houston, etc., R. Co. v. Davis*, 88 Tex. 593, 594, 32 S. W. 510, affirming 31 S. W. 308, 11 Tex. Civ. App. 24, 32 S. W. 163.

A plea, by a railroad company sued for damages to transported live stock, alleging that plaintiff had failed to comply with a stipulation requiring him to notify some agent of the company of the damage, is insufficient, where it states that it had an agent in Chicago to whom such notice should have been given, but does not state his name, or that plaintiff knew about him. *Gulf, C. & S. F. Ry. Co. v. Wilhelm*, 3 Willson, Civ. Cas. Ct. App. § 459.

A railway company in a suit to recover damages against it for negligence in failing to deliver cattle within a reasonable time, set up a special contract in its answer by which it was agreed that as a condition precedent to the plaintiff's right to recover damages for loss or injury to the cattle, the shipper should give notice in writing of his claim to the officers of the company or its nearest station agent before the cattle were removed from their place of destination, and before they were mingled with other stock. The line of railway did not extend to the point of destination, and both contracting parties understood that the carrier would transport the cattle from its own road over a connecting road. Held, the failure of the answer to show that the carrier had an officer or agent so situated that the contract to give notice to such officer or agent was reasonable, was fatal on demurrer. *Mis-*

*souri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

In answer to an action for damages to horses shipped over defendant's railroad, defendant pleaded a written contract requiring, as a condition precedent to plaintiff's recovery, notice, in writing, of his claim, to some officer of defendant, or its nearest station agent, before the stock was removed from its destination. Held, that the answer was defective in failing to allege the name of the agent to whom the notice was to be given, or whether or not he was accessible, or conveniently located at the point of destination. *Galveston, H. & S. A. Ry. Co. v. Thompson* (Civ. App.), 23 S. W. 930.

The answer was defective, but no exceptions were taken by plaintiff, and the contract was admitted without objection. The court charged that, under the pleadings, the jury could not consider the contract as a defense. Held, that, since no objection was urged to the pleading or testimony, the charge was erroneous, but was not prejudicial to defendant, as it did not introduce any testimony to sustain its plea of failure to give notice of damages. *Galveston, etc., Ry. Co. v. Thompson* (Civ. App.), 23 S. W. 930.

The shipping contract stipulated that the shipper should give written notice of any claim for injury, before the stock was mingled with other stock, "to ———, station agent of said" carrier at A. station, or, if he were not at said office, then to such servant of the carrier at said station as represented it at the actual delivery. This contract was set up by a special plea which averred that plaintiff never made any demand within 90 days after receipt of the stock, and that defendant had and has at A. an agent named. Held, that it did not aver a reasonable limitation, since it failed to show that plaintiff knew the name of the station agent, or that the carrier had a station agent, or any servant representing it,

at the delivery. *Galveston, H. & S. A. Ry. Co. v. Williams* (Civ. App.), 25 S. W. 1019, reversing (Civ. App. 1894) *Id.* 311.

Where a contract for the shipment of live stock requires the shipper to give notice in writing of any claim for damages to some general officer of the carrier, or to its nearest station agent, within one day after the delivery of the cattle, and before they are removed, slaughtered, or intermingled with others, the burden is on the carrier to show that it afforded the shipper reasonable facilities to comply with the contract; and where the cattle are delivered in a large city, in which it is doubtful whether the carrier has an officer known as the "station agent," it should also appear that the shipper knew what was meant by the term "general officers," and that they were so accessible that he could have reached them, by the exercise of reasonable diligence, within the required time. *Missouri Pac. Ry. Co. v. Childers* (Civ. App.), 29 S. W. 559.

Where a live stock shipping contract is unreasonable in requiring almost immediate notice of claim for loss to unnamed officers of the carrier, the burden is on the carrier to show that shipper has information sufficient to comply within the time stipulated. *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 624, 21 S. W. 78.

This is the rule under the act of March 4, 1891, art. 3379, Rev. Stat. 1895. See *Houston, etc., R. Co. v. Davis*, 88 Tex. 593, 594, 32 S. W. 510, affirming 11 Tex. Civ. App. 24, 31 S. W. 308, 32 S. W. 163; *Houston, etc., R. Co. v. Mayes*, 44 Tex. Civ. App. 31, 97 S. W. 318.

**Interstate Shipments.**—The burden is upon the carrier to allege and prove the facts and circumstances showing such stipulation to be reasonable even if it is a contract for an interstate shipment. *Houston, etc., R.*

*Co. v. Davis*, 11 Tex. Civ. App. 24, 28, 31 S. W. 308, affirmed in 88 Tex. 593, no op., citing *Missouri, Pac. R. Co. v. Harris*, 67 Tex. 166, 167, 2 S. W. 574; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834.

#### **bb. Admissibility and Weight of Evidence.**

In an action by a shipper against a carrier for injury to stock, testimony was admissible to show that the terminus of defendant's line of railway was at Cairo, Illinois, and from there to East St. Louis, the point of destination, the cattle were carried by a connecting line, such evidence being proper as bearing upon the reasonableness of the written contract, requiring plaintiff to give notice of damage at the place of destination, there being other evidence showing that defendant had no agent at the point of destination to whom the notice called for in the contract could be given. *St. Louis, Arkansas & T. Ry. Co. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. 1008.

Plaintiff delivered his cattle to the company, and executed a contract reciting that, "as a condition precedent to his right" to damages for loss or injury of his stock in transit, he must give notice in writing of his claim therefor to some general officer of the company, or its nearest station agent, within one day after the delivery of the stock at the destination. Held, that verbal testimony that the terminus of the railroad company was at one point, and the destination was at another, was admissible as bearing on the reasonableness of the contract in requiring written notice of damage at the destination, and in connection with other evidence that there was no agent at the point of destination. *St. Louis, A. & T. Ry. Co. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. 1008.

In an action for damages for negligence and default of defendant, a com-

mon carrier, in transportation of cattle shipped by plaintiff, held, that the evidence did not conclusively establish the reasonableness of the contract requiring notice by plaintiff of damages within a certain time after arrival of the stock. *Missouri Pac. Ry. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. 78.

Proof that the shipper, while at the point of destination, saw and talked with the station agent there of the delivering road, does not conclusively establish that the contract for notice was reasonable, such proof failing to show that the shipper saw such agent within twenty-four hours after arrival of the cattle there. *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. 78.

The mere fact that cattle shipper obtained return pass from carrier's station agent at Chicago, the point of destination does not prove that he could have notified such agent of damages to his stock within the twenty-four hours stipulated in the shipping contract. *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 624, 21 S. W. 78.

**Evidence of Custom.**—It not being shown that there was an officer or agent at the point of shipment or destination, evidence of a custom requiring the shipper to agree, as a condition precedent to his right to damages for any loss or injury, that he will give notice of claim therefor, before the stock are removed from the point of shipment or destination, is properly excluded; the custom without such officer or agent being unreasonable. *Missouri Pac. Ry. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75.

### c. Construction, Operation and Effect.

#### (1) In General.

Contracts limiting the time within which a claim for damages to freight must be presented stands on the same footing as regulations or rules of

carrier regarding shipments over its line. *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 541, 24 S. W. 354.

#### **Effect of Failure to Give Notice.**—

The supreme and other superior courts of Texas have been very undecided as to whether lack of notice, as required in railroad contracts for the shipment of live stock, should ever preclude a shipper from recovery, and have always refused to lay down a general rule on the subject. *Galveston, etc., R. Co. v. Thompson* (Civ. App.), 23 S. W. 930, 931, citing *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 172, 2 S. W. 574; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749; *Texas, etc., R. Co. v. Adams*, 78 Tex. 372, 374, 14 S. W. 666; *Missouri Pac. R. Co. v. Childers & Co.*, 1 Tex. Civ. App. 302, 21 S. W. 78, and *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. 78.

#### **(2) One of Several Packages Not Delivered.**

Contract limitation as to notice of loss or damage to freight within certain time after arrival does not apply in suit for loss of one of several packages which was never delivered. *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 605, 16 S. W. 441.

#### **(3) Claims Accruing Prior to Written Contract.**

A stipulation in a bill of lading requiring a shipper to give notice within a certain time if he claims damages does not apply to a claim accruing under a prior verbal contract before the bill of lading was signed. *Receivers of Missouri, K. & T. Ry. Co. v. Graves*, 4 Willson, Civ. Cas. Ct. App., § 100, 16 S. W. 102.

Such stipulation in a contract for live stock shipment does not apply to such a claim accruing under prior verbal contract to furnish cars at a specified time. *Cross v. Graves*, 4 App. Civ. Cases, § 100, 16 S. W. 102.

A stipulation in a contract for trans-

portation of cattle requiring the shipper to give notice within a certain time of "loss or injury to his said stock," is not binding upon the shipper where the cause of action to recover it had accrued and was complete before the written contract for the transportation of the cattle was executed, there being no consideration for any provision in the writing affecting that cause of action. *Pecos, etc., R. Co. v. Evans-Snyder-Buel Co.*, 100 Tex. 190, 97 S. W. 466, affirming 42 Tex. Civ. App. 60.

**(4) Decline in Value during Delay.**

A provision of a shipping contract, requiring certain notice of any claim for damages for loss or injury to the stock shipped during the transportation, was not applicable to a claim for depreciation in the market value on account of a decline in the market during the time lost in delay in transportation. Judgment, *Pecos & N. T. Ry. Co. v. Evans-Snyder-Buel Co.* (Civ. App.), 93 S. W. 1024, affirmed. *Pecos & N. T. Ry. Co. v. Evans-Snyder-Buel Co.*, 97 S. W. 466, 42 Tex. Civ. App. 60.

A depreciation in the market price of cattle resulting from negligent delays is not covered by the stipulation for a notice in writing for loss or injury to their stock. *Southern Kansas R. Co. v. Curtis Bros.*, 44 Tex. Civ. App. 477, 480, 99 S. W. 566, affirmed in 102 Tex. 593, no op.

**Claim for Loss by Delay.**—See ante, "Reasonableness," VIII, G, 2, b, (4).

**(5) Claim for Wrongful Delivery.**

It may be doubted whether a stipulation in a bill of lading for notice of claim within 90 days has any application to a claim growing out of the failure to deliver the goods to the proper party under the bill of lading. *Grayson County Nat. Bank v. Nashville, etc., Railway* (Civ. App.), 79 S. W. 1094, 1097.

**(6) Where Owner Refuses to Receive Goods.**

A stipulation in a bill of lading as to notice of claim for damage done to

goods while in transit, and before delivery, does not apply where the owner refuses to receive the goods at all. *Gulf, C. & S. F. R. Co. v. Golding*, 3 Willson, Civ. Cas. Ct. App., § 36.

So held as to stipulations for presentation of claim before removal of goods from station and for presentation of such claim within ten days after delivery, when owner refused to receive the goods because of their damaged condition. *G. C. & S. F. R. Co. v. Golding*, 3 App. Civ. Cases, § 33.

**(7) Inurement to Final Carrier's Benefit.**

A stipulation in a bill of lading for notice of claim within 90 days is restricted to claims against the initial carrier, and can not inure to the final carrier's benefit. *Grayson County Nat. Bank v. Nashville, etc., Railway* (Civ. App.), 79 S. W. 1094.

**d. Sufficiency of Notice.**

**When Verbal Notice Sufficient.**—

Where stipulation in contract of shipment providing for written notice of claim for damages is expressly waived, verbal notice is sufficient. *Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 682, 26 S. W. 286, affirmed in 93 Tex. 699, no op.

Appellant pleaded general denial, and specially that one of appellees, representing them all in the shipment of the cattle, entered into a written agreement with defendant, whereby he undertook to superintend the loading of the cattle, and, among other things, as a condition precedent to his right to recover anything for said cattle, to give notice in writing of his claim therefor to some agent or officer of the defendant before the stock should be removed from the place of destination, which was not done. The written notice required was not given for several days after the arrival of the train at Sherman. The cattle were put off in the night. It was dark and raining. There were no pens to put

them in, and they could not be kept together in the darkness. They scattered abroad into the country, and it was several days before they could be collected, and many of them were entirely lost. The court holds that under the above circumstances the appellant could not insist upon a literal compliance with the condition. It was sufficient that verbal notice of the claim was given to the agent on the night of the arrival at Sherman, and written notice as soon as it could be reasonably given after collecting the cattle. *Houston, etc., R. Co. v. Hester*, 2 Posey 296.

**Letter.**—Where the only notice of a claim for damages is a letter written to the carrier's general freight agent complaining that the train which transported his cattle had been delayed and that the company's agent had compelled him to pay \$15 expense of transportation in addition to the contract price, it was held that the letter was not a notice of a claim for damages. *Texas, etc., R. Co. v. Jackson*, 3 App. Civ. Cases, § 41.

**Filing Suit and Service of Citation.**

—The filing of suit and service of citation are sufficient to meet requirements of a shipping contract whereby the shipper agrees to give definite notice in writing of his claim to the carrier within a certain time after date of injury. *Houston & T. C. R. Co. v. Davis*, 50 Tex. Civ. App. 74, 109 S. W. 422.

In the case of *Phillips v. Western Union Tel. Co.*, 95 Tex. 638, 69 S. W. 63, the supreme court, in answer to a certified question, discussed the conflicting holdings of the several courts of civil appeals upon this question, as well as the holdings in other states, and held that the filing of suit and service of process within the period of time named in the contracts was a compliance with such contracts. Counsel for appellant cites as sustaining his proposition the cases of *Houston, etc., R. Co. v. Mayes*, 44 Tex. Civ. App. 31, 97 S. W. 318 and *International, etc., R.*

*Co. v. Heittner*, 42 Tex. Civ. App. 617, 94 S. W. 189. These cases, however, are not in point, because the question involved in each of them was not similar to the one under consideration, for in said cases it was shown that no notice whatever was given, and no suit was filed within the period of limitation prescribed by the contract. *Houston, etc., R. Co. v. Davis*, 50 Tex. Civ. App. 74, 109 S. W. 422.

**Officer or Agent to Whom Given.**—

Ordinarily, it is sufficient, to charge the company itself with notice of a given fact, to show that its agent in charge of that particular branch of the business had, notice thereof. *Ft. Worth, etc., R. Co. v. Wilson*, 3 Tex. Civ. App. 583, 24 S. W. 686, affirmed, in part and reversed in part, in 85 Tex. 516, 22 S. W. 578. And it would seem that if the real object of the company in exacting these complicated contracts be to guard against fraudulent claims, instead of to confuse the shipper and escape liability, upon other than equitable grounds, notice to the delivering conductor is all that should be required. *Missouri Pac. R. Co. v. Childers* (Civ. App.), 29 S. W. 559, 560.

**Connecting Carriers.**—Where a shipper made a contract with one carrier to take stock to a certain place, and there made a contract with a connecting carrier to take it to another place, each expressly stipulating that it only agreed to carry the stock between the points that it did carry them and that its liability should be limited to its own line, the contracts are independent, so that notice given to one of claim of damages is not notice to the other. *Houston, etc., R. Co. v. Mayes*, 44 Tex. Civ. App. 31, 97 S. W. 318.

Plaintiff submitted testimony tending to show that the agent of the terminal carrier, at his instance, prepared a written notice of his claim for damages, and forwarded it to the headquarters of that company, but that testimony fails to show that that company or its agent was the agent or



representative of the defendant. And according to the rule that notice given to the agent of the terminal carrier without proof to show that he was agent to receive same for defendant, the initial one, is not a compliance with the contract, the notice was held insufficient. *International, etc., R. Co. v. Heittner*, 42 Tex. Civ. App. 617, 619, 94 S. W. 189.

Where a contract for shipment over two connecting lines of carriers requires a notice of claim for damages to be made at the point of destination, notice of a claim against the first carrier need not be given at the connecting point. *Atchison, T. & S. F. Ry. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. 286.

#### e. Waiver of Noncompliance.

Where a contract between a carrier and shipper requires the shipper to give notice of any claim for damages within a specified time, etc., waiver of notice may be shown by circumstances inconsistent with the carrier's right to insist upon such condition. *Missouri Pac. Ry. Co. v. Scott*, 2 Willson, Civ. Cas. Ct. App., § 325.

A carrier may waive his right to be notified before suit of the extent of the damage to the goods. *International & G. N. Ry. Co. v. Underwood*, 62 Tex. 21.

**What Constitutes a Waiver and Proof.**—The rule is that "if the course of conduct pursued by the appellant was such as to induce the appellee to believe that his claim for damages would be paid without suit, and for this reason suit was not brought within the time prescribed, then the action could be maintained after the expiration of the time." *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 273, 15 S. W. 568, 18 S. W. 948; *Galveston, etc., R. Co. v. Silegman* (Civ. App.), 23 S. W. 298, 301; *Galveston, etc., R. Co. v. Kelley* (Civ. App.), 26 S. W. 470, 471.

A contract limitation as to time when a claim for loss or damage must

be presented is waived by statement of the local agent that the package would be delivered "in a few days." *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 605, 16 S. W. 441.

In order to establish a waiver on the part of the defendant it is necessary for the plaintiff to submit proof tending to show that defendant or one of its agents did something calculated to induce him to believe that it would not insist upon the stipulation of the contract requiring written notice. Instead of showing that the statement of defendant's agent to the effect that he had received information from the company that the plaintiff's horses were damaged, influenced him in the course thereafter pursued, he assigned other and different reasons by which he was influenced. Hence, the court held that the proof of waiver was insufficient. *International, etc., R. Co. v. Heittner*, 42 Tex. Civ. App. 617, 619, 94 S. W. 189.

Plaintiff's horses were damaged in transit, but plaintiff failed to comply with the stipulation in the bill of lading requiring him to give written notice of his claim for damages within 91 days. The agent of one of the connecting carriers prepared a written notice of his claim for damages, which was forwarded to the headquarters of the company, but there was no evidence that such agent was the agent of defendant company. Plaintiff went to one of defendants' agents on other business and incidentally stated to him that all of the horses were damaged, to which the agent replied that he had received notice from the company to that effect, but this statement did not induce plaintiff to forego the presentation of written notice as required. Held, that such facts were insufficient to establish a waiver of such notice by defendant. *International & G. N. R. Co. v. Heittner*, 42 Tex. Civ. App. 617, 94 S. W. 189.

Where the default of the carrier ren-

dered it impossible for the shipper to comply with a condition requiring him to give notice in writing, etc., of damage sustained, if any, before removing the cattle from the place of delivery, etc., and he failed to give such notice, to allow a carrier to enforce this condition would enable it to unlawfully stipulate against its misconduct. *Gulf, etc., R. Co. v. York*, 2 App. Civ. Cases, § 813.

Where a shipper, having a claim for damages against a carrier, which by the contract of shipment was required to be sued upon within 40 days, presented his claim before the expiration of that time to the carrier's agent, who forwarded it to the general offices, and afterwards, within the 40 days, when asking the agent about the claim, was requested to wait, and told that the carrier had written that it would pay the claim, the court properly refused to charge that the fact that the agent received the claim to be forwarded to the general offices would not be a waiver or estoppel on the part of the carrier, but that the shipper must have been deprived of his right to sue by the willful acts and promises of the carrier. *Galveston, H. & S. A. Ry. Co. v. Silegman* (Civ. App.), 23 S. W. 298.

Where, by the conduct of an agent of a railroad company, a shipper is induced to believe that his claim for damages to goods will be paid without suit, and for that reason suit is not brought within the time prescribed in the contract of shipment, it may be brought thereafter. *Galveston, H. & S. A. Ry. Co. v. Kelley* (Civ. App.), 26 S. W. 470.

Where a contract with a carrier required notice of injury to freight before suit, and it was shown that compliance with this stipulation was waived by carrier whose agent agreed to pay fixed sum in satisfaction of damage, verdict for agreed sum is not erroneous. *International, etc., R. Co. v. Underwood*, 62 Tex. 21, 23.

#### f. Pleading and Proof of Breach.

In an action against a carrier for injury to freight, the burden of showing a breach of stipulation to give notice of claim for damages in a fixed time is on the carrier. *St. Louis S. W. R. Co. of Texas v. Hays*, 13 Tex. Civ. App. 577, 35 S. W. 476; *St. Louis, etc., R. Co. v. Boshear* (Civ. App.), 108 S. W. 1032, 1033; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 105, 17 S. W. 834.

In a suit for injury based on a contract requiring the shipper to give notice of his claim, plaintiff need not allege nor prove the giving of such notice. *St. Louis, etc., R. Co. v. Hays*, 13 Tex. Civ. App. 577, 35 S. W. 476.

The act of March 4, 1891 (art. 3379, Rev. Stat., 1895), places the burden of proof to show failure to give notice as required by the contract on the defendant. *St. Louis, etc., R. Co. v. Hays*, 13 Tex. Civ. App. 577, 579, 35 S. W. 476.

Under Rev. St. 1895, art. 3379, providing that it shall be presumed that notice of a claim for damages has been given in accordance with a stipulation of a contract requiring such notice, unless the want of notice shall be pleaded under oath, a plea setting up a stipulation in a contract requiring the giving of notice, and alleging plaintiff's failure to comply therewith, raises no issue, unless it is sworn to. *St. Louis, etc., R. Co. v. Honea* (Civ. App.), 84 S. W. 267. See, also, *Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 27, 31 S. W. 308, affirmed in 88 Tex. 593; *Texas Tel., etc., Co. v. Seiders*, 9 Tex. Civ. App. 431, 29 S. W. 258, affirmed in 93 Tex. 697, no op.

Where a plea set up plaintiff's failure to comply with the provisions of a contract requiring notice of damages to be given was not sworn to as required by Rev. Stat. 1895, art. 3379, the erroneous sustaining of a demurrer to such plea, based on the ground that the stipulation of the contract was un-

reasonable, as a matter of law, was harmless. *St. Louis, etc., R. Co. v. Honea* (Civ. App.), 84 S. W. 267.

**Live Stock Shipment.**—The burden is on the defendant in an action against a carrier for injury to cattle in shipment to show that notice of the claim as required by the terms of the contract was not given. *Texas, etc., R. Co. v. Crowley* (Civ. App.), 86 S. W. 342; *St. Louis, etc., R. Co. v. Hays*, 13 Tex. Civ. App. 577, 35 S. W. 476; *Texas, etc., R. Co. v. Reeves*, 90 Tex. 499, 39 S. W. 564, affirming 39 S. W. 135. See *Western Union Tel. Co. v. Jackson*, 19 Tex. Civ. App. 273, 46 S. W. 279, affirmed in 93 Tex. 697, no op.

So held where the shipper swore that he had put his claim in the hands of A. F. Crowley, and had instructed him to give notice of it. It was not shown that he did not give the notice. *Texas, etc., R. Co. v. Crowley* (Civ. App.), 86 S. W. 342, 343.

In a suit for injury to stock transported by rail, fraud on a contract requiring the shipper to give notice of his claim, the burden of proving absence thereof is not met by defendant showing that such notice was not given to its local agent, where under the contract it might have been given to its general officers. *St. Louis, etc., R. Co. v. Hays*, 13 Tex. Civ. App. 577, 35 S. W. 476; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 105, 17 S. W. 834.

### 3. Stipulations Respecting Time within Which Suit to Be Brought.

#### a. Power to Stipulate.

##### (1) Prior to Act March 4, 1891.

A railroad company may contract with a shipper fixing a reasonably shorter time than that allowed by statute, within which suit may be brought in case of damages. *Gulf, C. & S. F. Ry. Co. v. Hume Bros.*, 87 Tex. 211, 27 S. W. 110; *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 38, 15 S. W. 164; *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 94, 14 S. W. 913; *Gulf, etc., R. Co. v. Tra-*

*wick*, 68 Tex. 314, 318, 4 S. W. 567; *Gulf, etc., R. Co. v. Clarke*, 5 Tex. Civ. App. 547, 24 S. W. 355; *International etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354; *Galveston, etc., R. Co. v. Silegman* (Civ. App.), 23 S. W. 298; *Texas, etc., R. Co. v. Hawkins* (Civ. App.), 30 S. W. 1113; *Gulf, etc., R. Co. v. White* (Civ. App.), 32 S. W. 322.

It is lawful for a carrier to fix time, by agreement, shorter than that allowed by law, within which to file suit for injuries received. *Texas & P. Ry. Co. v. Hawkins* (Civ. App.), 30 S. W. 1113.

**Not within Rev. Stat., Art. 278.**—A clause of a contract between a shipper and a railroad company which limits the time within which a suit may be brought by the shipper, for any claim for damage arising under the contract, to less than the time prescribed by the statute of limitations, does not limit or restrict the liability of the railroad company, within the prohibition of Rev. St. art. 278, and, if reasonable, will be enforced. *Gulf, C. & S. F. Ry. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494.

A contract, however, which does not in any way, if given effect, defeat the complete vestiture of the right to recover from a common carrier for a breach of duty that at common law would give it, does not operate as a restriction on the common-law liability of the carrier, even though it may require the assertion of that right, by action, at an earlier period than would be necessary to defeat it through the operation of the ordinary statutes of limitation. *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 319, 4 S. W. 567.

#### Interstate or Domestic Shipments.

—The cattle were received for transportation from a point in Texas to Chicago, the bill of lading providing that the carrier should be liable only while the cattle were on its own road.

The route over that was wholly within the state, and the delay was caused by the refusal of the connecting lines to receive the cattle on account of a strike on their roads. Held, that the provisions limiting the time in which suit could be brought, and releasing the carrier from liability for delay caused by strikes, are valid, whether the contract of shipment be considered as interstate or as one to be wholly performed within the state. *Gulf, C. & S. F. Ry. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419.

**(2) Under Act March 4, 1891, Rev. Stat. 1895, Art. 3378.**

The act of March 4, 1891, forbids the making of any contract limiting the time in which suit may be brought to less than two years. *Reeves v. Texas, etc., R. Co.*, 11 Tex. Civ. App. 514, 32 S. W. 926; *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161.

A clause in a contract for the shipment of cattle providing that suit for damages to the cattle must be brought within 14 days is in conflict with Act March 4, 1891, making it unlawful to limit time within which suit may be brought on a contract to a shorter period than two years. *St. Louis S. W. Ry. Co. v. Williams* (Civ. App.), 32 S. W. 225.

A clause in a shipping contract requiring suit to be brought within forty days is in conflict with act of March 4, 1891, making it unlawful to limit time to less than two years. *St. Louis, etc., R. Co. v. Williams* (Civ. App.), 32 S. W. 225.

A stipulation requiring the shipper to bring suit within 90 days is against the spirit and letter of the act of March 4, 1891. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 681, 29 S. W. 565.

**Not Retroactive.**—The statute of March 4, 1891, Rev. Stat. 1895, art. 3378, condemning such contracts can not be given a retroactive effect. *Gulf, etc., R. Co. v. White* (Civ. App.), 32 S. W. 322, 323.

**Interstate Shipments.**—Act March 4, 1891, invalidating contracts which limit the time in which to sue thereon to less than 2 years, or which require notice of claim for damages to be given within less than 90 days after the damage, applies to claims for damages for breach of contracts by a carrier for interstate shipments. *Missouri, K. & T. Ry. Co. v. Withers* (Tex. Civ. App.), 40 S. W. 1073, 16 Tex. Civ. App. 506, affirmed in 93 Tex. 691, no op.; *Galveston, etc., R. Co. v. Herring* (Civ. App.), 36 S. W. 129, holding the act of March 4, 1891 applicable to an interstate shipment of live stock; *St. Louis, etc., R. Co. v. Hamdrick* (Civ. App.), 97 S. W. 1072; *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 682, 29 S. W. 565; *Missouri, etc., R. Co. v. Cocreham*, 10 Tex. Civ. App. 166, 167, 30 S. W. 1118; *Reeves v. Texas, etc., R. Co.*, 11 Tex. Civ. App. 514, 32 S. W. 926. See, also, *Capps v. Leachman*, 90 Tex. 499, 39 S. W. 917; *Galveston, etc., R. Co. v. Johnson* (Civ. App.), 29 S. W. 428; *Armstrong v. Galveston, etc., R. Co.*, 92 Tex. 117, 46 S. W. 33, reversing 43 S. W. 614.

Legislation of this character can not be said to in any manner affect interstate commerce. It does not impose any burden upon it. It does not regulate it, nor does it interfere with it. *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 578, 10 S. W. 1001. The only effect it has is to prescribe a time in which the remedy shall be limited. The act is general in effect, and applies alike to all persons, either natural or artificial, that are capable of contracting. It does not single out commerce and undertake to regulate it or to impose restrictions upon it, but the broad purpose of the act is simply to prescribe a period of time in which contracts executed within this state shall not be affected by limitation. It prescribes a period of limitation that simply affects the remedy, and not the

merits. 13 Am. and Eng. Ency. of Law, 703, 768. *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 125, 26 S. W. 161.

Rev. St. 1895, art. 3378, makes unlawful any agreement by reason whereof the time within which to sue thereon is limited to a shorter period than two years. Held that, though a contract for the shipment of cattle was executed in Arkansas and no part of the contract was to be performed in Texas, a stipulation of the contract, providing that no suit should be sustainable thereon, unless commenced within 6 months after the accrual of the cause of action, was unenforceable in Texas, though valid under the law of Arkansas. *St. Louis, I. M. & S. Ry. Co. v. Hambrick* (Civ. App.), 97 S. W. 1072.

A stipulation in a contract of carriage requiring suit on the contract to be begun within six months after the accrual of the cause of action is void. *Southern Kansas Ry. Co. of Texas v. J. W. Burgess Co.* (Civ. App.), 90 S. W. 189.

This was a Missouri contract. The act of negligence complained occurred in Texas after the shipment reached its destination. *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161, cited and approved.

### (3) Interstate Shipments.

See ante, "Prior to Act March 4, 1891," VIII, G, 3, a, (1); "Under Act March 4, 1891, Rev. Stat. 1895, Art. 3376," VIII, G, 3, a, (2); post, "What Law Governs," VIII, G, 3, a, (4).

### (4) What Law Governs.

A stipulation in a contract for carriage of live stock providing that any action for delay, injuries, etc., should be brought against the carrier within six months from its accrual, was one affecting the remedy only, and is controlled by the law of the forum, irrespective of the place of the contract. *St. Louis & S. F. R. Co. v. Bryce*, 110 S. W. 529, 49 Tex. Civ. App. 608.

Where acts of negligence charged against a carrier occur after the goods have reached their destination in this state, and suit is brought here, a stipulation in the contract of carriage requiring suit to be brought within six months after the accrual of the cause of action must be tested by the laws of this state, although the contract was made in another state. *Southern Kansas Ry. Co. of Texas v. J. W. Burgess Co.* (Civ. App.), 90 S. W. 189.

The contracts under which the cattle were shipped stipulated that no suit should be brought after the lapse of 90 days from the date of the injuries upon which the action was based. It was agreed that in the Indian Territory, where the contracts were made, there was no statute rendering such stipulation invalid. It was held that such stipulation relates only to the remedy, and as to the remedy the law of the forum governs. *Missouri, etc., R. Co. v. Godair Commission Co.*, 39 Tex. Civ. App. 298, 87 S. W. 871, affirmed in 101 Tex. 648, no op.

### b. Requisites.

#### (1) Consideration.

A reduction from the regular freight rate for live stock is a sufficient consideration to uphold a clause in the contract of shipment requiring suit for damages to the stock to be brought within 40 days from delivery. *Texas & P. Ry. Co. v. Klepper* (Civ. App.), 24 S. W. 567.

#### (2) Reasonableness.

A provision in a shipping receipt, limiting the time in which suit shall be brought, will be enforced if, under the circumstances of the shipment, it is reasonable. *Gulf, C. & S. F. Ry. Co. v. Clarke*, 5 Tex. Civ. App. 547, 24 S. W. 355; *Gulf, etc., R. Co. v. Hume Bros.*, 6 Tex. Civ. App. 653, 24 S. W. 915, reversed in 87 Tex. 211; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567; *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. 354; *Texas, etc., R. Co. v. Haw-*

kins (Civ. App.), 30 S. W. 1113; Gulf, etc., R. Co. v. Elliot (Civ. App.), 26 S. W. 636, affirmed in 93 Tex. 684, no op.; Gulf, etc., R. Co. v. Hume, 87 Tex. 211, 27 S. W. 110; Capps v. Leachman, 90 Tex. 499, 39 S. W. 917; Missouri, etc., R. Co. v. Godair Commission Co., 39 Tex. Civ. App. 298, 87 S. W. 871, affirmed in 101 Tex. 648, no op.; Gulf, etc., R. Co. v. Gatewood, 79 Tex. 89, 14 S. W. 913; McCarty v. Gulf, etc., R. Co., 79 Tex. 33, 35, 15 S. W. 164. See, also, Houston, etc., R. Co. v. Davis, 88 Tex. 593, 32 S. W. 510; Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574; Gulf, etc., R. Co. v. White (Civ. App.), 32 S. W. 322, 323.

The courts have denied the authority of the carrier to impose upon the shipper a contract limiting the time in which to sue, it from the facts of the case it appeared that the stipulation as to the time was unreasonable. Gulf, etc., R. Co. v. Eddins, 7 Tex. Civ. App. 116, 124, 26 S. W. 161; Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 168, 2 S. W. 574; Pacific Exp. Co. v. Darnell (Sup.), 6 S. W. 765; International, etc., R. Co. v. Garrett, 5 Tex. Civ. App. 540, 24 S. W. 354.

A railroad company may, by contract, limit the time in which suit may be instituted against it for damages for injuries to cattle in transportation, so long as time is reasonable. Gulf, etc., R. Co. v. Trawick, 68 Tex. 314, 318, 4 S. W. 567.

Such stipulations are valid and binding, if from the contract itself or facts of the particular case they are reasonable. Gulf, etc., R. Co. v. Hume Bros., 6 Tex. Civ. App. 653, 24 S. W. 915, reversed in 87 Tex. 211; Gulf, etc., R. Co. v. Trawick, 68 Tex. 214, 4 S. W. 567; International, etc., R. Co. v. Garrett, 5 Tex. Civ. App. 540, 24 S. W. 354.

**Interstate Shipments.**—Stipulations in contracts of interstate shipments limiting the time in which to sue have been permitted only when they were

reasonable. Gulf, etc., R. Co. v. Eddins, 7 Tex. Civ. App. 116, 124, 26 S. W. 161, citing Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 168, 2 S. W. 574; Pacific Exp. Co. v. Darnell (Sup.), 6 S. W. 765, and International, etc., R. Co. v. Garrett, 5 Tex. Civ. App. 540, 24 S. W. 354.

State courts have power to determine and adjudicate question whether time limited in carrier's contracts, within which to sue is reasonable or unreasonable, and exercise of such jurisdiction does not regulate or interfere with interstate commerce. Gulf, etc., R. Co. v. Eddins, 7 Tex. Civ. App. 116, 124, 125, 26 S. W. 161.

**Pleading and Proof of Reasonableness.**—The burden rests on the carrier to show by proper pleading and proof that a stipulation as to suit on a shipment contract is reasonable. Ft. Worth, etc., R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834; Missouri Pac. R. Co. v. Fagan, 72 Tex. 127, 132, 9 S. W. 749; Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 167, 2 S. W. 574.

To avail itself of stipulation in a bill of lading, limiting commencement of action for breach of carrier's contract, the latter must plead facts showing reasonableness of stipulation. Texas, etc., R. Co. v. Reeves, 90 Tex. 499, 39 S. W. 564.

A stipulation limiting the time in which suit may be brought for breach of a shipping contract is not available as a defense unless the answer shows that such stipulation was reasonable. Texas & P. Ry. Co. v. Reeves (Tex. Sup.), 39 S. W. 564, 90 Tex. 499.

The defendant carrier to avail itself of the stipulation in the contract should in its answer have alleged the facts which would have shown it to be reasonable. Capps v. Leachman, 90 Tex. 499, 39 S. W. 917, affirming 39 S. W. 135. See, also, Houston, etc., R. Co. v. Davis, 88 Tex. 593, 32 S. W. 510, affirming 31 S. W. 308, 11 Tex. Civ. App. 24, 32 S. W. 163; Missouri Pac.

*R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

**Interstate Shipment.**—A common carrier relying on a stipulation in a contract for an interstate shipment limiting time for suit must allege facts showing the contract to be reasonable. *Capps v. Leachman*, 90 Tex. 499, 39 S. W. 917, affirming 39 S. W. 135.

In an action against a carrier for damages to a shipment, the burden is on the carrier to show that a stipulation in the contract of shipment limiting the time within which an action may be brought thereon is reasonable. *Missouri, K. & T. Ry. Co. of Texas v. Godair Commission Co.*, 39 Tex. Civ. App. 298, 87 S. W. 871.

**Question for Jury.**—A provision in a shipping receipt limiting the time in which suit shall be brought will be enforced if, under the circumstances of the shipment, it is reasonable, which is a question of fact for the jury. *Gulf, C. & S. F. Ry. Co. v. Clarke*, 5 Tex. Civ. App. 547, 24 S. W. 355.

The reasonableness of the time fixed is generally a question of fact to be determined by the jury. *Gulf, etc., R. Co. v. Hume Bros.*, 87 Tex. 211, 218, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915; *Texas, etc., R. Co. v. Hawkins* (Civ. App.), 30 S. W. 1113.

**Stipulation Held to Be Reasonable.**—A stipulation in a carrier's contract of shipment requiring any action to recover a claim against it by virtue of the contract to be commenced within 40 days after the damage shall occur, is reasonable, and binding on the shipper. *Galveston, etc., R. Co. v. Silegman* (Civ. App.), 23 S. W. 298.

**Forty Days Held a Reasonable Time.**—See *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 38, 15 S. W. 164; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 319, 4 S. W. 567; *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 94, 14 S. W. 913; *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 18 S. W. 948, 15 S. W. 568;

*Gulf, etc., R. Co. v. White* (Civ. App.), 32 S. W. 322; *Gulf, etc., R. Co. v. Williams*, 4 Tex. Civ. App. 294, 296, 23 S. W. 626; *Gulf, etc., R. Co. v. Hume Bros.*, 87 Tex. 211, 218, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915.

**Stipulations Held to Be Unreasonable.**—Stipulation in a contract of carriage of cattle that suit be brought within 40 days for damage to them is unreasonable. *Gulf, C. & S. F. Ry. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109.

A stipulation in a shipping contract, requiring action to be brought and service had within thirty days after breach, is unreasonable and void. *Gulf, etc., R. Co. v. Elliott* (Civ. App.), 26 S. W. 636, 637, affirmed in 93 Tex. 684, no op.; *Gulf, etc., R. Co. v. Hume*, following 6 Tex. Civ. App. 653, 24 S. W. 915, reversed in 87 Tex. 211.

#### c. Operation and Effect.

Where a contract of shipment fixes a reasonably shorter time than that allowed by statute within which suit may be brought in case of damages, such stipulation is binding on the parties. If the suit is not brought within the stipulated time after the injury occurred it is barred and can not be maintained, unless the plaintiff shows some reasonable excuse for the delay; and failure to so bring suit should be charged as defense, unless excused for some reason. *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 38, 15 S. W. 164; *Galveston, etc., R. Co. v. Silegman* (Civ. App.), 23 S. W. 298; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567; *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. 913; *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 273, 15 S. W. 568, 18 S. W. 948.

Such stipulation in bill of lading binds a shipper who shows no excuse for delay. *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 94, 14 S. W. 913.

A stipulation that no suit shall be maintainable to recover for injuries to

cattle shipped unless brought within forty days, not shown to be unreasonable nor waived, constituted an effectual bar to a suit not brought in conformity thereto. *Gulf, Colorado & S. F. Ry. Co. v. Williams*, 4 Tex. Civ. App. 294, 23 S. W. 626.

**Breach of Prior Verbal Contract to Furnish Cars.**—Under a stipulation in a bill of lading that no action for breach thereof shall be sustainable, unless brought within 40 days after the right of action has accrued, a delay for a longer period will not bar an action for breach of a prior verbal contract to furnish cars for the shipment of stock at a certain place, on a certain day. *McCarty v. Gulf, C. & S. F. Ry. Co.*, 79 Tex. 33, 15 S. W. 164; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 611, 18 S. W. 716.

**Live Stock Shipments.**—In a contract for the transportation of cattle, a common carrier may provide that suit on any claim thereunder must be brought within 40 days after the damage occurred, and such a provision will bar an action for delay commenced 77 days after the delivery of the cattle, the carrier having notified the plaintiff 25 days after the delivery that his claim would not be paid. *Gulf, C. & S. F. Ry. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419.

In an action by a shipper against a railroad company for injuries to live stock shipped thereon, the refusal of the court to instruct the jury as to the effect of the failure of the shipper to institute suit within the time prescribed by the shipping contract is error. *Gulf, C. & S. F. Ry. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567.

**Loss of Cattle from Stock Pens.**—In an action against a railroad company to recover damages for the loss of cattle by escape from defendants' stock pen while awaiting shipment, and for injuries received by other cattle while being shipped, the limitation of 40 days, in the shipping contract, in

which to bring an action for damages, does not apply to the loss of the cattle from the stock pen. *Gulf, C. & S. F. Ry. Co. v. Trawick*, 80 Tex. 270, 18 S. W. 948, modifying (1891) 80 Tex. 270, 15 S. W. 568.

**Penal Action for Failure to Feed and Water Cattle.**—A statutory penal action against a carrier for failure to sufficiently feed and water live stock in transit is not limited by a clause in the contract of shipment barring claims thereon unless sued within 40 days after damage done. *Gulf, C. & S. F. Ry. Co. v. Gray* (Civ. App.) 24 S. W. 837.

The liability for the penalty does not arise under the contract, and is not damages resulting from its breach. The court below correctly submitted the issue of penalty under the statute, independently of the limitation clause. That clause did not refer to, or by its terms include, the penalty. It would not be construed more favorably for the carrier than the shipper, but the reverse. Its terms do not, nor was it intended to, bar the penalty by 40 days' delay in bringing suit. The penalty being a separate right, independent of the contract, the later should not be construed to include it. *Gulf, etc., Ry. Co. v. Gray* (Civ. App.), 24 S. W. 837, 839, reversed in 87 Tex. 312.

**Removal of Bar.**—The 40 days limited in a contract of shipment for bringing action for injury to the cattle shipped not being shown to be an unreasonable time, and having expired without action brought, the bar can be removed by nothing short of an absolute promise, in writing, to pay. *Gulf, C. & S. F. Ry. Co. v. White* (Civ. App.), 32 S. W. 322.

#### d. What Constitutes Commencement of Action.

The filing of a petition, with instructions to the clerk to issue citation thereon, is the commencement of the action, within the meaning of a contract which provides that, unless "suit



or action shall be commenced within 40 days" after the damage occurs, no suit shall be maintained by virtue of such contract. *Gulf, C. & S. F. Ry. Co. v. Wilbanks*, 7 Tex. Civ. App. 489, 27 S. W. 302.

The contract of shipment stipulated that in case of loss in order to make appellant liable therefor, suit should be instituted within forty days after such loss occurred. Within forty days after the damage occurred appellee's petition was filed, and the clerk was instructed to issue them. More than forty days after the damage occurred citation was issued, and appellee filed an amended petition setting up a co-partnership between appellant and its connecting lines, which had not been alleged in the original petition. Held, the amendment did not set up a new cause of action, but only amplified the grounds upon which appellant was liable; and the suit is treated as having been commenced at the time the original petition was filed. *Gulf, etc., R. Co. v. Wilbanks*, 7 Tex. Civ. App. 489, 27 S. W. 303.

#### **e. Waiver of Breach of Stipulation.**

Carrier, by inducing claimant for damages for injury to cattle, to believe that claim would be amicably adjusted, waives right to assert clause limiting right to sue to forty days after injury. *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 273, 15 S. W. 568, 18 S. W. 948.

A provision in a contract of shipment that any action thereon must be brought within 40 days after the damage shall have occurred is waived where defendant carrier, by promising to pay plaintiff's claim if made for a reasonable amount, induces him to delay bringing suit until after the expiration of the 40 days. *Gulf, C. & S. F. Ry. Co. v. Trawick*, 80 Tex. 270, 15 S. W. 568.

The principle involved in the rule as to waiver in insurance policies and contracts of carriage is substantially the same. *Gulf, etc., R. v. Trawick*, 80

Tex. 270, 273, 15 S. W. 568, 18 S. W. 948.

If the defendant, by negotiations for settlement or otherwise, so acted as to justify a reasonable belief on the part of the plaintiff that his claim would be settled without suit, and the plaintiff acting on such belief did not institute his suit until after the expiration of the forty days, the defendant would be estopped from invoking the limitation. *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 94, 14 S. W. 913.

Promises of settlement delaying suit are a waiver of a stipulation in a contract between shipper and carrier, that suit for goods damaged in transit must be brought within a specified time. *Galveston, etc., R. Co. v. Silegman* (Civ. App.), 23 S. W. 298, 301.

**Authority of Agent.**—A carrier's agent may not waive a limitation requiring suit for loss or injury to cattle to be brought within forty days unless such waiver is within the scope of his authority either actual or implied. *Gulf, Colorado & S. F. Ry. Co. v. Williams*, 4 Tex. Civ. App. 294, 23 S. W. 626.

Where a shipment contract stipulated that suit for loss or injury should be brought in forty days after the injury occurred, an agent of a connecting carrier could not waive such provision in contract without express authority of initial carrier. *Gulf, etc., R. Co. v. Williams*, 4 Tex. Civ. App. 294, 23 S. W. 626.

The agents of a line of railway connected with the line of defendant company, and over which the stock was shipped, are not the agents of defendant, for the purpose of waiving a provision of the shipping contract whereby the plaintiff was required to bring suit for his damages for loss or injury to the stock within forty days, unless express authority from the company sought to be made liable is shown. *Gulf, etc., R. Co. v. Williams*, 4 Tex. Civ. App. 294, 23 S. W. 626.

Where a shipment contract stipulated that a suit for injury should be brought in forty days, and plaintiff sued after such time claiming limitation was waived by defendant's agent, the burden was on him to show that the agent in making waiver acted within the scope of his authority. *Gulf, etc., R. Co. v. Williams*, 4 Tex. Civ. App. 294, 23 S. W. 626.

When promises of an agent of the defendant company are relied on to show a waiver of the provision requiring suit within forty days, it must be shown by evidence that such waiver was within the scope of his authority, or circumstances must be shown from which an inference would arise that his acts and statements were within the scope of his authority. *Gulf, etc., R. Co. v. Williams*, 4 Tex. Civ. App. 294, 23 S. W. 626.

Evidence that it was the duty of the agents of the connecting railway to investigate and settle all claims was inadmissible, unless such duty resulted from some relation between the companies; and no such relation was shown by the evidence. *Gulf, etc., R. Co. v. Williams*, 4 Tex. Civ. App. 294, 23 S. W. 626.

If such a relation existed, it should have been proven, and its legal effect left to the court and jury. One of the persons upon whose promises plaintiff relied in not bringing his suit appears to have been an agent of defendant. The extent of his powers as such is not proven otherwise than by the testimony offered by defendant, which shows that he was never entrusted with and did not exercise authority such as that claimed for him. Whether he had ever adjusted and paid such claims, or had waived such conditions as those in question, is not indicated further than this, nor are any circumstances disclosed from which an inference that his acts and statements by which it is sought to bind the defendant were within the

scope of his apparent authority. The evidence fails to show authority to waive the stipulation in question in those whose acts are relied on, and for this the judgment must be reversed. The plaintiff testified, that the two roads "were connecting lines, and that they were acting together at the time of shipment." This is too indefinite to establish a partnership or other relation between them, such as to enable the agents of one to bind the other. How they were acting together, whether simply as connecting lines or otherwise, is not shown. *Gulf, etc., R. Co. v. Williams*, 4 Tex. Civ. App. 294, 23 S. W. 626.

Where an agent of a railroad company is generally intrusted with the settlement of claims for overcharges of freight, a waiver by him of a clause in a bill of lading that suit for overcharges must be brought within 40 days is binding on the company, though such waiver was contrary to his instructions. *Galveston, H. & S. A. Ry. Co. v. House*, 4 Tex. Civ. App. 263, 23 S. W. 332.

As to the authority of the agent to waive a provision requiring suit to be brought within forty days, it was held that evidence that he was generally entrusted with the settlement of such claims, was sufficient to authorize the jury to infer that it was within the scope of his apparent authority to do so. The fact justified the public in acting upon such promises as he made to plaintiff. That his act was contrary to his instructions, or was without real authority, is not an answer to this view. *Hull v. East Line, etc., R. Co.*, 66 Tex. 619, 621, 2 S. W. 831. In the case of *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 273, 15 S. W. 568, 18 S. W. 948, there was no such evidence as there is in this case, that the local agent generally settles such claims. *Galveston, etc., R. Co. v. House*, 4 Tex. Civ. App. 263, 268, 23 S. W. 332.

**Replication Setting Up Waiver.**—Suit against a railway company for injury and loss caused by its negligence to cattle shipped by plaintiff upon its road. The freight contract contained a clause requiring suit within forty days from the time damages occurred. The plaintiff in replication to a plea of this limitation, the suit not having been filed within the stipulated time, alleged that "within three days after the accrual of the cause of action, and on divers days down to and including October 27, 1884, the defendant by and through its agents represented to plaintiff that the defendant would adjust and pay his claim for the cattle killed and injured, and induced him to put his claim for much less than the real damage, upon a statement made by defendant through the local agent of defendant at Lampasas to the effect that defendant would pay said claim without suit if plaintiff would put it in for a reasonable sum," alleging refusal to pay October 27 and suit filed November 11, 1884. Held, that the replication was sufficient. *St. Paul Fire, etc., Ins. Co. v. McGregor*, 63 Tex. 399, 404; *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 273, 15 S. W. 568, 18 S. W. 948.

**Weight of Evidence.**—In suit on a shipment contract against carrier, defended on ground that suit was not brought in time stipulated in contract, where plaintiff proved bringing of suit was delayed by promises of defendant to settle, held sufficient evidence of defendant's waiver of limitation. *Galveston, etc., R. Co. v. House*, 4 Tex. Civ. App. 263, 265, 23 S. W. 332.

An allegation of waiver of stipulation requiring suit to be brought within forty days from the time the damage occurred is not sustained by the evidence, where all of the evidence is to the effect that the only statements that were made to the plaintiff upon the subject were made to him by the local agent of the defendant mentioned in the pleading, and that

he gave them only as his own opinion and stated at the time that he had no authority in the matter. The evidence shows that he in fact had none. The defendant sought a ruling of the court upon the insufficiency of the evidence to support the issue of estoppel, both by a charge requested and upon its motion for a new trial. The charge should have been given and the motion should have been granted. *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 273, 15 S. W. 568, 18 S. W. 948.

In *Missouri, etc., R. Co. v. Godair Commission Co.*, 39 Tex. Civ. App. 298, 87 S. W. 871, affirmed in 101 Tex. 648, no op., there was evidence tending to show that the carrier had by its conduct waived the stipulation in the contracts of shipment requiring suit to be brought within 90 days.

#### 4. Stipulation as to Time of Service of Process.

A stipulation in a shipping contract requiring suit to be brought within a time less than that prescribed in the general law of limitations and the citation served, was held to be unreasonable in the case of *Gulf, etc., R. Co. v. Hume Bros.*, 87 Tex. 211, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915. *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 46, 33 S. W. 109, affirming 29 S. W. 806.

A railroad company can not lawfully contract with a shipper, that citation for damages shall be served within forty days, for the reason that service of citation is duty of public officer and not governable by private contract. *Gulf, etc., R. Co. v. Hume Bros.*, 87 Tex. 211, 218, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915.

A clause, in a contract by a railroad company to ship cattle, providing that no action for delay in transportation shall lie unless commenced and citation served within 40 days, is against public policy and void. *Gulf, C. & S. F. Ry. Co. v. Hume*, 6 Tex. Civ. App.

653, 24 S. W. 915; *Same v. Elliott* (Civ. App.), 26 S. W. 636; *Same v. Hume*, 87 Tex. 211, 27 S. W. 110.

The duties of public officers in issuing and in serving citations are prescribed by law; and any contract between parties which would involve any interference with the regular discharge of those duties would be against public policy and void. A stipulation requiring that suit be brought and citation served within a time less than that prescribed in the general law of limitations would be void. It is not a subject about which the parties could contract. *Gulf, etc., R. Co. v. Hume Bros.*, 87 Tex. 211, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915.

A freight contract stipulated that suit for damages must be filed and service had within forty days after accrual of the claim. The stipulation as to service of citation being unlawful, the two acts of filing suit and service of citation are so blended that they can not be separated. The entire clause is nugatory. *Gulf, etc., R. Co. v. Hume Bros.*, 87 Tex. 211, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 914.

One period of time is by this agreement designated within which two things are to be done; no part of that time can be specified as that within which suit might be filed, and the limitation of the right to recovery avoided, without performing the other act of serving citation. It is apparent, therefore, that these acts are so blended that they can not be separated, and the entire clause is rendered nugatory by including that which it was not lawful to embrace in the agreement. *Gulf, etc., R. Co. v. Hume Bros.*, 87 Tex. 211, 218, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915.

**Demurrer.**—A demurrer to a plea setting up a failure to comply with

a stipulation in shipping contract that injured party must serve citation on defendant within forty days, should be sustained. *Gulf, etc., R. v. Hume*, 6 Tex. Civ. App. 653, 657, 24 S. W. 915.

##### 5. Stipulations Abrogating Rules of Evidence.

If, under any circumstances, parties should be allowed to abrogate by contract well-settled rules of evidence, it should not be countenanced where it would place the shipper in the power of the carrier, who would hold the key to all the evidence. It is the rule, when a carrier is sued for the non-delivery of goods, that the shipper is only required to show that the carrier had received the goods, and that they had not been delivered at point of destination, and then the burden would rest upon the carrier to show that he is relieved from liability by the act of God or the public enemy, or any other exception lawfully ingrafted on the contract. *Ryan & Co. v. M. K. & T. R. Co.*, 65 Tex. 13; *Missouri Pac. R. Co. v. China Mfg. Co.*, 79 Tex. 26, 14 S. W. 785. It is a rule, also, that the existence of negligence is presumed against the party having the means of disproving it, but who fails to do so. *Galveston, etc., R. Co. v. Horne*, 69 Tex. 643, 9 S. W. 440. A contract abrogating these salutary rules of evidence is unreasonable, if not void, and will not be enforced. *Southern Pac. Co. v. Phillipson* (Civ. App.), 39 S. W. 958.

A stipulation in an interstate contract of carriage against the presumption of negligence which would arise from proof of certain facts, and prescribing the character of proof necessary to fix liability for loss of the goods on the carrier, is unreasonable, as an abrogation of the rules of evidence, and will not be enforced. *Southern Pac. Co. v. Phillipson* (Tex. Civ. App.), 39 S. W. 958.

# 6. Loss While "in Transit" or "in Depot or Place of Transshipment."

While a consignment of cotton was on a compress company's platform, a railroad company executed to the owner a bill of lading therefor, and bound itself to transport it. The bill provided that the company and connecting carriers should not be liable for loss of or damage to the cotton "while in transit, or while in depot or place of transshipment, or of landing at place of delivery." While yet on the compress company's platform, the cotton was burned. Held, that the cotton was not constructively in transit. *Amory Manuf'g Co. v. Gulf, C. & S. F. Ry. Co.* (Tex. Sup.), 37 S. W. 856, 89 Tex. 419, 59 Am. St. Rep. 65; *Gulf, C. & S. F. Ry. Co. v. Pepperell Mfg. Co.* (Civ. App.), 37 S. W. 965.

Such cotton is not in transit or at depot or place of transshipment, within contract in bill of lading, exempting carrier from loss by fire. *Amory Mfg. Co. v. Gulf, etc., R. Co.*, 89 Tex. 419, 426, 427, 37 S. W. 856.

The words "in transit" are not the equivalent of the words "in transitu," and goods in the hands of a carrier are not in transit from the moment of delivery to the carrier until they reach the hands of the consignee. In sense, the meaning of the two phrases is the same; the one is a literal translation of the other; but as actually employed they have a materially different meaning and application. "In transit" means literally, in course of passing from point to point, and such is its common acceptation. Such also is the literal meaning of the phrase "in transitu;" but for the sake of convenience in defining the right of a creditor to stop goods which have been sold but not delivered to an insolvent purchaser, they have been given a broader technical signification. It may be doubted whether the phrase is ever used in our language in any other connection. It would seem there-

fore that if the parties to the contract in question had desired to employ a single phrase which would cover the carrier's exemption from liability from the time the goods were received by it until it had delivered them to the consignee, they would have used the more comprehensive terms. But here the words "in transit"—the words actually used—according to their ordinary signification, apply only to the cotton from the time the transportation was to begin until the time it was to end under the contract. The cotton not having been set in motion towards its destination was not in fact in transit, and it can not be held to be constructively in transit while on the platform, without unwarrantably extending the meaning of a well-defined word and doing violence to a well-established canon of construction. *Amory Mfg. Co. v. Gulf, etc., R. Co.*, 89 Tex. 419, 425, 37 S. W. 856.

This interpretation of the word is strengthened by the fact that, in addition to exemption while in transit, the contract also provides that the company is not liable for loss of the cotton while in depot or place of transshipment or of landing at place of delivery. If the words "in transit" are to be given the broad construction contended for, then this additional provision is unnecessary. It is to be presumed that the express provision, that the company was not to be liable for loss while in depot or place of transshipment or of landing at place of delivery, was incorporated for a purpose, and the inference is strong that the purpose was to supply that which would have been wanting without it. In the absence of the well-recognized rule of construction applicable to these contracts, it would be necessary to hold that the phrase "while in transit" did not exempt the company from the loss of the cotton before the transportation actually began; and in any event, there is such

grave doubt as to the construction of the phrase as would require that the doubt should be resolved in favor of the shipper. *Amory Mfg. Co. v. Gulf, etc.*, R. Co., 89 Tex. 419, 426, 37 S. W. 856.

The provision, "while in depot or place of transshipment," must be read as, "while in depot of transshipment or place of transshipment," within the meaning of the contract limitation, and hence the company was liable for loss at its receiving depot. *Amory Manuf'g Co. v. Gulf, C. & S. F. Ry. Co.* (Tex. Sup.), 37 S. W. 856, 89 Tex. 419, 59 Am. St. Rep. 65; *Gulf, C. & S. F. Ry. Co. v. Pepperell Mfg. Co.* (Civ. App.), 37 S. W. 965.

The cotton was not "in depot" within the meaning of the contract, when it was destroyed. The clause in which the words quoted are found admits of two constructions—one as if it read "or while in depot, or while in place of transshipment"—the other as if the words were "while in depot or transshipment or place of transshipment." If the former be the correct rendering of the clause, then the company would not have been liable for the loss of the cotton while at its depot at the initial point of the carriage; the latter is the better construction. The words "depot" and "place" stand in close connection, being separated only by the disjunctive conjunction, and by a strict grammatical construction occupy precisely the same relation to the other words of the clause. If it were intended to say depot or other place of transshipment, the words accurately expressed the idea and no others are necessary to be supplied. But if it were intended to mean any depot, then to express fully and accurately the meaning, the words "in" or "while in" must be inserted before the word "place." In addition, the punctuation supports the court's construction of the language. If there had been a comma after the

word "depot," it would have indicated that it was the purpose to detach that word from those next succeeding and to render it independent of and unqualified by them. But the instrument, though in print, as appears from a facsimile found in the transcript and though carefully and correctly punctuated, has no comma at the place indicated. This tends to show that it was intended that the word depot should be qualified by the subsequent words in the clause, and that only depots of transshipment were meant. "Punctuation is a most fallible standard by which to interpret a writing," but "it may be resorted to when all other means fail." *Amory Mfg. Co. v. Gulf, etc.*, R. Co., 89 Tex. 419, 426, 37 S. W. 856.

## 7. Loss by Fire.

### a. Power to Limit and Validity.

#### (1) In General.

A common carrier, unless forbidden by statute, may exempt itself from liability for loss by fire unless caused by negligence of itself or its servants such a limitation is reasonable. *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 132, 19 S. W. 455.

#### (2) Loss Caused by Negligence.

Except for losses caused by negligence, a carrier may limit its liability to any extent not prohibited by the statutes of this state. *Missouri Pacific Ry. Co. v. China Mfg. Co.*, 79 Tex. 26, 14 S. W. 785.

A carrier can not stipulate so as to release itself from liability for injuries to a shipment from fire caused by its own negligence. *Houston & T. C. R. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308, affirmed in 88 Tex. 593.

#### (3) Interstate and Foreign Shipments.

In contracts of interstate shipment the carrier has the right to contract against liability for loss occasioned by fire, not caused by its own negligence. *Texas, etc., R. Co. v. Payne*, 15 Tex. Civ. App. 58, 60, 38 S. W. 366.

A carrier may limit its liability for loss by fire in foreign shipment unless its negligence contributed to the loss. *Houston, etc., R. Co. v. Bath & Co.*, 17 Tex. Civ. App. 697, 710, 44 S. W. 595, affirmed in 93 Tex. 731, no op.

Where a railway company, on receiving a car load of cotton in Texas for carriage to Rhode Island, stipulated that it should not be liable for destruction of the cotton by fire, or for any loss thereof by causes beyond its control, and the cotton was burned while being transported, in the absence of a statute controlling or limiting the right to contract, such right was controlled by the common law, and the burden was on the company to show that the fire did not result from its negligence or that of its servants. Judgment (Civ. App.), 61 S. W. 410, reversed. *Texas & P. Ry. Co. v. Richmond*, 63 S. W. 619, 94 Tex. 571.

#### (4) What Law Governs.

Carrier whose contract is not governed by laws of Texas may stipulate against loss by fire, and Texas courts will uphold such stipulation when read with condition which law attaches, that loss be not result of carrier's negligence. *Missouri Pac. R. Co. v. China Mfg. Co.*, 79 Tex. 26, 28, 14 S. W. 785. See, also, *International, etc., R. Co. v. Moody*, 71 Tex. 614, 617, 9 S. W. 465.

#### b. Operation and Effect.

Carrier's act in leaving cotton on platform exposed to danger of fire from passing engines is negligence which is proximate cause of loss by fire, and he is not exempt from loss under fire clause in bill. *Missouri, etc., R. Co. v. McFadden Bros.*, 89 Tex. 138, 146, 33 S. W. 853.

A railroad company received, and issued bills of lading making it liable for loss by fire, in case of negligence, for, uncompressed cotton, and, under authority of the assignee of the bills, sent it to a compress company, and,

after it was compressed, allowed it to remain for an unreasonable length of time on the platform of the compress company, exposed to sparks from passing engines, and it was burned up. Held, that the company was liable for the cotton. *Missouri, K. & T. Ry. Co. v. McFadden*, 89 Tex. 138, 33 S. W. 853, reversing 32 S. W. 18, on another point.

**Question of Negligence One for the Jury.**—Where, in an action against a railway company for the value of cotton burned while being transported, all engineers and conductors of trains in which the car was carrier testified that the engines were in good condition and carefully managed, and that the car was tight and securely sealed, and carefully handled and managed while in their trains, and there was no evidence as to how the fire originated, the question of the negligence of the company was for the jury. Judgment (Civ. App.), 61 S. W. 410, reversed. *Texas & P. Ry. Co. v. Richmond*, 63 S. W. 619, 94 Tex. 571.

**Direction of Verdict.**—In suit against a carrier for loss of shipment, by fire, under contract limiting defendant's liability, where the evidence did not show cause of the fire, nor conclusively show absence of defendant's negligence, a directed verdict for plaintiff was error. *Texas, etc., R. Co. v. Richmond*, 94 Tex. 571, 574, 577, 63 S. W. 619, reversing 61 S. W. 410.

In suit against a carrier for loss of shipment by fire, where contract of shipment limited its liability, proof excluding the possibility of defendant's negligence was not necessary to entitle it to submission of issue of its negligence. *Texas, etc., R. Co. v. Richmond*, 94 Tex. 571, 576, 63 S. W. 619, reversing 61 S. W. 410.

#### c. Pleading and Proof.

##### (1) Necessity and Burden of Proof.

Under a bill of lading providing that the carrier shall not be liable for loss or damage by fire, the burden

of proof is on the carrier not only to show that the cause of loss was within the exception, but also that there was no negligence on its part. *Ryan v. Missouri, K. & T. Ry. Co.*, 65 Tex. 13, 57 Am. Rep. 589; *Missouri Pac. Ry. Co. v. China Mfg. Co.*, 79 Tex. 26, 14 S. W. 785; *Houston, etc., R. Co. v. Bath & Co.*, 17 Tex. Civ. App. 697, 710, 44 S. W. 595, affirmed in 93 Tex. 731, no op.; *Texas, etc., R. Co. v. Richmond*, 94 Tex. 571, 63 S. W. 619, reversing 61 S. W. 410; *Texas, etc., R. Co. v. Payne*, 15 Tex. Civ. App. 58, 60, 38 S. W. 366.

Where cotton was shipped over defendant's road under a contract exempting defendant from loss by fire not due to its negligence, the burden is on the defendant, in an action for the loss of the cotton to show that it was destroyed by fire, and that such fire was not due to defendant's negligence. *Galveston, etc., R. Co. v. Efron* (Civ. App.), 38 S. W. 639.

The burden was upon the carrier to show that the cotton was destroyed by fire, and that such fire was not the result of the negligence of appellant. As to whether this was done was a question of fact, to be determined by the jury, or, in the absence of a jury, by the trial judge. *Galveston, etc., R. Co. v. Efron* (Civ. App.), 38 S. W. 639.

The burden of proof is upon the carrier to show that a loss by fire, where the contract exempted it from liability therefor, did not occur through its negligence; but it is not necessary that such proof exclude the possibility of negligence on its part in order to entitle it to a submission of the issue. *Texas, etc., R. Co. v. Richmond*, 94 Tex. 571, 63 S. W. 619, reversing 61 S. W. 410.

Where plaintiffs' action against a common carrier for a failure to deliver certain cotton is based throughout on the theory that it was destroyed by fire, as shown by his testimony and

otherwise, he is not entitled to judgment against the carrier on its common-law liability merely because it has failed to show that the cotton was in fact destroyed by fire without its negligence, which under its contract was an excepted risk. *Houston, etc., R. Co. v. Bath & Co.*, 17 Tex. Civ. App. 697, 44 S. W. 595, affirmed in 93 Tex. 731, no op.

**Interstate Shipment.**—A carrier in a foreign shipment, contracting against liability for loss from fire, has the burden of proving it was not caused by its negligence. *Houston & T. R. Co. v. Bath*, 44 S. W. 595, 17 Tex. Civ. App. 697; *Texas, etc., R. Co. v. Payne*, 15 Tex. Civ. App. 58, 60, 38 S. W. 366, citing *Ryan & Co. v. M. K. & T. R. Co.*, 65 Tex. 13.

## (2) Weight and Sufficiency of Evidence.

Where one shipping goods over a common carrier sues to recover for their loss by fire, proof that the loss was caused by sparks from a locomotive, establishes a prima facie case of negligence, shifting the burden to the carrier to show a sufficient spark arrester, and a proper handling of the engine. *Fire Ass'n of Philadelphia v. Loeb*, 59 S. W. 617, 25 Tex. Civ. App. 24.

Plaintiff shipped cotton over the defendant railroad, the bill of lading excepting the company from liability for fire, and providing that the burden of proof should be on the shipper to show that loss by fire was caused by negligence. The cotton was carried in a new car, the doors and windows of which were cleated. The car ahead and next to the engine was loaded with rotten timber, which was set on fire by a spark from the engine. It was shown that the fire in the cotton broke out just below a closed window in the end of the cotton car next to the front car. The engine was a wood burner, and had set fires almost daily for 30 days. A witness testified that



it threw more sparks than an ordinary wood burner. There was evidence that it was equipped with a sufficient spark arrester, but none as to how it was handled. Held that, notwithstanding the provisions in the bill of lading, the evidence sustained a finding that the fire was caused by defendant's negligence. *Fire Ass'n of Philadelphia v. Loeb*, 59 S. W. 617, 25 Tex. Civ. App. 24.

Cotton was destroyed at the burning of a compress. Several witnesses were near when the alarm sounded, but did not know what caused the fire. The switch engine had not been near for  $3\frac{1}{2}$  hours. The cotton was on two cars on a side track near the compress. One of the cars was saved. What effort was made to save the other was not shown, nor what precautions had been taken for the protection of cotton in cars on the side track. Held, that the evidence did not show that the loss occurred without fault on the part of the carrier. *Missouri Pac. Ry. Co. v. China Mfg. Co.*, 79 Tex. 26, 14 S. W. 785.

#### 8. Liability for Breakage and Rust.

A contract with a railroad company, exempting it from liability for damages to goods transported by it caused by breakage, is void, as against public policy. *Heaton v. Morgan's L. & T. R. R. & S. S. Co.*, 1 White & W. Civ. Cas. Ct. App. § 774.

**Loss by Rust.**—A stipulation that a carrier will not be liable for rust is void. *Heaton & Bro. v. Morgan's, etc.*, S. S. Co., 1 App. Civ. Cases, § 774.

#### 9. Loss by Thieves and Robbers.

The trustees operating the road gave to the consignors a written memorandum stating the quality, character, condition, and value of the property shipped, with agreement to deliver the same at Brazos, to the steamship company. Before the shipment, the consignors delivered this writing to the agent of the steamship company, who

took it up and gave the consignors bills of lading, the terms of which excused the steamship company from liability for loss by robbers or thieves. The train was robbed on the way to Brazos, and the money shipped was never delivered to the steamship company. The limitation of liability in the bill of lading was held to apply to carriage by ship, and not to carriage by the railway company. *Rio Grande R. Co. v. Cross*, 5 Tex. Civ. App. 454, 23 S. W. 529, affirmed in 93 Tex. 648, no op.

#### 10. Loss from Injury in Overloading.

Article 320, Rev. Stat., prohibiting common carriers from limiting their liability as at common law, renders nugatory a provision in a contract for the shipment of live stock exempting the carrier from liability for injuries in overloading. *International, etc., R. Co. v. Parish*, 18 Tex. Civ. App. 130, 43 S. W. 1066.

#### 11. Stipulations against Liability for Delay.

See ante, "Limitation of Loss Arising from Negligence," VIII, G, 1.

##### a. Power to Stipulate.

##### (1) In General.

Stipulation that carrier shall not be liable for delay occasioned by cause beyond its power to control by use of all means reasonably available is valid. *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 95, 14 S. W. 913.

A stipulation that a carrier will not be liable for delay except that due to the willful negligence of the company's servants, is void. *Missouri Pac. R. Co. v. Harris*, 1 App. Civ. Cases, § 1257.

##### (2) Under Texas Statutes.

Under Rev. St., art. 278, prohibiting carriers from limiting their common-law liability by notice or contract, a stipulation exempting it from all risk of damage, because of any delay in transportation not resulting from willful negligence of its servants, is in-

valid. *Missouri Pac. R. Co. v. Harris*, 1 White & W. Civ. Cas. Ct. App. § 1257.

Whenever a railroad company receives stock to be transported over its road from one place to another, it assumes all the responsibility of a common carrier, and can not maintain the defense that, under its contract with the shipper, it acted only as a mere forwarder or private carrier for hire, and was released from any liability to the shipper for delay in receiving or forwarding the cattle. *Texas & P. Ry. Co. v. Hamm*, 2 Willson, Civ. Cas. Ct. App. § 493.

### (3) Delay Caused by Mobs and Strikes.

Stipulation in contract of shipment providing that carrier shall not be liable for damages by reason of delay in transporting and delivering goods caused by strike, etc., is unreasonable and invalid in so far as it undertakes to exempt carrier from liability for negligent delay. *I. & G. N. R. R. Co. v. Server*, 3 App. Civ. Cases, § 441.

The cattle were received for transportation from a point in Texas to Chicago, the bill of lading providing that the carrier should be liable only while the cattle were on its own road. The route over that was wholly within the state, and the delay was caused by the refusal of the connecting lines to receive the cattle on account of a strike on their roads. Held, that the provisions limiting the time in which suit could be brought, and releasing the carrier from liability for delay caused by strikes, are valid, whether the contract of shipment be considered as interstate or as one to be wholly performed within the state. *Gulf, C. & S. F. Ry. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419.

Independent of special contract, carriers are not liable for damages resulting from delay occasioned by any cause beyond their power to control by the use of all means reasonably

available to them. If such defense is available without being stipulated for by special contract, they certainly may claim such exemption under a special contract. *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, 13 S. W. 191; *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 95, 14 S. W. 913.

### b. Consideration.

Stipulation in carrier's contract releasing it from damages caused by delay is not binding on shipper if there was no consideration for it. *San Antonio, etc., R. Co. v. Barnett*, 12 Tex. Civ. App. 321, 322, 34 S. W. 139; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716.

Where the evidence showed that a carrier was negligent in delaying to furnish cars for a shipment of cattle and there was no consideration for a waiver of a claim to damages for such delay, the waiver, embodied in the shipping contract executed after the damages had accrued, was void. *Pecos, etc., R. Co. v. Evans-Snyder-Buel Co.*, 42 Tex. Civ. App. 60, 93 S. W. 1024, affirmed in 100 Tex. 190.

### c. Operation and Effect.

A stipulation, in a contract by a railroad company to carry freight, that it shall not be liable for delay caused by a strike, will not exempt it from liability for delay occasioned by a strike which it could have suppressed by the exercise of diligence. *International & G. N. R. Co. v. Server*, 3 Willson, Civ. Cas. Ct. App. § 442.

The shipper having expressly agreed to assume all risk of delay caused by any mob or strike or threatened violence to person or property, he can not recover for delay occasioned by a strike and violence of such magnitude as to require the military forces of the government to overcome. *Gulf, C. & S. F. Ry. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419.

**12. Owner Required to Accompany, Feed and Water Cattle.**

See the title CARRIERS OF LIVE STOCK.

**13. Stipulations Fixing Value or Prescribing Measure of Damages.**

**a. Power to Stipulate and Validity.**

**(1) In General.**

The question of the validity of a contract limiting a carrier's common-law liability as to the measure of damages for injuries occasioned by its own negligence has often been considered by the courts and the conclusions reached are conflicting. *St. Louis, etc., R. Co. v. Moon*, 47 Tex. Civ. App. 209, 211, 103 S. W. 1176; *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 12 S. W. 815; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *St. Louis, etc., R. Co. v. Robbins*, 4 App. Civ. Cases, § 43, 14 S. W. 1075; *Galveston, etc., R. Co. v. Febo*, 8 Tex. Ct. Rep. 629; *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 16 S. W. 441.

The theory of the cases affirming the validity of such contracts, generally speaking, is that in express and other cases where packages are sealed, and in cases where the carrier has not the opportunity of fairly learning the value of articles shipped, it is reasonable that the carrier be accorded the right to agree with the shipper upon amounts beyond which it will not be liable, in order to protect itself against fanciful or extravagant values. *St. Louis, etc., R. Co. v. Moon*, 47 Tex. Civ. App. 209, 211, 103 S. W. 1176.

The common law determines what shall relieve a common carrier for liabilities for goods carried and, in absence of such facts, a carrier is liable for the full value of goods lost or damaged, and a contract making a less sum payable on the loss of goods than the real value is a limitation on the carrier's liability contrary

to public policy. *Southern Pac. Ry. Co. v. R. E. Maddox & Co.*, 75 Tex. 300, 12 S. W. 815.

The liability or responsibility of the carrier has relation to the extent of which it is under obligation to make compensation for loss or injury to goods, as well as to the mere existence of the obligation. *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 307, 12 S. W. 815.

"The common law and all other laws require the carrier to pay the full value of property lost or destroyed while in its possession, if lost or destroyed under circumstances which impose obligation, and the contract which provides that the carrier shall be freed from obligation or payment of a sum less than the value of the thing lost or destroyed is as much a limitation on the carrier's liability as is a contract that the carrier shall not be responsible for a loss resulting from a cause not sufficient under the law to relieve it from obligation." *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 12 S. W. 815; *Southern Pac. Co. v. Anderson*, 26 Tex. Civ. App. 518, 520, 63 S. W. 1023, affirmed in 95 Tex. 686, no op.

"But the reasons, founded as they are on public policy, for fixing obligation on the carrier under a given state of facts, do not apply with their entire force when applied to the extent to which compensation shall be made." *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 307, 12 S. W. 815.

When a carrier receives freight, any contract which relieves from liability for its full value, if lost through the carrier's negligence, violates the wholesome rule so long and well established in other cases, in which the carrier attempts by contract to relieve itself from liability for the negligence of itself or employees. *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 12 S. W. 815. See, also, *Missouri Pac.*

*R. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607; *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 605, 16 S. W. 441; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 108, 17 S. W. 834; *St. Louis, etc., R. Co. v. Robbins*, 4 App. Civ. Cases, § 43, 14 S. W. 1075; *Houston, etc., R. Co. v. Williams* (Civ. App.), 31 S. W. 556, 558; *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 403, 82 S. W. 346, citing *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 169, 2 S. W. 574; *Sanger v. French Piano, etc., Co.*, 21 Tex. Civ. App. 523, 52 S. W. 621; *Building, etc., Ass'n v. Griffin*, 90 Tex. 480, 39 S. W. 656.

The liability of a common carrier to make compensation for goods or property lost by it extends at common law not only to the duty imposed upon it by law to safely transport the goods, but also to its responsibility to make reparation by way of damages in favor of the owner of the property to the fullest extent fixed and allowed by law in such cases. Any agreement that diminishes or destroys its liability in either of these respects would be contrary to public policy and void—certainly when the loss is attributable, in the eyes of the law, to the negligence of the carrier. Such is the character of the stipulation in this case, because no exception is made allowing full recovery in case the loss should be the result of even ordinary negligence. *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 12 S. W. 815. The stipulation being void, it could not lessen the defendant's liability under the law. *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 606, 16 S. W. 441; *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 402, 82 S. W. 346.

### (3) Under Texas Statute.

#### (a) In General.

The general rule at common law is that the carrier, in case of loss of goods, is liable to the shipper or owner for the value of them at the

place of destination, less the charges for transportation. This rule, under the provisions of our statute, can not be altered by contract, so as to limit or restrict the liability of the carrier, when the contract is to be performed entirely within this state. *Rev. Stat. Tex.*, art. 278. *Gulf, etc., R. Co. v. Booton*, 4 App. Civ. Cases, § 230, 15 S. W. 909. In *M. P. R. Co. v. Ryan*, 2 App. Civ. Cases, §§ 430, 432, and *M. P. R. Co. v. Barnes & Co.*, 2 App. Civ. Cases, §§ 575, 579, the contracts were interstate. See the case of *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 12 S. W. 815.

The law fixes the carrier's liability at the value of the goods at the place of destination, and in a case involving the carrier's negligence, a stipulation in the contract limiting the liability to the value at the point of shipment, or to anything less than the value at destination, is invalid as against public policy. *Southern Pac. R. Co. v. D'Arcais*, 27 Tex. Civ. App. 57, 64 S. W. 813, affirmed in 95 Tex. 686, no op.

#### (b) Interstate Shipments.

The fact that the shipment is an interstate one does not vary the rule. *Southern Pac. R. Co. v. D'Arcais*, 27 Tex. Civ. App. 57, 64 S. W. 813, affirmed in 95 Tex. 686, no op.; *M. P. R. Co. v. Ryan*, 2 App. Civ. Cases, §§ 430, 432; *M. P. R. Co. v. Barnes & Co.*, 2 App. Civ. Cases, §§ 575, 579; *Gulf, etc., R. Co. v. Booton*, 4 App. Civ. Cases, § 230, 15 S. W. 909. See post, "Losses Caused by Negligence," VIII, G, 13, a, (5), (c).

A stipulation in the contract of a carrier for an interstate shipment, limiting its common-law liability for the full value of the goods in case of loss, however reasonable, is invalid under article 320, *Rev. Stat.*, providing that common carriers of goods entirely within the body of the state shall not limit or restrict their liability as it exists at common law in any manner whatever. *Pacific Exp. Co. v. Hertz-*

berg, 17 Tex. Civ. App. 100, 42 S. W. 795.

### (3) What Law Governs.

A stipulation that, in case of injury to cattle shipped, their value at the place of shipment in case of total loss should constitute the measure of damages, and, in case of partial loss, in the same proportions, being valid under the law of Arkansas, was enforceable in Texas. *St. Louis, etc., R. Co. v. Hambrick* (Civ. App.), 97 S. W. 1072; *St. Louis, etc., R. Co. v. Moon*, 47 Tex. Civ. App. 209, 103 S. W. 1176, criticising *St. Louis, etc., R. Co. v. Hambrick* (Civ. App.), 97 S. W. 1072; *Missouri Pac. R. Co. v. Harris*, 1 App. Civ. Cases, § 1257. See post, "Losses Caused by Negligence," VIII, G, 13, a, (5), (c).

### (4) Contract Limiting Liability to Carrier's Own Line.

Although there may be a stipulation in the contract limiting the liability of the carrier to its own line of road, a contract of shipment made under such circumstances contemplates that the market value of the animals shipped at the place of final destination is considered by the parties and enters into the contract as one of its elements. The carrier can not stipulate to relieve itself of that value when the damage and loss are traceable to its negligence. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 111, 17 S. W. 834. A reader of these cases will discover that this doctrine has been applied in cases of interstate shipment. *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 121, 26 S. W. 161.

The principle upon which contracts limiting a carrier's common-law liability as to measure of damages are sustained should not be applied in behalf of an intermediate carrier in any

case where the property is wholly unconcealed and is shipped over several independent lines of railway upon a through freight rate and consists of a common merchantable article destined for sale on an open market and only having a well-known and easily ascertained market value. *St. Louis, etc., R. Co. v. Moon*, 47 Tex. Civ. App. 209, 211, 103 S. W. 1176.

### (5) Value Fixed in Contracts.

#### (a) In General.

It seems that an agreement as to the value of the thing shipped made to avoid controversy as to the actual value if it be lost in the hands of the carrier, is valid. *Southern Pac. Ry. Co. v. R. E. Maddox & Co.*, 75 Tex. 300, 12 S. W. 815. See, also, *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 110, 17 S. W. 834, in which the court said: "We do not deny the privilege of the carrier and shipper to make contracts fixing the valuation of articles shipped that would in some cases be binding and conclusive upon the parties to the contract."

"The parties before loss may as well by agreement fix value while each has equal means of doing so, as by proof to be made after a loss occurs; and such an agreement would not operate as a limitation on the liability of the carrier, for the valuation actually agreed upon ought to be deemed, in such cases, the actual value." *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 306, 12 S. W. 815.

The valuation of the property is ordinarily not part of the terms of the shipment, as the rights and duties of the parties are fixed by law. *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 12 S. W. 815; *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 606, 16 S. W. 441.

There are cases where the circumstances are such that the price named in the contract might fix the measure of damages. *Southern Pac. Co. v. Anderson*, 26 Tex. Civ. App. 518, 520,

63 S. W. 1023, affirmed in 95 Tex. 686, no op. See, also, *Pacific Exp. Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 105, 42 S. W. 795.

Stipulation in carrier's contract that it will only be liable for a fixed value of goods is void. *Pacific Exp. Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 105, 42 S. W. 795.

**(b) Determination of Value in Fixing Freight Rate.**

The value of the thing to be carried may be properly considered in fixing the freight rate, but when the carrier knows what the goods are, and what degree of care is essential to carry them safely, it seems that to permit the carrier to grade his care by his compensation would be to permit him to contract against full liability for loss resulting from failure to use ordinary care. *Southern Pac. Ry. Co. v. R. E. Maddox & Co.*, 75 Tex. 300, 12 S. W. 815.

A common carrier is entitled to an opportunity to fix a freight rate with a view to the labor necessary and the risk incurred in carrying the goods which depends to some extent on the value and character of the goods, but when such opportunity is given and the carrier receives the freight, any contract which relieves from liability for its full value, if lost through the carrier's negligence, is an attempt to relieve it from its own negligence. *Southern Pac. Ry. Co. v. R. E. Maddox & Co.*, 75 Tex. 300, 301, 12 S. W. 815.

Where there is no agreement as to value of goods shipped, carrier may secure to itself a reasonable freight by determining that for himself. *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 307, 12 S. W. 815.

A shipper is under no obligation to make an agreement with the carrier as to the value of the goods shipped, as the carrier may determine a reasonable freight rate without such an agreement, by determining for itself

the value of the goods shipped. *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 307, 12 S. W. 815.

**(c) Losses Caused by Negligence.**

A stipulation in the contract of carriage limiting the carrier's liability to a value fixed in the contract is not binding, when the goods are injured through the carrier's negligence, in the absence of a statute permitting such a limitation of liability. *Southern Pac. Co. v. Anderson*, 26 Tex. Civ. App. 518, 63 S. W. 1023, affirmed in 95 Tex. 686, no op. See, also, *Pacific Exp. Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 42 S. W. 795; *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 12 S. W. 815; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 110, 17 S. W. 834; *International, etc., R. Co. v. Foltz*, 3 Tex. Civ. App. 644, 649, 22 S. W. 541, affirmed in 93 Tex. 687, no op.

In this state it has been definitely decided that a restriction as to liability less than the true or market value of the property lost or damaged, will not be enforced when such loss arises from the negligence of the carrier. *International, etc., R. Co. v. Vandeventer*, 48 Tex. Civ. App. 366, 368, 107 S. W. 560, affirmed, no op.; *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 16 S. W. 441; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 110, 17 S. W. 834.

A carrier can not limit its liability for the full value of stock lost, through its negligence, by a contract to pay "the actual cash value at the time and place of shipment, but in no case to exceed one hundred dollars per head," in case of total loss of said stock. *Southern Pac. Ry. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815. See *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 403, 82 S. W. 346; *Southern Pac. Ry. Co. v. Anderson*, 26 Tex. Civ. App. 518, 520, 63 S. W. 1023, affirmed in 95 Tex. 686, no op.

There were stamped on the face of a bill of lading the following words:

"Twenty dollars per barrel valuation and owner's risk of leakage, caused by cracked or broken staves, wormholes, or for any other cause, not the gross negligence of the company;" and in the body of the bill of lading there was also the following provision: "It is further agreed that, in case of loss, \* \* \* the amount of the loss or damage shall be computed at the value or cost of said goods or property at the place and time of shipment." Held, that these provisions amounted to a stipulation limiting the liability of the carrier for loss caused by negligence, and are therefore void, as against public policy. *Galveston, H. & S. A. Ry. Co. v. Ball*, 80 Tex. 602, 16 S. W. 441; *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 402, 82 S. W. 346. See post, "Value at Place and Date of Shipment," VIII, G, 13, a, (7).

**(6) Liability Limited to Specified Amount.**

Where the law of the state of contract of carriage prohibits a carrier from limiting his common-law liability, a stipulation in such contract limiting the carrier's liability to a certain sum, regardless of the value of the goods shipped, is void. *Pittman v. Pacific Express Co.*, 24 Tex. Civ. App. 595, 599, 59 S. W. 949.

In absence of statutory permission, a shipping contract providing that the carrier shall not be liable for a greater sum than therein mentioned for loss resulting from its negligence, although real value is greater than mentioned, is void. *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 307, 12 S. W. 815.

When the injuries and damages result from a violation of the contract of shipment growing out of the negligence of the carrier, it can not restrict and limit its liability to less than the true value of the property. *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 110, 17 S. W. 834; *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 12

S. W. 815; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

Provisions in a contract for the shipment of live stock which arbitrarily fix the amount of the damages and which relieve the carrier from damages resulting from certain named risks, and from "any and all other causes whatever," are void as contrary to public policy. *Pecos, etc., R. Co. v. Hughes*, 44 Tex. Civ. App. 135, 98 S. W. 410.

In a bill of lading for a bull, a provision limiting the liability of the carrier to \$30 is not valid, and the shipper may recover according to the measure of damages fixed by law. *St. Louis, A. & T. Ry. Co. v. Robbins*, 4 Willson Civ. Cas. Ct. App., § 43, 14 S. W. 1075, following *Southern Pac. Ry. Co. v. Maddox* (1889), 75 Tex. 300, 12 S. W. 815; overruling *International & G. N. R. Co. v. Caldwell* (1889), 3 Willson, Civ. Cas. Ct. App., § 439.

Where a statute forbids a common carrier from limiting its common law liability, a stipulation in a contract of carriage limiting an express company's liability to a certain sum, regardless of the value of the goods, is void. *Pittman v. Pacific Exp. Co.*, 24 Tex. Civ. App. 595, 59 S. W. 949.

Plaintiff shipped by rail household goods worth \$300, the bill of lading reciting that in consideration of a reduced rate the carrier should be liable, in case of loss of the goods, only at the rate of \$5 per 100 pounds. No other freight rate than the one paid was offered the shipper, and the railroad agent was not authorized to contract at any other rate. The goods were destroyed by fire en route, and at \$5 per 100 pounds the carrier's liability would have been \$63. Held, that, even if the clause of the contract limiting the liability was valid in South Carolina, where the contract was made, it must be held invalid in Texas because the difference between the value of the property and the stipulated lia-

bility was so great as to render it unreasonable, and it did not appear that the parties to the contract mutually understood, intended and agreed upon \$5 per 100 pounds as stipulated damages in case of loss of the property. *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 62 S. W. 346.

**(7) Value at Place and Date of Shipment.**

A provision in a contract of carriage that in case of loss the measure of damages shall be the value of the goods at the place of shipment (New York) is valid. *Southern Pac. Co. v. Phillipson* (Civ. App.), 39 S. W. 958, citing *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 12 S. W. 815.

Stipulation in a bill of lading, that in event of loss or damage to property, value or cost at place of shipment should govern, is reasonable and valid. *M. P. R. Co. v. Barnes & Co.*, 2 App. Civ. Cases, § 575.

Where, in a contract of shipment of cattle with a railroad company, it is stipulated that, in case of damage to the cattle, the value of the cattle at the place and date of shipment should govern the settlement, etc., it is error to award as damages for the loss of such cattle the value thereof at the place of destination. *Missouri Pac. Ry. Co. v. Ryan*, 2 Willson, Civ. Cas. Ct. App., § 432.

**Under Texas Statute.**—A stipulation in a shipping contract limiting to carriers liability for loss of goods to the value at the place of shipment is contrary to public policy and void. *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 606, 16 S. W. 441; *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815; *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 403, 82 S. W. 346; *Southern Pacific R. Co. v. D'Arcais*, 27 Tex. Civ. App. 57, 64 S. W. 813, affirmed in 95 Tex. 686, no op.; *Texas, etc., R. Co. v. Montgomery*, 4 App. Civ. Cases, § 238, 16 S. W. 178.

Under Rev. St., art. 278, forbidding  
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common carriers to limit their liability at common law by inserting exceptions in the bill of lading, a railroad company which transports goods within the state, but fails to deliver them, is liable for their value at the place of destination, less transportation charges, although the bill of lading provides that, in event of loss, the value or cost at the point of shipment shall govern the settlement. *Gulf, C. & S. F. Ry. Co. v. Booton*, 4 Willson, Civ. Cas. Ct. App., § 230, 15 S. W. 909.

Article 320, Rev. Stat., prohibiting common carriers from limiting their liability as at common law, renders nugatory a provision in a contract for the shipment of live stock, that the nature of the stock at the place of shipment shall be the basis of value in recovering the damages for injury in the shipment. *International, etc., R. Co. v. Parish*, 18 Tex. Civ. App. 130, 43 S. W. 1066; *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607, limiting *International, etc., R. Co. v. Tisdale*, 74 Tex. 8, 17, 11 S. W. 900, in so far as it apparently sanctions a contract which limited the damages for stock lost to the value at the place of shipment.

A common carrier can not limit its liability, in case of loss or injury to stock through its negligence, for the full value at the place of destination, by a contract to pay the value at the time and place of shipment. *Taylor, B. & H. Ry. Co. v. Montgomery*, 4 Willson, Civ. Cas. Ct. App., § 238, 16 S. W. 178; *Same v. Sublett*, Id. 182.

A provision in a contract with a carrier for the shipment of cattle, limiting the shipper's damages, in case of loss or partial loss, to the value of the cattle at the place of shipment, can not affect the shipper's right to recover the true value, if loss is caused by the carrier's negligence. *Ft. Worth & D. C. Ry. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834, followed in *International, etc., R. Co. v. Foltz*, 3 Tex. Civ. App.



644, 649, 22 S. W. 541, affirmed in 93 Tex. 687, no op.

A contract for the shipment of live stock, which fixes the value of the animals at the shipping point, instead of at destination, as the measure of damages for injuries, will not be enforced. *International & G. N. R. Co. v. Anderson*, 3 Tex. Civ. App. 8, 21 S. W. 691.

Where the carrier is not deceived as to the value of property shipped, a stipulation that the measure of damages, in case of injury, should be governed by the value of the property at the place of shipment, instead of at the place of destination, is not binding. *Houston & T. C. R. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308; *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815; *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 603, 16 S. W. 441. And the court does not err in allowing proof of value at the point of destination.

**Interstate Shipments.**—A stipulation in the contract of shipment limiting the liability to value at the place of shipment will be disregarded, as against public policy, notwithstanding it was an interstate shipment. *Southern Pac. Co. v. D'Arcais*, 64 S. W. 813, 27 Tex. Civ. App. 57.

A stipulation in an interstate shipment that the measure of damages for injuries to the property shipped should be governed by the value of the property at its place of shipment, instead of its place of destination, is void, as unreasonable. *Houston & T. C. Ry. Co. v. Williams* (Civ. App.), 31 S. W. 556.

As to the rule in Arkansas, see ante, "What Law Governs," VIII, G, 7, a, (4).

#### (8) Value at Destination.

In case of shipment of an animal over a railroad, under a contract providing that, in case of loss, its market value at the point of destination shall be taken as liquidated damages for

such loss, it is error, in an action for its death through the railroad company's negligence, to allow as damages a greater amount than the price for which the shipper has sold it to the consignee. *Gulf, C. & S. F. Ry. Co. v. Key*, 4 Willson, Civ. Cas. Ct. App., § 257, 16 S. W. 106.

#### b. Requisites.

##### (1) Authority of Agent or Consignor.

In the absence of proof to that effect, mere consignors ought not to be presumed to have been authorized to fix or consent for the owner to the valuation of his goods at greatly less than their true value. *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 606, 16 S. W. 441.

"In such case, however, it may be doubted if an agent empowered to ship ought to be held to have power to fix value, unless authorized to do so by the owner; and no wrong would be done to the carrier by so holding in any case where the thing to be shipped is open to the inspection of the carrier, or though boxed or otherwise enclosed, is one of ordinary commerce whose value could be ascertained by inquiry, for in such cases the carrier may for himself determine the value and regulate his charges thereby. It ought not to be presumed that a shipping agent had power to make a contract other than the carrier may lawfully require." *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 306, 12 S. W. 815.

##### (2) Consideration.

The contract of transportation provided that any damage to shipper's cattle was to be determined according to the actual cash value thereof at the time and place of shipment, and recovery was limited to a maximum amount per head, but no reduction in the freight rate was made in consideration of such stipulation. Held, in an action to recover for damages to the cattle by carrier's negligent delay en route that the stipulation limiting any

damage to the value at the place of shipment, etc., was not binding, being without consideration. *St. Louis, etc., R. Co. v. Rogers*, 49 Tex. Civ. App. 304, 108 S. W. 1027, affirmed, no op.

Such a provision will not be enforced where the evidence shows that the common carrier accepted the cattle for transportation without any reduction of the freight rate. The evidence in this case was sufficient to show that no reduction of the freight rate was made by either the initial carrier, or the plaintiff in error in consideration of the stipulation in question, and that the contract containing it was signed by the defendant in error, without opportunity for a fair consideration of the stipulation. *St. Louis, etc., R. Co. v. Rogers*, 49 Tex. Civ. App. 304, 312, 108 S. W. 1027, affirmed, no op.

"Even the cases upholding contracts of the kind under consideration proceeded upon the theory that to be valid the contract must have been fairly entered into with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation." *St. Louis, etc., R. Co. v. Rogers*, 49 Tex. Civ. App. 304, 313, 108 S. W. 1027, affirmed, no op.; *St. Louis, etc., R. Co. v. Moon*, 47 Tex. Civ. App. 209, 103 S. W. 1176.

A provision in a bill of lading that, in consideration of the reduced rate at which the goods were shipped, the carrier's liability in case of loss should be limited to \$5 per 100 pounds, the provision being arbitrarily fixed by the carrier, without any consideration in fact, is an unreasonable restriction of its liability, against the settled policy of the state, and void as to one whose damages are in reality \$300, for which only \$63 would be recoverable under the bill of lading. *St. Louis Southwestern Ry. Co. of Texas v. McIntyre*, 82 S. W. 346, 36 Tex. Civ. App. 399.

### (3) **Mutuality—Meeting of Minds of Parties.**

In an action against a carrier for the

loss of goods, where the defense was based on the provisions of the bill of lading, limiting defendant's liability to \$5 per 100 pounds in case of loss, evidence held insufficient to show that the terms of the bill of lading were agreed to by the plaintiff, as the owner of the goods, or by his son, as his agent in the shipment, and \$5 per 100 pounds mutually intended as stipulated damages in case of loss. *St. Louis Southwestern Ry. Co. of Texas v. McIntyre*, 82 S. W. 346, 36 Tex. Civ. App. 399.

### (4) **Reasonable and Fairly Made.**

If it be admitted that a carrier and shipper can by contract limit the liability of the carrier to less than the real or market value of the property, the facts pleaded and proven must show that the contract was reasonable and was fairly made and entered into. *International, etc., R. Co. v. Vandeventer*, 48 Tex. Civ. App. 368, 107 S. W. 560, affirmed, no op. And see *Houston, etc., R. Co. v. Williams* (Civ. App.), 31 S. W. 556; *St. Louis, etc., R. Co. v. Rogers*, 49 Tex. Civ. App. 304, 108 S. W. 1027, affirmed, no op.

Plaintiff shipped by rail from South Carolina to Texas household goods worth \$300, the bill of lading reciting that in consideration of a reduced rate the carrier should be liable, in case of loss of the goods, only at the rate of \$5 per 100 pounds. No other freight rate than the one paid was offered the shipper, and the railroad agent was not authorized to contract at any other rate. The goods were destroyed by fire en route, and at \$5 per 100 pounds the carrier's liability would have been \$63. Held, that, even if the clause of the contract limiting the liability was valid in South Carolina, where the contract was made, it must be held invalid in Texas because the difference between the value of the property and the stipulated liability was so great as to render it unreasonable. *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 82 S. W. 346; *Missouri Pac.*

R. Co. v. Harris, 67 Tex. 166, 169, 2 S. W. 574; Ft. Worth, etc., R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834; Houston, etc., R. Co. v. Williams (Civ. App.), 31 S. W. 556; Sanger v. French Piano, etc., Co., 21 Tex. Civ. App. 523, 52 S. W. 621; Building, etc., Ass'n v. Griffin, 90 Tex. 480, 39 S. W. 656.

#### c. Operation and Effect.

A provision in a contract for the shipment of live stock which limits the liability of the carrier so as to relieve it in a measure from the consequences of its own negligence, does not apply to a claim for damages where the carrier's liability depends on it having arbitrarily changed the route of the shipment. Pecos & N. T. Ry. Co. v. Hughes, 98 S. W. 410, 44 Tex. Civ. App. 135.

A bill of lading, which stipulates that, in the event of the loss of the property, "the value or cost of the same at the point of shipment shall govern the settlement," will authorize a judgment for the market value of the goods at the time of shipment, which was greater than the cost thereof. Missouri Pac. Ry. Co. v. Barnes, 2 Willson, Civ. Cas. Ct. App., § 579.

**As Estoppel.**—A carrier can not avail itself of an estoppel against a shipper to recover the full value of goods delivered to the wrong person, on the ground that the shipper understated the value and thereby procured a lower rate, under a plea setting up a provision of the contract (which was void because in contravention of the statute) restricting the liability for loss to a specified sum unless the true value was stated, and providing that such sum was the value agreed upon as the basis of freight charges. Pacific Exp. Co. v. Hertzberg, 17 Tex. Civ. App. 100, 42 S. W. 795.

#### d. Pleading and Proof.

In a suit against a railway company, if the petition alleges facts which if true would entitle the plaintiff to damages on account of injury to specific

articles of freight, to be measured by their value at the point of destination, the defendant can not introduce evidence of a special contract to limit its liability to a more restricted measure of damages, in the absence of plea setting it up. Missouri Pac. R. Co. v. Edwards, 75 Tex. 334, 12 S. W. 853.

#### 14. Release of Damages Accruing before Execution of Written Contract.

A provision in a bill of lading in an interstate shipment releasing a railroad company from any damages a shipper may have sustained under a prior verbal contract for failure to supply cars is an unreasonable and oppressive limitation of its common-law liability. Receivers of Missouri, K. & T. Ry. Co. v. Graves, 4 Willson, Civ. Cas. Ct. App., § 100, 16 S. W. 102.

It has been held, in this state, that the agreement to release damages accruing before the signing of the written contract, can be enforced, if there be any consideration for it. San Antonio, etc., R. Co. v. Barnett, 12 Tex. Civ. App. 321, 322, 34 S. W. 139; Gulf, etc., R. Co. v. McCarty, 82 Tex. 608, 18 S. W. 716; Gulf, etc., R. Co. v. Wright, 1 Tex. Civ. App. 402, 21 S. W. 80.

A contract for shipment of cattle from Ballinger, Texas, to Chicago, was agreed upon at \$102.50 per carload. Subsequently, and upon the cattle being taken upon the cars, a freight bill was signed containing waiver of certain claims by the shipper (liability for delay in shipping under a prior verbal contract) in favor of the carrier in consideration of reduced rates. No reduced freight charges were allowed. Held, there being no consideration for the waiver, it would have no effect. Gulf, etc., R. Co. v. McCarty, 82 Tex. 608, 18 S. W. 716.

Had the court charged upon the release of liability for detention of the cattle, as contained in the written agreement, it would have been neces-

sary also to have stated the law, that if it was without consideration it could not have effect, in which case the result under the evidence would have been the same as if he had not submitted the question at all. Under the circumstances, it was not the duty of the court to notice this feature of the written agreement. *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 613, 18 S. W. 716.

**Release of Liability for Delay in Furnishing Cars.**—A contract signed by shippers limiting the carrier's liability and releasing it from liability for delay in furnishing a car as the train was about to start at the instance of the station agent without knowledge of what the contract was, was without consideration. *Texas Central R. Co. v. Fisher & McFatter*, 15 Tex. Civ. App. 63, 38 S. W. 392.

#### 15. Statement That Cars Accepted.

A stipulation in a contract of shipment that the shipper would accept the cars furnished him by the carrier, etc., is unreasonable and invalid. The carrier can not relieve himself from liability for loss and injury caused by his negligence of the duty to furnish suitable cars by special contract. *G. C. & S. F. R. Co. v. Wilhelm*, 3 App. Civ. Cases, § 458.

Duty of a common carrier can not be limited by a bill of lading stating that cars were accepted, where it is shown that the cars actually furnished were not suitable. *Galveston, etc., R. Co. v. Silegman* (Civ. App.), 23 S. W. 298, 299.

#### 16. Stipulations Respecting Insurance.

See, also, the titles INSURANCE; SUBROGATION.

##### a. Power to Stipulate and Validity.

**In General.**—It must be that in the absence of stipulation in a policy to the contrary the insured may without invalidating his policy make such contracts with a carrier limiting the liability of the latter as may be lawful under the laws in force at the place of

shipment, or such other laws as may be applicable; for the parties ought to be presumed to contract with reference to the right of the carrier to refuse to receive and transport freight without contract limiting his liability in so far as this may lawfully be done under the law governing the shipment. With the carrier's liability lawfully restricted by contract, a loss resulting from a cause within the restriction would not give right of action in favor of the insured shipper against the carrier, and where this is the case there can be no subrogation under the general principles applicable to the subject. *Insurance Co. v. Easton*, 73 Tex. 167, 176, 11 S. W. 180.

Carrier may stipulate in his contract of shipment for the benefit of any insurance that may have been effected upon the goods to be transported. *Missouri Pac. R. Co. v. International, etc., Ins. Co.*, 84 Tex. 149, 152, 19 S. W. 459; *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475, 480; *Gulf, etc., Ry. Co. v. Zimmerman*, 81 Tex. 605, 17 S. W. 239.

If the carrier had desired, it could have insured the goods to the extent of their full value. Since the right of the carrier exists to make a direct contract of insurance, the right follows, to stipulate for the insurance effected by the shipper. *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475.

A clause in a bill of lading to the effect that the carrier shall have the full benefit of any insurance that may have been effected upon or on account of the article to be transported is not invalid by reason of its being in contravention of any rule based on public policy. *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475; *Insurance Co. v. Easton*, 73 Tex. 167, 11 S. W. 180.

"Besides, the owner does not bind himself to insure, or to do anything which will result in benefit to the carrier. "There is, therefore, no contract

of exemption against liability for loss by negligence, no agreement that the carrier shall be indemnified, but the contract simply is that, in the contingency of insurance, a consequent benefit will, in case of loss, result to the carrier.' " *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475, 480.

The carrier's liability for loss of a commodity received for transportation is the ultimate liability; for the loss of the property while in his custody as carrier results in fact or in legal contemplation from his failure of duty, while that of the insurer is that of an indemnitor in all cases in which the insurance contract does not stipulate to the contrary, or in which a contrary intention may not be fairly inferred from the time and circumstances of the contract. *Insurance Co. v. Easton*, 73 Tex. 167, 11 S. W. 180.

If the insured wishes a policy that will place the ultimate liability on the insurer and not on the carrier, he must so make his contract as to protect the carrier afterwards to be selected by him, compensate the insurer for the increased risk of ultimate loss, and thus be in position to contract with the carrier for reduction in freight rates rendered proper by reason of the shifting of the ultimate risk from the carrier to the insurer. *Insurance Co. v. Easton*, 73 Tex. 167, 11 S. W. 180.

#### **As Condition of Receiving Freight.**

—A carrier can not exact of a shipper a stipulation that the former shall have the benefit of insurance effected in case of loss, as the condition on which the freight will be received and transported. *Insurance Co. v. Easton*, 73 Tex. 167, 176, 179, 11 S. W. 180.

It is the right of the shippers to reject that bill of lading and to have their cotton transported on one that did not contain that provision. A refusal to give the carrier the benefit of insurance already secured would be in effect but a refusal to insure for the benefit of the carrier, and this a car-

rier can not require as a condition on which it will receive and transport freight. *Insurance Co. v. Easton*, 73 Tex. 167, 179, 11 S. W. 180.

**Under Texas Statutes.**—A statute forbidding common carriers to impose restriction of their liability is not infringed by a provision in a bill of lading that the carrier shall have the benefit of any insurance to the owner on the freight. *British & Foreign Marine Ins. Co. v. Gulf, C. & S. F. Ry. Co.*, 63 Tex. 475, 51 Am. Rep. 661.

"To an action of the shipper for the value of the goods, he could not successfully plead that he was not liable because of the insurance, and that the shipper must look to the insurance company for compensation. It would be no defense to the action, and the carrier has not, therefore, limited his liability to the person with whom he has contracted. The shipper has all the rights and remedies against the carrier he would have possessed had no such reservation been made. If the goods are lost from other causes than the act of God or the public enemy, the carrier is liable; and it is no concern of the owner that, after the loss is compensated by the carrier, the latter can seek reimbursement at the hands of some one else." *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475, 479.

#### **b. Form and Requisites.**

**Power of Agent of Shipper to Assent to Stipulation.**—In absence of notice to contrary, the carrier may assume that the agent, having authority to make contract for a shipment, has power to assent to stipulation for benefit of insurance. *Missouri Pac. R. Co. v. International, etc., Ins. Co.*, 84 Tex. 149, 152, 153, 19 S. W. 459, citing *Ryan & Co. v. M. K. & T. R. Co.*, 65 Tex. 13.

In absence of limited authority, the carrier would not be affected by the want of authority by an agent of a nonresident firm who bought cotton

for the firm and shipped it to his principal to make a freight contract, reserving benefit of the insurance upon the freight. *Missouri Pac. R. Co. v. International, etc., Ins. Co.*, 84 Tex. 149, 19 S. W. 459.

**Consideration.**—A stipulation that the carrier should have the benefit of any insurance on the goods to be carried is valid without a special consideration therefor to the shipper. *Missouri Pac. R. Co. v. International Marine Ins. Co.*, 84 Tex. 149, 19 S. W. 459.

Such stipulation need not rest upon separate and additional consideration. *Missouri Pac. R. Co. v. International, etc., Ins. Co.*, 84 Tex. 149, 152, 153, 19 S. W. 459.

### c. Operation and Effect.

#### (1) Right of Shipper to Recover from Carrier.

The fact that a carrier may have the right to reimburse himself from a third party for losses under the bill of lading will afford no defense to an action against him by the shipper. He must first pay and may then sue on his policy. *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475.

Where a carrier provided in his contract of shipment that he shall have the benefit of any insurance effected upon the goods to be transported, the owner, if he has received from the insurance company the amount of the loan, will be precluded by such shipment from recovering against the carrier. *Gulf, etc., R. Co. v. Zimmerman & Co.*, 81 Tex. 605, 17 S. W. 239.

"He must pay the value of the property destroyed and then bring suit against the party liable to him under the contract of insurance. This is the case whether the carrier has insured or has received the benefit of the insurance obtained by the owner—especially under our system of jurisprudence, where suits may be prosecuted in the name of the true or equitable owner of the cause of action. But

if the insured proceeds first against the insurer and recovers under the policy, or it is paid by the latter without suit, can he then bring suit upon the bill of lading against the carrier? A complete answer to such suit, although brought for the benefit of the insurer, would be the reservation contained in the bill of lading to which the plaintiff was a party. To recover the value of the property destroyed and appropriate it to the insurance company would be in direct violation of that stipulation, and the suit brought directly by the insurer is in no better condition." *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475, 481.

**Right of Carrier to Recover from Insurance Company.**—Where railroad in bill of lading reserves the right to recover insurance on goods destroyed in transitu, for destruction of which it is liable, insurance company is liable to such carrier. *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475, 478.

#### (2) Right of Insurer to Recover from Carrier.

When a shipping contract provides that the carrier shall have the benefit of an insurance affected by the shipper, the insurance company can not recover from the railroad company the amount paid on the policy. *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475.

The right of the insurance company to enforce repayment against the carrier for the loss, if it existed at all, was the right to be subrogated to the right of the shipper, but that right could not be enforced, for both the shipper and the carrier had contracted in effect that it should not exist. *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475.

**Effect of Advancement by Underwriter to Assured.**—The "advancement" by the underwriter to the assured of the insured value of the cotton does not constitute a "payment" in such sense as to preclude the assured from

recovering from the railroad company the amount of its common-law liability. *Gulf, C. & S. F. Ry. Co. v. Zimmerman*, 81 Tex. 605, 17 S. W. 239.

An insurance policy on cotton consigned from Texas to Liverpool stipulated that it was not to cover the common law liability of the carrier, but that if the cotton were lost while in the care of any carrier the underwriter should "advance" to the assured an amount equivalent to the insured value of the cotton so lost, and if the carrier proved liable, the assured should return to the underwriter the amount received from the carrier. Held, that the advancement by the underwriter to the assured of the insured value of the cotton did not constitute a "payment" in such sense as to preclude the insured from recovering from the carrier the amount of its common law liability. *Gulf, Colorado & Santa Fe Ry. Co. v. J. Zimmerman & Co.*, 81 Tex. 605, 17 S. W. 239.

### (3) Inconsistent Stipulations in Bill of Lading and Policy.

An action can not be maintained by the insured against the insurance company when by his inconsistent stipulations with the carrier he has defeated the insurer's right of subrogation. *Missouri Pac. R. Co. v. International, etc., Ins. Co.*, 84 Tex. 149, 19 S. W. 459.

The effect of a stipulation in a contract of shipment for the benefit of any insurance that may have been effected upon the goods to be transported, where previously thereto the shipper has obtained a policy providing that the insurer shall be subrogated to the claim of the insured against the carrier, is to invalidate the contract of insurance and defeat a recovery by the insured on the insurance policy. *Missouri Pac. R. Co. v. International, etc., Ins. Co.*, 84 Tex. 149, 19 S. W. 459.

If a stipulation that the carrier shall have the benefit of insurance effected

in case of loss, is contained in the bill of lading, and afterwards a certificate of insurance is issued to the shipper on an open policy which provides as follows: "Warranted that this insurance shall not enure to the benefit of any carrier," and the certificate is transferred to the carrier after the loss occurs, it confers no right as against the insurance company, and this though both the carrier and the insured were in fact ignorant of the clause contained in the open policy. *Insurance Co. v. Easton*, 73 Tex. 167, 11 S. W. 180.

An open policy of insurance which stipulates that "this insurance shall not enure to the benefit of any carrier," is not void as being in restraint of trade, and when violated by a contract between the insured and a carrier by which the latter should be subrogated to the rights of the insured in case of loss, avoids the policy, and neither the insured nor the carrier can assert rights under it in case of loss, and this whether the carrier had notice of the stipulation in the policy or not. *Insurance Co. v. Easton*, 73 Tex. 167, 11 S. W. 180.

Where shipper has by inconsistent stipulation with carrier defeated insurer's right to subrogation, payment by insurer is purely voluntary and gives no rights against carrier. No subrogation would follow from such payment against the carrier. *Missouri Pac. R. Co. v. International, etc., Ins. Co.*, 84 Tex. 149, 152, 19 S. W. 459.

**Notice to Insurer of Stipulation in Bill of Lading.**—Where a bill of lading reserved to a carrier the right to receive the insurance money in case of damage to goods shipped, for which damage carrier would be liable to shipper, and insurance company, chargeable with notice of said reservation, pays loss to shipper direct, it can not recover from the carrier by reason of the subrogation of the shipper's rights. *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475, 481.

Where a certificate of insurance described cotton as having been already shipped, the insurance company was chargeable with notice of a reservation contained in a bill of lading, to the effect, that, if loss occurred while the cotton was in charge of the railroad company, and that loss was satisfied by it, the railroad company should be entitled to the insurance money due on the cotton. *British and Foreign Marine Ins. Co. v. Gulf, C. & S. F. Ry. Co.*, 63 Tex. 475.

In *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475, the bill of lading was prior in point of time to the policy, which recited the fact of shipment, and it was held that this was sufficient evidence that the policy was issued with notice of the right secured by the carrier by contract and in subordination to that right. *Insurance Co. v. Easton*, 73 Tex. 167, 173, 11 S. W. 180.

The insurance company had no rights against the railroad company when the bill of lading was signed and the reservation made, and the railroad company had every right which the reservation could confer when the insurance was effected. *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475, 476.

#### **d. Suits.**

##### **(1) Suits by Shipper for Benefit of Carrier.**

A plaintiff stated in his petition that he was the owner of certain goods injured by fire while in the possession of a railroad company for shipment; that he had transferred to an insurance company one-half of his right of action against the road, and that his suit was for one-half the damages sustained, for the use of the insurance company. Held, the legal right of action remained in the owner of the goods, the petition disclosed a good cause of action, and the mere allegation by the plaintiff that the cause of action had been transferred did not compel him

to negative the illegality of such transfer. *E. L. & R. R. Co. v. Hall*, 64 Tex. 615.

The allegation in the petition that the suit was for the use of the insurance company was proper to protect the interest of that company, though it did not make it a plaintiff, and it was not necessary to show by averment or proof how the insurance company acquired its interest; the owner of the property could recover without offering proof of the transfer to the insurance company. *E. L. & R. R. Co. v. Hall*, 64 Tex. 615.

To entitle the shipper to recover for the use of the insurance company, the averment and proof need not go further than to show a right of recovery in shipper, the record plaintiff; for this purpose the suit is not the suit of the insurance company. To show that this holding is sustained by the authorities, and is consistent with the opinion in *McFaddin v. MacGreal*, 25 Tex. 73, it is only necessary to examine the cases cited in *McFaddin v. MacGreal*. *E. L. & R. R. Co. v. Hall*, 64 Tex. 615, 621.

**Admissibility of Transfer.**—Where plaintiff suing a railway company for injuries to goods by fire alleged that he had transferred to an insurance company one-half of his right of action the transfer when offered in evidence could not be excluded on the ground that it contained other matters than the bare transfer itself. *East Line & Red River Ry. Co. v. Hall*, 64 Tex. 615.

##### **(2) Suits by Carrier.**

The supplemental petition does not allege that the carrier in this instance had notice of such want of authority. It is hence defective, and the carrier's exception should have been sustained. *Missouri Pac. R. Co. v. International, etc., Ins. Co.*, 84 Tex. 149, 152, 19 S. W. 459.

**Burden of Proof.**—Where a carrier stipulates for the benefit of any insur-



ance effected on the shipment, the burden is on it to prove that such insurance was procured and paid by the insurer. *Gulf, etc., R. Co. v. Zimmerman & Co.*, 81 Tex. 605, 608, 17 S. W. 239.

#### 17. Adjustment of Claim.

A stipulation requiring a shipper of freight to adjust a claim for damages before delivery, in the presence of an officer of the railroad, does not apply where the shipper refuses to receive the freight because it had become worthless. *Gulf, C. & S. F. Ry. Co. v. Golding*, 3 Willson, Civ. Cas. Ct. App., § 36.

#### 18. Statement to Each Conductor Showing Condition of Cattle.

A stipulation in a freight contract for carrying cattle, providing that the shipper should sign and furnish a statement to each conductor on the route, showing condition of the cattle, and that a failure to so report should be conclusive evidence that the cattle were in good condition, is unreasonable and of no effect. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

The provision requiring a report of the condition of the cattle to be made to the conductors, stipulates that a failure to furnish such a report should be conclusive evidence that the cattle were in good condition. A stipulation such as this should be held unreasonable. It makes the passive failure to do an act which might not in any case result in harm to the carrier defeat a meritorious claim of the shipper, with a result to relieve the carrier for injuries that have resulted from its negligence, and gives this passive negative act the effect of an estoppel when it may not in anywise mislead the carrier or place it in any more condition than it would occupy if the condition was complied with. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 681, 29 S. W. 565.

In *Missouri Pac. R. Co. v. Ivy*, 79

Tex. 444, 447, 15 S. W. 692; *Missouri Pac. R. Co. v. Fennell*, 79 Tex. 448, 449, 15 S. W. 693, and *St. Louis, etc., R. Co. v. Turner*, 1 Tex. Civ. App. 625, 631, 20 S. W. 1008, it is held, that the signing of statements by the carrier such as are exacted by this provision of the contract would simply be an admission of the party that signed it, which could be rebutted and explained, and that the statements contained in such reports would not estop the maker from denying their truth. No statement or report was signed by the shipper in this case, or by those that accompanied the cattle. The logic of these decisions is to the effect that an effort to make a statement or report of this character an estoppel is unreasonable, and that it will not be so enforced; and the reason of this rule would extend to denying the effect of an estoppel to a failure to make the report of the condition of the stock. Certainly the failure to make the statement and report could have no more conclusive effect in tending to estop the shipper than would be the deliberate written statement of the shipper showing the condition of the cattle, and if the estoppel could not exist in this latter instance, it would certainly be unreasonable and illogical to hold that it would exist in the former. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 681, 29 S. W. 565.

#### 19. Limitation of Liability to Carrier's Own Line.

See the title CONNECTING CARRIERS.

### IX. Special Contracts.

#### A. WHAT LAW GOVERNS.

When there are no circumstances attending the transaction, except the mere execution, delivery and acceptance of a bill of lading, the safest rule to arrive at the intention of the parties is that which upholds, rather than that

which defeats, the contract, and the laws of the state under which the contract is valid should be applied. *Ryan & Co. v. M., K. & T. R. Co.*, 65 Tex. 13.

A contract made with a railroad company in one state to carry property into another state, if valid by the laws of the former, would be valid in the latter. *Texas & P. Ry. Co. v. Davis*, 2 Willson, Civ. Cas. Ct. App., § 191.

## **B. FORM, REQUISITES AND VALIDITY.**

### **1. Meeting of Minds.**

To constitute a contract of carriage, the minds of the parties must meet as to all the terms and considerations of the contract. *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 52, 99 S. W. 418.

### **2. Denial of Knowledge of Contents.**

A shipper who had made a special contract with the carrier was bound by its terms and could not avoid it on the ground that he did not read it or know its contents when he signed it. *International & G. N. R. Co. v. Watt*, 3 Willson, Civ. Cas. Ct. App., § 782.

### **3. Authority to Make.**

#### **a. Receiver.**

A contract by a receiver of a railway to furnish certain transportation to a shipper, is of force only during the receivership, and does not bind the company succeeding to the control of the property. *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2, reversing 40 S. W. 431. See the title **RECEIVERS**.

#### **b. Agents.**

##### **(1) In General.**

"Unless some special reasons known to the shipper restrict the general powers of the agent, the public have a right to assume that the agents of carriers, whether corporations or not, and whether such agents be local or general, have the right to bind such carriers by contracts with their employers in the particular line of business in which they are employed or

are represented or held out as being employed, and within the scope of the business of their principals." *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 37, 15 S. W. 164.

The railroad companies must, in the very nature of things, have agents, and those agents must have the authority to do those things necessary to accomplish the designs of the agency. *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 50, 99 S. W. 418.

A carrier is bound by a contract in its name, by another as agent, who has been accustomed to make similar contracts as agent for such carrier, with its knowledge and approbation, and which have been ratified or recognized by it. *Texas Pac. Ry. Co. v. Nicholson*, 61 Tex. 491.

##### **(2) Local or Station Agent.**

###### **(a) Business at His Own Station.**

###### **aa. In General.**

A railroad, which places an agent in charge of its business at a station and empowers him to contract for the shipment of freight, holds him out to the public as having authority to contract with reference to all the necessary and ordinary details of the business, and within the range of such business he is a general agent. *Gulf, C. & S. F. Ry. Co. v. Jackson & Edwards*, 99 Tex. 343, 89 S. W. 968, reversing judgment (Civ. App.), 86 S. W. 47; *Same v. Brown & Williamson*, 99 Tex. 349, 89 S. W. 971; *Same v. Zimmerman*, Id. Reversing judgment (Civ. App.), 86 S. W. 343.

The authority of a local agent does not extend to the performance of any act for which he has not express authority, unless it is a thing necessary for him to do in the execution of the powers expressly given. *Gulf, etc., R. Co. v. Jackson*, 99 Tex. 343, 89 S. W. 968, 969, reversing 86 S. W. 47; *Gulf, etc., R. Co. v. Dinwiddie*, 21 Tex. Civ. App. 344, 51 S. W. 353; *Missouri, etc.,*

R. Co. v. Belcher, 88 Tex. 549, 32 S. W. 518.

**bb. Presumption as to and Proof of Want of Authority.**

A local station agent in charge of a railway company's business at a station is presumed to have authority to represent the company in all matters connected with the transaction of its business at that particular station. Gulf, etc., R. Co. v. Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829.

Station agents are presumed to have authority to make contracts for the transportation of freight, and in the absence of any adequate notice to the public of any limitations upon their authority in that respect the corporation will be bound thereby, both as to rates and as to expedition of transportation and delivery. Easton v. Dudley, 78 Tex. 238, 14 S. W. 583.

A station agent is presumed to have authority to contract for shipments over his line. Gulf, C. & S. F. Ry. Co. v. Short (Civ. App.), 51 S. W. 261.

A shipper may rely upon the authority of a station agent to make a special contract for the shipment of fruit trees by a certain train, and need not affirmatively prove such authority. Pacific Exp. Co. v. Needham, 37 Tex. Civ. App. 129, 83 S. W. 22.

Where a contract of shipment is entered into between a shipper and a station agent, it is not necessary for the former to prove that the latter has the authority to make the contract. Gulf, etc., R. Co. v. Short (Civ. App.), 51 S. W. 261, affirmed in 93 Tex. 685, no op.

A shipper contracting with a railroad station agent for the transportation of freight is under no legal obligation to make inquiries concerning the station agent's instructions or powers. San Antonio & A. P. Ry. Co. v. Williams (Civ. App.), 57 S. W. 883.

**Burden of Proof of Want of Authority.**—As a railroad company's station agent is ordinarily its agent to make

contracts for the shipment of stock, the burden is on the company, when it seeks to limit his authority, to show, not only that the authority did not exist, but that such fact was known to the shipper. Gulf, C. & S. F. Ry. Co. v. Hume, 6 Tex. Civ. App. 653, 24 S. W. 915.

In an action by a shipper for failure to furnish transportation at a time agreed on, the court properly refused to instruct the jury that the burden was on plaintiff to prove that the station master had authority to make the contract. Gulf, C. & S. F. Ry. Co. v. Wright, 1 Tex. Civ. App. 402, 21 S. W. 80, citing Easton v. Dudley, 78 Tex. 236, 14 S. W. 583; McCarty v. Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164; Gulf, etc., R. Co. v. McCarty, 82 Tex. 608, 18 S. W. 716.

**Weight of Evidence.**—In an action against a railroad to recover for breach of an alleged contract for the transportation of goods, evidence held to show that the one with whom plaintiff contracted had no authority to bind defendant corporation. Texas & N. O. R. Co. v. Merchants' & Farmers' Cotton Oil Co. (Civ. App.), 86 S. W. 1042.

**(b) As to Station Other than His Own.**

A local agent of a railroad company has no implied authority to make any contract which will bind the company with reference to freight to be received at a different station than his own. Gulf, etc., R. Co. v. Jackson, 99 Tex. 343, 89 S. W. 968, reversing 86 S. W. 47; Gulf, etc., R. Co. v. Dinwiddie, 21 Tex. Civ. App. 344, 51 S. W. 353; Missouri, etc., R. Co. v. Belcher, 88 Tex. 549, 32 S. W. 518.

A local station agent is not presumed to have authority to act for the company at any other station than his own; and when he attempts to do so, his act, until ratified, will not bind the company. This is in harmony with

the well-settled rule that a principal is not bound by a contract made by an agent that is not within the actual or apparent scope of the agent's authority. *Gulf, etc., R. Co. v. Hodge*, 10 Tex. Civ. App. 543, 548, 30 S. W. 829. See the title **PRINCIPAL AND AGENT**.

**(c) Shipments to His Station from Another.**

Prima facie the person in charge of a station at one place (station agent) has no power to act for the railway company in reference to the making of a contract of shipment to his station from another station on the railroad. Nor would it be the duty of the station agent receiving notice relating to a shipping contract made elsewhere, to transmit such notice to agent at the station at which the shipment was made. His failing to do so would involve the road in no liability. *Missouri, etc., R. Co. v. Belcher*, 88 Tex. 549, 32 S. W. 518, citing *Kauffman v. Kobey*, 60 Tex. 308, 310; *Labbe v. Corbett*, 69 Tex. 503, 507, 6 S. W. 808; *Irvine v. Grady*, 85 Tex. 120, 125, 19 S. W. 1028; *Taylor v. Taylor*, 88 Tex. 47, 29 S. W. 1057.

**(d) Respecting Trains in Which Shipment to Be Made.**

A local freight agent of a railroad had no authority to bind the railroad by an agreement that freight shall be shipped in a solid train without mixing any other freight with it or that the train shall be drawn by a single engine. *Gulf, etc., R. Co. v. Jackson*, 99 Tex. 343, 89 S. W. 968, reversing 86 S. W. 47.

**Agreement to Place Car in Passenger Train or Forward by First Freight.**—See post, "Instructions," IX, D, 4.

**(e) Contracts for Carriage beyond Carrier's Line.**

See post, "Contract for Transportation beyond Carrier's Own Line," IX, E, 2.

**4. Verbal Contracts.**

**a. In General.**

See post, "Writing—Parol Contracts," IX, E, 1, b, (5); "Necessity," X, C, 1. See the title **CARRIERS OF GOODS**.

A carrier may legally enter into a parol contract of shipment. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 690, 29 S. W. 565; *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491, 495; *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 52, 99 S. W. 418; *Ft. Worth, etc., R. Co. v. Wright*, 30 Tex. Civ. App. 234, 70 S. W. 335; *Gulf, etc., R. Co. v. Irvine (Civ. App.)*, 73 S. W. 540; *San Antonio, etc., R. Co. v. Williams (Civ. App.)*, 57 S. W. 883; *Missouri, etc., R. Co. v. Withers*, 16 Tex. Civ. App. 506, 511, 40 S. W. 1073, affirmed in 93 Tex. 691, no op.

When a carrier legally enters into a parol contract of shipment, it will be binding upon the parties as the contract regulating the shipment, unless voluntarily and mutually changed or abandoned. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 690, 29 S. W. 565.

**b. Authority of Agent.**

**(1) In General.**

Verbal contracts by a railroad station agent for the transportation of freight, bind the railroad company unless the shipper knows that the agent has no such authority. *Gulf, etc., R. Co. v. Hume Bros.*, 87 Tex. 211, 219, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915; *San Antonio, etc., R. Co. v. Williams (Civ. App.)*, 57 S. W. 883; *Missouri, etc., R. Co. v. Withers*, 16 Tex. Civ. App. 506, 511, 40 S. W. 1073, affirmed in 93 Tex. 691, no op.

This can be so only upon the theory that such agents have ostensible authority to make such contracts. The question in such case would be whether or not the shipper knew of the lack of authority, or was chargeable with such knowledge. Courts

probably might take notice of the fact that such agents represent the railway company in their locality in receiving and contracting for the shipment of freight. The public can not take notice of the limitations on their powers unless they are conveyed to the public in such a manner as to authorize the inference that shippers are apprised of them. Hence from the very nature of their office there is apparent authority for the making of freight contracts. *San Antonio, etc., R. Co. v. Williams* (Civ. App.), 57 S. W. 883.

Since an oral contract by a railroad station agent for transportation is binding unless the shipper has knowledge that the agent has no authority to make such contract, it is not error in an action against a railroad on such a contract to refuse to charge on defendant's plea setting up the agent's want of authority to enter into an oral contract. *San Antonio, etc., R. Co. v. Williams* (Civ. App.), 57 S. W. 883.

**Question for Jury.**—Whether the agents had authority to make a verbal contract of carriage and whether the shipper knew of lack of authority on his part to make such contract, is a question for the jury. *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 52, 99 S. W. 418.

**Contract for Shipment of Live Stock.**—See the title CARRIERS OF LIVE STOCK.

**(2) Stipulations Limiting Agent's Authority.**

A written contract for the shipment of cattle, limiting the authority of the carrier's agent to make a verbal contract, does not merge a previous verbal contract made by the agent with the shipper, in which the agent agreed to furnish cars ready to receive the cattle on a certain day. *Gulf, C. & S. F. Ry. Co. v. Combes & Rector* (Civ. App.), 80 S. W. 1045.

**(3) Shipper Knowing That Written Contract Required.**

The mere fact that a shipper knew,

when the verbal contract for a shipment was entered into, that he would be required to execute a written contract, was not sufficient to constitute a waiver of the rights that accrued under the verbal contract. *Gulf, C. & S. W. Ry. Co. v. Batte* (Civ. App.), 107 S. W. 632.

It can not be held as a matter of law that shipper's knowledge of what was in former contracts was notice to him of what would be in the next contract he would sign. There had been instances when he had not been required to sign such written contracts. *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 51, 99 S. W. 418.

The stipulation in the printed forms which shipper had at various times signed in former shipments could not constitute notice to him that the agent had no power to do things which were absolutely necessary for him to do in performance of the duties for which he was appointed. That a denial of such power in the agent might possibly be in a written contract that he would probably be required to sign after the cattle were loaded, would not be notice to him of the agent's lack of authority to make such a contract. Any reasonable man would naturally suppose that a railroad agent would have the authority almost essential in order for him to accomplish the purposes of his agency. *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 49, 99 S. W. 418.

In the case of *Texas, etc., R. Co. v. Gallagher* (Civ. App.), 70 S. W. 97, the point to be decided was, whether or not a verbal contract to transport to St. Louis, from San Diego, Texas, was valid when the shipper had afterwards signed a written contract in which the liability of the initial carrier was confined to its own line, the shipper knowing at the time he made the verbal contract

that the railroad company invariably required the signing of the written contract in which its liability was restricted. That was a matter about which it was not necessary for the agent to make a verbal agreement; one which would deprive his employer of a valuable right. The shipper knew he had no right to make it, and that no such contracts were ever ratified by the railway company. Under the facts of that case, the opinion was right, and must be confined to those facts. *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 50, 99 S. W. 418.

#### (4) Ratification of Unauthorized Contract.

An authorized agent of a railroad company who receives freight for shipment without objection under a parol agreement made by an unauthorized agent, binds the company by his authority, notwithstanding the want of authority by the agent who made the contract. *Gulf, etc., R. Co. v. Jackson*, 99 Tex. 343, 89 S. W. 968, reversing 86 S. W. 47.

#### c. Merger of Verbal in Subsequent Written Contract.

##### (1) In General.

A written shipping contract executed in pursuance of a prior oral contract governs the shipment as a matter of law. *Ft. Worth, etc., R. Co. v. Wright*, 30 Tex. Civ. App. 234, 70 S. W. 335.

An action may be maintained against a railway company on a verbal contract of shipment, under certain circumstances, although a written contract may have been subsequently entered into. *Gulf, C. & S. F. Ry. Co. v. McCord* (Civ. App.), 81 S. W. 1032; *Southern Pac. R. Co. v. Anderson*, 26 Tex. Civ. App. 518, 63 S. W. 1023, affirmed in 95 Tex. 686, no op.; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565; *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App.

235, 46 S. W. 897, affirmed in 93 Tex. 673, no op.; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 613, 18 S. W. 716; *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806; *San Antonio, etc., R. Co. v. Wright*, 20 Tex. Civ. App. 136, 137, 49 S. W. 147; *Galveston, etc., R. Co. v. Botts*, 22 Tex. Civ. App. 609, 611, 55 S. W. 514; *Gulf, etc., R. Co. v. Funk*, 42 Tex. Civ. App. 490, 92 S. W. 1032; *San Antonio, etc., R. Co. v. Barnett*, 27 Tex. Civ. App. 498, 66 S. W. 474; *Ft. Worth, etc., R. Co. v. Wright*, 30 Tex. Civ. App. 234, 70 S. W. 335; *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 219, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915; *San Antonio, etc., R. Co. v. Williams* (Civ. App.), 57 S. W. 883; *McNeill v. Galveston, etc., R. Co.* (Civ. App.), 86 S. W. 32; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565; *Missouri, etc., R. Co. v. Withers*, 16 Tex. Civ. App. 506, 40 S. W. 1073, affirmed in 93 Tex. 691, no op.; *Houston, etc., R. Co. v. Mayes*, 44 Tex. Civ. App. 31, 34, 97 S. W. 318; *Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 675, 680, 26 S. W. 286, affirmed in 93 Tex. 699, no op.

Of course, cases may arise in which this rule would not apply. *Gulf, etc., R. Co. v. McCord* (Civ. App.), 81 S. W. 1032.

Where a verbal contract was made, the goods received, and the journey begun, and then a written contract was presented to the shipper, which he signed with a knowledge of its contents or he had sufficient time to have read its contents, and which he was not induced to sign by any false representations of the carrier's agent, or which he signed under circumstances that he should have read the same; the verbal contract is merged into the written contract; but where the written contract was obtained by fraud or misrepresentation, the verbal contract would not be merged into it.

Atchison, etc., R. Co. v. Grant, 6 Tex. Civ. App. 674, 680, 26 S. W. 286, affirmed in 93 Tex. 699, no op.

The plaintiff in attacking the validity of the written contract must allege and prove the want of consideration for its execution, or circumstances of duress attending the same. See Texas, etc., R. Co. v. Avery, 19 Tex. Civ. App. 235, 46 S. W. 897, affirmed in 93 Tex. 673, no op.; Ft. Worth, etc., R. Co. v. Underwood, 39 Tex. Civ. App. 404, 87 S. W. 713.

In the absence of any evidence of want of any additional consideration, fraud, compulsion, duress or want of time to read the written contracts, they must be taken as merging all previous understandings between the parties. San Antonio, etc., R. Co. v. Barnett, 27 Tex. Civ. App. 498, 66 S. W. 474; Missouri, etc., R. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; Houston, etc., R. Co. v. Mayes, 44 Tex. Civ. App. 31, 34, 97 S. W. 318.

In the absence of a pleading putting in issue its validity, the written contract imports a consideration. Ft. Worth, etc., R. Co. v. Underwood, 39 Tex. Civ. App. 404, 87 S. W. 713.

In an action by a shipper against a carrier for failure to furnish cars within the time specified in an oral contract, it is error to ignore the written contract, pleaded by defendant, executed after the oral contract, and releasing defendant from liability for breach of the oral contract—its validity not having been assailed in plaintiff's pleadings—as, in the absence of a pleading putting in issue the validity of the written contract, it, besides reciting a consideration, imports one. Ft. Worth & D. C. Ry. Co. v. Underwood, 39 Tex. Civ. App. 404, 87 S. W. 713.

After the cattle were loaded in the cars, plaintiff signed a written contract of shipment, releasing defendant from all liability for delay in receiving or shipping the cattle, and making it a con-

dition precedent to plaintiff's right to recover for any injury to the cattle at any station where they might be loaded or unloaded that he should give the station master of the last-named station a written notice of his claim. Held, that the court erred in refusing to instruct that plaintiff, by his contract, had waived all claims for damages previously accrued, since, under Rev. St., art. 1265, subd. 10, the want of consideration for such contract could be set up only by a proper plea supported by affidavit, which was not done in this case. Gulf, C. & S. F. Ry. Co. v. Wright, 1 Tex. Civ. App. 402, 21 S. W. 80.

"It is another contention of appellees that they pleaded the written contracts, and plaintiff, although he alleged they were without consideration, did not allege this under oath. This the statute would seem to have required, although it was said in Gulf, etc., R. Co. v. Jackson (Civ. App.), 86 S. W. 47, reversed in 99 Tex. 343, in a similar situation, that it was not required." McNeill v. Galveston, etc., R. Co. (Civ. App.), 86 S. W. 32, 33.

**Merger a Question for Jury.**—Whether the written or verbal contract should control is a question for the jury; and it is for the jury to find whether or not the necessary time was given to inspect the written contract, and whether the contents were misrepresented to the shipper. Atchison, etc., R. Co. v. Grant, 6 Tex. Civ. App. 674, 681, 26 S. W. 286, affirmed in 93 Tex. 699, no op.

Defendant carrier has the right to set up in its answer that, instead of shipments being made under a verbal contract, as alleged by plaintiff, it was under a written contract, but it is error to hold, without submitting any issue thereon, that the verbal contract was merged into the written, and that a provision in the latter requiring

certain notices to be given, was binding. *Withers v. Missouri, etc., R. Co.* (Civ. App.), 32 S. W. 906.

**Instructions.**—Where, in an action against the carrier for damages to a shipment of freight, alleged by the shipper to have been made under an oral contract and by the carrier to have been made under a subsequent written contract, plaintiff showed facts as to the written contract which defeated it as a contract, a charge that the oral contract was not in force was properly refused as being on the weight of the evidence. *Texas, etc., R. Co. v. Miller* (Civ. App.), 88 S. W. 499.

**Weight of Evidence.**—See evidence held to show that the contracts sued on were duly executed by plaintiff's directions in order to secure transportation for his helpers. *San Antonio, etc., R. Co. v. Barnett*, 27 Tex. Civ. App. 498, 66 S. W. 474.

There is ample proof to sustain an allegation in plaintiff's pleading, that he was overreached and caused to sign a contract with whose contents he was not acquainted, and with which he was not permitted to acquaint himself by defendant; where the evidence shows that the written contract was not presented to the plaintiff until he was en route, and that he was then told that it was merely a paper that secured him transportation; and was not given time in which to read it, and that relying upon the statements made to him, and impelled by the fact that he was told that he must sign to get transportation, he signed the contract. *Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 680, 26 S. W. 286, affirmed in 93 Tex. 699, no op.

## (2) Oral Contract Breached before Written Executed.

Where an oral contract binding a carrier to furnish cars for shipment of cattle at a specified

time was breached before a written contract was signed, the carrier's liability for the breach of the oral contract could not be avoided by the written contract, unless there was a consideration inuring to the shipper as compensation for the damages resulting from the breach when the contract was signed. *Gulf, C. & S. F. Ry. Co. v. House & Watkins*, 88 S. W. 1110, 40 Tex. Civ. App. 105.

In the exercise of ordinary care a shipper would not be required to make a new contract with a railroad company which had just broken an identical one, and again agree to pay it for services which it was already under legal obligation to perform. This is analogous to the question decided in *Sun Mfg. Co. v. Egbert*, 37 Tex. Civ. App. 512, 84 S. W. 667; *Pecos River R. Co. v. Latham*, 40 Tex. Civ. App. 78, 88 S. W. 392, affirmed in 101 Tex. 652, no op.

## (3) Shipping Reports.

The shipping report signed by plaintiff and the agent of the connecting line at the connecting point could not change or affect the written contracts between plaintiff and defendant. *San Antonio & A. P. Ry. Co. v. Barnett*, 66 S. W. 474, 27 Tex. Civ. App. 498.

## 5. Contracts Violating Statute.

See post, "Petition or Complaint," IX, D, 1, a. See the title INTER-STATE COMMERCE.

## C. PERFORMANCE, DISCHARGE OR BREACH.

### 1. Tender of Property.

When a railway company announces through its agent that it will not make a shipment at a time previously contracted for, a tender of the articles to be shipped at the time previously agreed on is thereby waived and rendered unnecessary to fix the liability of the company for resulting damages. *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491.



**2. Excuses for Breach.****a. Unusual Rush of Business.**

See post, "Unusual Volume of Business," IX, E, 1, d, (2), (a).

**b. Default of Connecting Line.**

A common carrier which has contracted to transport merchandise to a certain point is not relieved from liability for injuries thereto by the fact that it has intrusted the performance of part of the contract to a connecting carrier. *Gulf, etc., R. Co. v. Insurance Co. (Civ. App.)*, 28 S. W. 237. See the title CONNECTING CARRIERS.

**3. Damages.**

A carrier refusing to comply with a contract to transport goods is liable for the difference between the market value at the destination when they would have arrived if he had complied, and their value at the same time at the place from which they were to have been carried. *Galveston, H. & S. A. Ry. Co. v. Stovall*, 3 Willson, Civ. Cas. Ct. App. § 252a.

The measure of damages on failure of a carrier to transport grain as agreed is the difference between the price at which plaintiff was required to sell the grain and the price agreed to be paid by the consignees, where such price is less than the market value of the grain at its intended destination. *Missouri, K. & T. Ry. Co. of Texas v. Witherspoon*, 45 S. W. 424, 18 Tex. Civ. App. 615.

Where defendant agreed to transport plaintiff's grain to L. at a fixed rate, in consequence of which plaintiff contracted to sell the grain to dealers in L. at a specified price, the measure of plaintiff's damages, on the refusal of defendant to transport the grain as agreed, is the difference between the market value of the grain at L. at the time it should have been carried and its value at the place of shipment, less the cost of carriage. *Missouri, K. & T. Ry. Co. of Texas v. Witherspoon (Tex. Civ. App.)*, 38 S. W. 833; *Inman v.*

*St. Louis, etc., R. Co.*, 14 Tex. Civ. App. 39, 37 S. W. 37, affirmed in 93 Tex. 643, no op.

In an action against a carrier for the breach of a special contract of shipment, plaintiff could recover items of expense incurred in renotifying and delivering to purchasers the goods which they had purchased, where defendant had been fully informed as to the accrual of this element of damage in the event it failed to deliver the goods safely at the time agreed upon. *Pacific Exp. Co. v. Needham*, 83 S. W. 22, 37 Tex. Civ. App. 129.

**D. REMEDIES.****1. Pleading.****a. Petition or Complaint.**

In an action against a carrier for breach of a special contract of shipment, where defendant was informed of the accrual of items of expense for renotifying and delivering the goods to the purchasers, in the event it failed to deliver them safely and at the time agreed upon, it was not necessary for plaintiff to itemize in his petition the different matters constituting the amount of such damage. *Pacific Exp. Co. v. Needham*, 83 S. W. 22, Tex. Civ. App. 129. See *St. Louis, etc., R. Co. v. Stone-Cypher*, 25 Tex. Civ. App. 569, 63 S. W. 946; *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607.

In an action against a carrier for breach of a special contract for the shipment of fruit trees, where the petition did not claim as damages the market value of the trees, but the amount for which the trees had been sold, of which it was alleged defendant was fully apprised when the contract was made, it was not necessary for plaintiff, in his complaint or by a bill of particulars, to give any description of the contents of the shipment; his measure of damages being the amount for which the trees had been sold. *Pacific Exp. Co. v.*

Needham, 83 S. W. 22, 37 Tex. Civ. App. 129.

In an action against a carrier for breach of contract of shipment, it is sufficient to allege that the shipping contract was made with defendant corporation and it is unnecessary to state the name of the agent making it. *Missouri, K. & T. R. Co. v. Withers*, 16 Tex. Civ. App. 506, 40 S. W. 1073.

The petition in an action against a carrier for breach of a freight contract, made while the railroad commission was in force, need not allege that the rate fixed by the contract was that established by the commission, as any violation of the commission act is a matter of defense. *Thompson v. San Antonio & A. P. Ry. Co.*, 11 Tex. Civ. App. 145, 32 S. W. 427.

Where the petition in an action against a railroad for breach of a freight contract showed no violation of law in the contract made, it was a matter of defense to show wherein it was illegal. *Thompson v. San Antonio, etc., R. Co.*, 11 Tex. Civ. App. 145, 147, 148, 32 S. W. 427.

#### **b. Plea or Answer.**

Where the agency of the person making a shipping contract which included personal transportation is not denied by verified plea, the contract is binding on the carrier. *International, etc., R. Co. v. Campbell*, 1 Tex. Civ. App. 509, 512, 20 S. W. 845.

#### **2. Issues and Proof.**

In a suit against a carrier for breach of contract of shipment, allegation in the petition that the contract provided for the shipment to a certain point, and the contract introduced showed shipment to a different point, the variance was fatal. *Texas, etc., R. Co. v. Hamm*, 2 App. Civ. Cases, § 491.

In an action against a railroad receiver for damages on a shipping contract to which the company was subsequently made a party, there is no

variance between the contract sued on which was alleged to have been executed by receiver and the contract in evidence which was signed by the agent of receiver without showing on its face that it was made with the receiver, where the road was in the receiver's hands, when the contract was made. *Texas, etc., R. Co. v. Wilson* (Civ. App.), 21 S. W. 373, affirmed in 85 Tex. 507.

Where a petition alleged the breach by a railroad of a contract to furnish cars on a specific date, it was error to submit to the jury the issue, raised only by the evidence, of a negligent delay in furnishing cars. *Texas & P. Ry. Co. v. Arnett*, 88 S. W. 448, 40 Tex. Civ. App. 76.

#### **3. Evidence.**

##### **a. Presumptions and Burden of Proof.**

In an action against a carrier to recover for damages resulting from a failure to carry out a contract for the transportation of produce at an agreed rate, defendant excepted to the petition as showing a contract for transportation at a fixed rate made while the state railway commission was in existence, without alleging that such rate was authorized by the commission. Held, that there is no presumption that the railroad commission of a state has established freight rates over a particular road. *Thompson v. San Antonio & A. P. Ry. Co.*, 11 Tex. Civ. App. 145, 32 S. W. 427.

##### **b. Admissibility.**

###### **(1) Parol Evidence.**

In a suit against a carrier on an interstate commerce contract, oral testimony as to the schedule rates of the interstate commerce commission was proper, as the records of such commission could not be reached by process of the court. *Gulf, etc., R. Co. v. Dimmitt*, 17 Tex. Civ. App. 255, 259, 42 S. W. 583.

###### **(2) Best and Secondary Evidence.**

Where the defendant carrier was alleged to be in possession of the con-

tracts of shipment, and after notification to produce them, defendant introduced secondary evidence of them, the court did not err in refusing to strike out such evidence upon defendant's subsequently offering the written contracts in evidence. *Gulf, etc., R. Co. v. Leatherwood*, 29 Tex. Civ. App. 507, 69 S. W. 119, affirmed in 97 Tex. 634, no op.

#### c. Weight and Sufficiency.

Testimony of a shipper that he was told by a person who was in the office of a carrier, but not the regular agent, that certain goods to be shipped a few days later would be carried at a certain rate less than the tariff rates, is not proof of a contract to carry at such reduced rate. *Wells, Fargo Exp. Co. v. Williams* (Civ. App.), 71 S. W. 314.

#### 4. Instructions.

In an action against an express company for the breach of a special contract of shipment, it was error for the court to assume in its charge that drivers of delivery wagons for the express company had authority to make the contract in question, where there was no evidence in the record tending to show that they had such authority. *Pacific Exp. Co. v. Needham*, 83 S. W. 22, 37 Tex. Civ. App. 129.

In an action for delay in transporting a circus, where plaintiff alleged and produced evidence to establish that carrier's agent agreed to place the circus car in a passenger train, and after failing to do so, agreed to put it in the first freight train, which he also failed to do, it was error to submit a charge on plaintiff's constructive or actual notice of agent's want of authority to contract for the passenger train, without also charging as to the freight train agreement. *Parks v. Gulf, etc., R. Co.* (Civ. App.), 30 S. W. 708, 709.

Such charge was misleading and

prejudicial, as ignoring the subsequent agreement to send the car by the freight train. *Parks v. Gulf, etc., R. Co.* (Civ. App.), 30 S. W. 708.

**Limiting Purpose of Evidence.**—The court's action in limiting to one purpose abandoned pleadings offered as evidence was not error, in the absence of a showing that they should have been considered for any other purpose. The privacy of contract between the parties distinguishes this case from that of *St. Louis, etc., R. Co. v. Jenkins* (Civ. App.), 89 S. W. 1106; *Southern Kansas R. Co. v. Morris* (Civ. App.), 99 S. W. 433, affirmed in 100 Tex. 611.

### E. PARTICULAR CONTRACTS CONSIDERED.

#### 1. Contracts to Furnish Cars.

##### a. Validity.

##### (1) In General.

No law prohibits a railway company from contracting to furnish cars at an agreed time and place on the line of the road to be used for shipment. *Cross v. McFaden*, 1 Tex. Civ. App. 461, 20 S. W. 846; *Easton v. Dudley*, 78 Tex. 236, 238, 14 S. W. 583.

##### (2) On Line of Connecting Carrier.

It is competent for a railroad company to bind itself by contract to furnish cars at a place not on its own line, but on the line of a connecting carrier. *Missouri, K. & T. Ry. Co. of Texas v. Kyser & Sutherland*, 87 S. W. 389, 38 Tex. Civ. App. 355.

##### (3) Effect of Partial Invalidity.

A station agent having apparent authority to bind the railway in contracting for cars at his station, would not invalidate a contract made by him for cars, by exceeding his authority in contracting for shipment by a named route. Testimony to the agent's authority to bind the road as to the route would be immaterial. *Gulf, etc., R. Co. v. Hodge*, 19 Tex. Civ. App. 543, 30 S. W. 829.

**b. Requisites.****(1) Unconditional Undertaking.**

Evidence that a railroad's agent, when applied to on October 30th to furnish cars, accepted the order, and said that he would have the cars ready by the 1st of November, if possible, but did not promise definitely to do so, was insufficient to establish a contract to furnish the cars on the 1st of November. *Texas & P. Ry. Co. v. Arnett*, 88 S. W. 448, 40 Tex. Civ. App. 76.

A railroad depot agent verbally agreed with a shipper, who desired a poultry car on a stated day, "that he thought he could get the car, and would do the best he could towards getting it, but did not make any absolute promise to get the car." The car was not furnished at the date asked for by the shipper. Held, that the contract imposed on the carrier no liability to furnish the car absolutely, and, as the shipper's action was based on contract, there could be no recovery. *St. Louis, etc., R. Co. v. Cannington (Civ. App.)*, 110 S. W. 965.

This did not tend to show an unconditional undertaking to furnish the car as requested, but was entirely consistent with the agent's promise merely to "do the best he could" to so furnish it, and evidenced an effort on his part to comply with his undertaking. *St. Louis, etc., R. Co. v. Cannington (Civ. App.)*, 110 S. W. 965; *Texas, etc., R. Co. v. Arnett*, 40 Tex. Civ. App. 76, 88 S. W. 448.

**(2) Mutuality of Obligation.**

A railroad company can recover damages against a shipper who fails to furnish the goods to be shipped at the time and place agreed on, and the company having been ready with their cars to receive them. The responsibilities for breach of contract can not rest upon one of the parties whilst the other is to reap its bene-

fits only. *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491, 496.

**(3) Date.**

See post, "Admissibility," IX, E, 1, e. (4), (b).

**(4) Authority of Agent.****(a) Necessity.**

See ante, "Authority to Make," IX, B, 3; post, "In General," IX, E, 1, b. (4), (b), aa, (aa).

**(b) Scope and Proof.****aa. Station Agent.****(aa) In General.**

A railway station master is by virtue of his position ordinarily the agent of the carrier for the making of contracts to furnish cars at his station upon the road. *Easton v. Dudley*, 78 Tex. 236, 14 S. W. 583; *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 37, 15 S. W. 164; *Gulf, etc., R. Co. v. Hume Bros.*, 6 Tex. Civ. App. 653, 24 S. W. 915, affirmed, on this point, by the supreme court in 87 Tex. 211; *Gulf, etc., R. Co. v. Hodge*, 10 Tex. Civ. App. 543, 547, 30 S. W. 829.

A railway station agent has power to contract to furnish cars at a named place and day for the transportation of freight. *McCarty v. G. C. & S. F. Ry. Co.*, 79 Tex. 33, 15 S. W. 164.

**Express Authority Unnecessary.**—A contract made by a station agent that the company will furnish cars at a named place and day for transportation of freight, binds the company, notwithstanding such a power may not have been expressly conferred on him. *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 37, 15 S. W. 164; *Easton v. Dudley*, 78 Tex. 236, 14 S. W. 583.

**Presumption as to Authority.**—The local agent of a railway company has authority, presumptively, to make contracts for cars; and if he does make such a contract, and receives notice as to when the cars were desired, and agrees to furnish them on that date, the railroad company will be liable for a failure to do so, even though rea-

sonable time was not given to have them on hand. *Galveston, H. & S. F. Ry. Co. v. Thompson* (Civ. App.), 44 S. W. 8, following *Easton v. Dudley*, 78 Tex. 236, 14 S. W. 583.

Whether or not an agent of a railroad company had authority to make a contract to furnish cars for the shipment of cattle is a matter of proof, and it is error to sustain a demurrer to an answer, in an action against such company for injury to the shipment, alleging want of such authority. *Texas & P. Ry. Co. v. Hamm*, 2 Willson, Civ. Cas. Ct. App. § 491.

**Burden of Proof.**—Railroad company is bound by act of station agent contracting to furnish cattle cars, in absence of evidence showing knowledge on part of shipper that agent exceeded his authority. *Gulf, etc., R. Co. v. Hume Bros.*, 6 Tex. Civ. App. 653, 656, 24 S. W. 915, reversed in 87 Tex. 211.

In order for the railway to relieve itself from liability, it devolves upon it to show want of authority in the agent, and that the shipper knew it. *Gulf, etc., R. Co. v. Hume Bros.*, 6 Tex. Civ. App. 653, 24 S. W. 915, reversed, on another point, in 87 Tex. 211.

Where it is understood that the shipper knew of no limitation upon the authority of the station agent, it was proper for the court to instruct the jury that the agent had the power to contract for the railway for supply of cars, etc., for a shipper. *Gulf, etc., R. Co. v. Hume Bros.*, 6 Tex. Civ. App. 653, 24 S. W. 915, reversed in 87 Tex. 211.

Where a contract to furnish cars to a shipper was made with an agent having no authority to make it, and he did not report it to the carrier, and the carrier did not learn of it, it was not binding on the carrier. *Gulf, C. & S. F. Ry. Co. v. Dinwiddie*, 51 S. W. 353, 21 Tex. Civ. App. 344.

**Admissibility and Weight.**—Evidence of contracts of witness with the agent of the railway company, by which cars had been furnished at I., was admissible to show that such agent's contract with plaintiff to furnish cars at I., was within the scope of his authority. *Pecos River R. Co. v. Latham*, 88 S. W. 392, 40 Tex. Civ. App. 78.

In an action against a carrier for failure to furnish cars at the time agreed on for a shipment, it appeared that plaintiff called up the station agent by telephone, but was told that the station agent was not there; that plaintiff gave his order for cars to the one who answered, who stated that it would be all right; but it appeared that he had no authority, and that plaintiff had no reason to think that he had. Held not to show any contract to furnish cars. *Gulf, W. T. & P. Ry. Co. v. Fromme* (Civ. App.), 86 S. W. 651.

**(bb) Time When Cars to Be Furnished.**

A local agent having the power to contract for a shipment has also power to agree with the shipper upon a time at which the cars necessary for that shipment shall be furnished. *Easton v. Dudley*, 78 Tex. 236, 14 S. W. 583; *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 37, 15 S. W. 164; *Gulf, etc., R. Co. v. Hume Bros.*, 87 Tex. 211, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915; *Gulf, etc., R. Co. v. Jackson*, 99 Tex. 343, 89 S. W. 968, reversing 86 S. W. 47; *Gulf, etc., R. Co. v. Irvine* (Civ. App.), 73 S. W. 540; *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 48, 99 S. W. 418; *Austin, etc., R. Co. v. Slator*, 7 Tex. Civ. App. 344, 347, 26 S. W. 233; *Galveston, etc., R. Co. v. Thompson* (Civ. App.), 44 S. W. 10; *Cross v. Graves*, 4 App. Civ. Cases, § 100, 16 S. W. 102.

The authority to contract for the shipment implied the power to make

the agreement to furnish cars at a given time. It was necessary to enable the agent properly to perform his duties. *Gulf, etc., R. Co. v. Jackson*, 99 Tex. 343, 89 S. W. 968, reversing 86 S. W. 47; *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 50, 99 S. W. 418; *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 37, 15 S. W. 164; *Gulf, etc., R. Co. v. Hume Bros.*, 87 Tex. 211, 219, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915.

In the case of *Gulf, etc., R. Co. v. Jackson*, 99 Tex. 343, 89 S. W. 968, reversing 86 S. W. 47, the court says in reference to *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 37, 15 S. W. 164, and *Gulf, etc., R. Co. v. Hume Bros.*, 87 Tex. 211, 219, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915: "These cases rest upon the well-recognized rule of law that, by conferring upon an agent express power to do certain acts, the authority is implied to do whatever may be necessary to execute the express power." *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 50, 99 S. W. 418.

In the absence of testimony showing a limitation upon his authority, a local station agent of a railway company has authority to bind the railway company by contract to furnish cars at a particular time. *Austin, etc., R. Co. v. Slator*, 7 Tex. Civ. App. 344, 347, 26 S. W. 233; *Easton v. Dudley*, 78 Tex. 236, 239, 14 S. W. 583.

"If the agent can contract to receive the freight, he can contract as to the time when he will receive it and as to every other undertaking necessary to that end." *Easton v. Dudley*, 78 Tex. 236, 239, 14 S. W. 583; *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 48, 99 S. W. 418.

The printing of the rule, upon the subject of the agent's authority to contract for cars at a specified time, in the contracts can not be notice to a shipper of his want of authority,

for the reason that such contracts in the natural course of things would not be known to the shipper until after the contract for cars had been made. There is no error in excluding the evidence offered to show that the agent had no authority to make the contract. *Gulf, etc., R. Co. v. Hume Bros.*, 87 Tex. 211, 219, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915.

To hold that the denial, in the printed forms of shipping contracts, to the agent of authority to contract for cars at a specified time, deprives him of such authority, is to hold that the powers necessary to carry out his agency have been utterly destroyed by such stipulation. *Easton v. Dudley*, 78 Tex. 236, 14 S. W. 583; *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 50, 99 S. W. 418.

#### (cc) Station at Which Cars to Be Furnished.

The station agent of a railroad company may bind it by a contract to furnish cars at his station for the shipment of freight, but not at other stations. *Gulf, C. & S. F. Ry. Co. v. Hodge*, 10 Tex. Civ. App. 543, 30 S. W. 829.

An agent of a railway company has no implied authority to order cars for another station. *Southern Kansas R. Co. v. Cox*, 47 Tex. Civ. App. 84, 103 S. W. 1122; *Missouri, etc., R. Co. v. Belcher*, 88 Tex. 549, 32 S. W. 518; *Gulf, etc., R. Co. v. Jackson*, 99 Tex. 343, 89 S. W. 968, reversing 86 S. W. 47; *Gulf, etc., R. Co. v. Hodge*, 10 Tex. Civ. App. 543, 30 S. W. 829; *Gulf, etc., R. Co. v. Dinwiddie*, 21 Tex. Civ. App. 344, 51 S. W. 353.

Railway is not liable for damages for breach of contract made by its agent to furnish cars at another station than that at which he is stationed, unless the agent is shown to have been authorized to so contract or the company had notice of and ratified such contract. *Gulf, etc., R. Co. v.*

Dinwiddie, 21 Tex. Civ. App. 344, 51 S. W. 353; Gulf, etc., R. Co. v. Hodge, 10 Tex. Civ. App. 543, 548, 30 S. W. 829; Missouri, etc., R. Co. v. Belcher, 88 Tex. 549, 32 S. W. 518; S. C., 89 Tex. 428, 35 S. W. 6.

In an action for breach of a carrier's contract to furnish cars, evidence of a witness as to contracts made by him with C., the agent of the Texas & Pacific Railway Company, by which cars had been furnished at I., a station on the line of such company, was admissible to show that such agent's contract with plaintiff to furnish cars at I., instead of the place originally contemplated, was within the scope of the agent's authority. *Pecos River R. Co. v. Latham*, 40 Tex. Civ. App. 78, 88 S. W. 392, affirmed in 101 Tex. 652, no op.

In an action against a railroad for breach of a contract made by a station agent in one county to furnish cars in another county, the railroad could show a want of authority in the station agent to contract for the furnishing of cars in other counties. *Texas & P. Ry. Co. v. Ray Bros. & Hughes*, 84 S. W. 891, 37 Tex. Civ. App. 622, citing *Gulf, etc., R. Co. v. Hodge*, 10 Tex. Civ. App. 543, 30 S. W. 829; *Gulf, etc., R. Co. v. Dinwiddie*, 21 Tex. Civ. App. 344, 51 S. W. 353.

Action for damages from breach of a contract made by station agent for 150 cars, for use in shipping corn from Belton to Laredo. The contract by plaintiffs with the Laredo house, the purchasers of the corn, required plaintiffs to load the corn upon the cars at place of shipment, and did not require the delivery by plaintiffs at Laredo. It was therefore not necessary that the station agent have authority to make freight contracts from Belton to Laredo. Having authority to contract for supply of cars for the shipper, the railway company was bound by his contract to furnish the cars as the contract declared on.

*Gulf, etc., R. Co. v. Hodge*, 10 Tex. Civ. App. 543, 30 S. W. 829.

#### bb. Traveling Agent.

Whether a carrier's traveling freight agent has authority to contract to furnish cars, held, under the evidence, for the jury. *St. Louis, etc., R. Co. v. Boshear*, 102 Tex. 76, 113 S. W. 6.

Whether a carrier ratified the contract of its traveling freight agent to furnish cars for a through transportation over its own and a connecting line, if he acted without authority, held, under the evidence, to be for the jury. *St. Louis, etc., R. Co. v. Boshear*, 102 Tex. 76, 113 S. W. 6.

Where defendant's agent contracted to furnish cars at a point on another line for a through shipment to a destination on his own line, and the rule of the initial carrier was that responsibility for through transportation must be assumed, if at all, by its connecting carrier, the transaction must be assumed to have been conducted in accordance with that custom, the duty to furnish the cars under the contract resting upon defendant, and hence it could ratify the agent's act. *St. Louis, etc., R. Co. v. Boshear*, 102 Tex. 76, 113 S. W. 6.

Defendant not being legally bound to furnish cars on another line, unless it had agreed to do so, and the rule of the other line requiring defendant to do so to insure the passing of the shipment to destination over defendant's line, the fact that it furnished cars to be so used at the instance of its agent would justify an inference that it acted upon the agent's agreement. *St. Louis, etc., R. Co. v. Boshear*, 102 Tex. 76, 113 S. W. 6.

Evidence that similar agreements of a traveling freight agent, to furnish cars at points on other lines for through shipments to points on his line, were acted upon by the carrier tends to show that the making of such agreements was within the agent's authority. *St. Louis, etc.,*

R. Co. v. Boshear, 102 Tex. 76, 113 S. W. 6.

**(5) Writing—Parol Contracts.**

See ante, "Verbal Contracts," IX, B, 4.

A station agent of a railroad company can bind it by verbal contract to furnish cars at a given time for the shipment of freight, unless the shipper knows that the agent has no such authority. *Gulf, C. & S. F. Ry. Co. v. Hume*, 87 Tex. 211, 27 S. W. 110; *Easton v. Dudley*, 78 Tex. 236, 14 S. W. 583; *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 37, 15 S. W. 164; *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915; *International, etc., R. Co. v. True*, 23 Tex. Civ. App. 523, 57 S. W. 977, affirmed in 94 Tex. 705, no op.; *Texas, etc., R. Co. v. Gallagher (Civ. App.)*, 70 S. W. 97; *Gulf, etc., R. Co. v. Irvine (Civ. App.)*, 73 S. W. 540.

Upon issue as to the authority of a station agent to contract verbally to furnish cars at a given time for the shipment of freight, the fact that the rule denying such authority was printed upon the contract of shipment, is properly excluded for the reason that the shipper would not naturally know of such contract until after the contract for cars was made. *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 219, 27 S. W. 110.

The fact that a shipper knew that he would be required to sign a written contract before his property was shipped, would not, as a matter of law, destroy the oral contract for the cars at a certain time, even though he may have known that the written contract would probably contain a negation to the agent of the power or authority to agree to furnish cars at any specified time. *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 48, 99 S. W. 418.

**c. Construction.**

Contract to furnish cars when en-

tered into are to be governed by the ordinary and general rules of construction that relates to contracts and the breaches thereof. *Cross v. McFaden*, 1 Tex. Civ. App. 461, 465, 20 S. W. 846; *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491, 495; *Gulf, etc., R. Co. v. McCorquodale*, 71 Tex. 41, 46, 9 S. W. 80.

**d. Performance, Discharge or Breach.**

**(1) Liability for Breach.**

A carrier is liable for damages resulting from a breach of a contract to furnish cars at a specified time and place. *Cross v. McFaden*, 1 Tex. Civ. App. 461, 465, 20 S. W. 846; *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491, 495; *Gulf, etc., R. Co. v. McCorquodale*, 71 Tex. 41, 46, 9 S. W. 80; *Pecos River R. Co. v. Latham*, 40 Tex. Civ. App. 78, 88 S. W. 392, affirmed in 101 Tex. 652, no op.

Where a railway company promises to provide cars at a certain time, in which to ship property, it would be liable for its failure to have them at the time promised for a breach of contract as an individual, and not as a common carrier. *International, etc., R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186, 23 S. W. 754.

An action against a railroad company for breach of a parol agreement to furnish cars at a time specified is not an action for the penalty prescribed by Sayles' Civ. St., art. 4227a, for a failure to supply cars on written application, and is maintainable. *Receivers of Missouri, K. & T. Ry. Co. v. Graves*, 4 Willson, Civ. Cas. Ct. App. § 100, 16 S. W. 102.

Where a carrier agreed to furnish a shipper stable cars, which were not shown to be the only suitable kind and proper for the freight to be shipped, although that did not render it liable to the statutory penalty for a failure to do so, it is liable to damages for breach of the contract. *Texas, etc., R. Co. v. Barrow*, 33 Tex. Civ. App. 611, 77 S. W. 643, affirmed



in 101 Tex. 663, no op.; Austin, etc., R. Co. v. Slator, 7 Tex. Civ. App. 344, 346, 26 S. W. 233.

The Texas statute in no way limits the liability for damages for breach of a contract, in which case it is only necessary to show a valid contract and the extent of injury from its breach. *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 15 S. W. 164.

A shipper, if he desires only to recover for breach of contract to furnish cars, although he may be entitled to recover the statutory penalty for carrier's failure to furnish cars, need only show a valid contract, breach and extent of injury. *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 38, 15 S. W. 164.

The refusal to permit shipper to use cars furnished him at an agreed time and place, and resulting in damage, gives cause of action. *Cross v. McFaden*, 1 Tex. Civ. App. 461, 20 S. W. 846.

Whether or not the cars contracted for were furnished within a reasonable time was a question of fact for the jury to be determined from all the evidence, and not a fact to be proved by the opinion of any witness. *Pecas, etc., R. Co. v. Evans-Snyder-Buel Co.*, 42 Tex. Civ. App. 60, 93 S. W. 1024, affirmed 100 Tex. 190.

### (3) Excuses for Breach.

#### (a) Unusual Volume of Business.

Heavy and unprecedented traffic does not relieve a carrier from liability for breach of a contract to furnish cars at a certain time. *Gulf, C. & S. F. Ry. Co. v. Hume*, 6 Tex. Civ. App. 653, 24 S. W. 915, following *Cross v. McFaden* (1892), 1 Tex. Civ. App. 461, 20 S. W. 846; *Gulf, C. & S. F. Ry. Co. v. Hume*, 87 Tex. 211, 27 S. W. 110.

Inability of a railroad to furnish cars contracted for, owing to an unexpected increase in its volume of business, is no defense for breach of such contract. *Gulf, C. & S. F. Ry.*

*Co. v. Hodge*, 10 Tex. Civ. App. 543, 30 S. W. 829; *Southern Kansas R. Co. v. Morris* (Civ. App.), 99 S. W. 433, affirmed in 100 Tex. 611; *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 220, 27 S. W. 110.

Where a station agent made a contract to furnish cars at a given time for the shipment of freight, the fact that owing to heavy shipments of similar freight, the company had not enough cars to furnish those contracted for, is no defense to a suit for breach of contract. *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 219, 27 S. W. 110.

#### (b) Road Not Equipped with Cars of Character to Be Furnished.

Where a carrier agreed to furnish a certain kind of cars it could not avoid the consequences of a breach of the duty to do so by showing that its road was not equipped with cars of that character. *International & G. N. R. Co. v. J. R. True & Co.*, 23 Tex. Civ. App. 523, 57 S. W. 977.

A railroad company which does not own refrigerator cars, but has an arrangement with the owners of such cars whereby it can furnish the same to its shippers, is liable for injuries to shippers caused by delay in furnishing cars when promised. *International & G. N. R. Co. v. Young* (Civ. App.), 28 S. W. 819; *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491.

### (3) Damages.

#### (a) Measure and Elements.

A carrier, for breach of contract to furnish cars to plaintiff, made with knowledge that he had a contract to deliver to others grain on board the cars at a certain price, is liable for the profit which he would have made but for such breach. *Gulf, C. & S. F. Ry. Co. v. Hodge* (Tex. Civ. App.), 39 S. W. 986.

#### (b) Duty of Shipper to Mitigate.

See the titles CARRIERS OF GOODS; CARRIERS OF LIVE STOCK.

A shipper is not required in any

attempt to lessen the damages resulting from a carrier's refusal to supply cars as contracted for, to employ, or attempt to employ, another carrier to do that which the defendant carrier had obligated itself to do, and the failure to do which constitutes the breach sued upon. *Gulf, etc., R. Co. v. Hodge*, 10 Tex. Civ. App. 543, 30 S. W. 829.

### (c) Special Damages.

In an action against a railroad for failure to furnish cars for the shipment of cattle according to contract, there can be no recovery for horse hire made necessary by the delay, where such item is not pleaded. *Texas, etc., R. Co. v. Arnett*, 40 Tex. Civ. App. 76, 88 S. W. 448.

An item of damages was loss of price on 4,000 bushels of corn from the breach of contract to furnish cars. There was no averment of injury to corn accumulated, through exposure, etc. Held, error to admit testimony to the injury not alleged. *Gulf, etc., R. Co. v. Hodge*, 10 Tex. Civ. App. 543, 30 S. W. 829.

### (d) Release and Waiver.

Damages for breach of a contract to furnish cars for a shipment are not released by a provision in a subsequent contract releasing such damages for the expressed consideration of a reduced freight rate, where it appears that no reduction was given. *Missouri, etc., R. Co. v. Darlington* (Civ. App.), 40 S. W. 550; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 680, 29 S. W. 565; *G. C. & S. F. R. Co. v. Holliday*, 65 Tex. 512. See ante, "Meiger of Verbal in Subsequent Written Contract," IX, B, 4, c.

### e. Actions for Breach.

#### (1) Nature and Form.

See ante, "Liability for Breach," IX, E, 1, d, (1).

#### (2) Pleading.

**Special Damage.**—See ante, "Special Damages," IX, E, 1, d, (3), (c).

#### (3) Issues and Proof.

Where, in an action for breach of a carrier's contract to furnish cars, plaintiff alleged that defendant's agents who acted for them in negotiating the contract, to wit, W. and S., were duly authorized to make such contract, proof that plaintiff negotiated the contract with S. through letters and telegrams, and consummated a verbal contract with M., did not constitute a fatal variance. *Pecos River R. Co. v. Latham*, 40 Tex. Civ. App. 78, 88 S. W. 392, affirmed in 101 Tex. 652, no op.

#### (4) Evidence.

##### (a) Presumptions and Burden of Proof.

In an action against a railroad for its failure to furnish cars within a reasonable time for the shipment of cattle, the burden is on plaintiff to prove the making of a contract for the cars. *Texas & P. Ry. Co. v. Ray Bros. & Hughes*, 84 S. W. 691, 37 Tex. Civ. App. 622.

**Authority of Agent.**—See ante, "Authority of Agent," IX, E, 1, b, (4).

##### (b) Admissibility.

In an action against a carrier for failure to furnish cars, evidence that cars were ordered at a station from the agent there, who stated that cars could be had through the agent at another place, was admissible, as showing that the carrier had contracted to furnish cars. *Gulf, etc., R. Co. v. House*, 40 Tex. Civ. App. 105, 88 S. W. 1110.

**Date of Contract.**—Plaintiff, in his petition in an action for breach of contract, alleged the making of a contract with defendant on or about June 10th to furnish him by June 14th cars to be delivered June 17th. Held, that the time of the making of the contract was not material, and it was error to exclude evidence of a contract made

on June 14th. *Morehouse v. Texas*, etc., R. Co., 4 App. Civ. Cases, § 267, 17 S. W. 1086.

It was sufficient to prove that the damage occurred by reason of the failure of appellee to furnish the cars, without reference particularly to the date of the entering into said contract. *Morehouse v. Texas*, etc., R. Co., 4 App. Civ. Cases, § 267, 17 S. W. 1086; *St. Louis*, etc., R. Co. v. *Evans*, 78 Tex. 369, 14 S. W. 798; *Brown v. Sullivan*, 71 Tex. 470, 477, 10 S. W. 288.

**Custom.**—In a suit for damages for breach of contract to furnish cars, evidence of custom in the matter of furnishing cars was properly excluded as irrelevant and immaterial. *Pecos*, etc., R. Co. v. *Evans-Snider-Buel Co.*, 42 Tex. Civ. App. 60, 93 S. W. 1024, affirmed in 100 Tex. 190.

**Authority of Agent.**—See ante, "Authority of Agent," IX, E, 1, b, (4).

#### (5) Instructions.

In an action against a railroad company for failure to furnish cars for the shipment of live stock, the court instructed that if the jury believed that plaintiffs contracted with defendant's agent to furnish the cars at a certain time and place, and that the agent had the authority to make such contract, and that defendant failed to receive and ship the cattle as agreed, to plaintiffs' damage, they must find for plaintiffs. Held not error; that if, defendant wished to raise an issue as to the agent's authority to make such a contract, it should have tendered an instruction on that subject. *McCarty v. Gulf, C. & S. F. Ry. Co.*, 79 Tex. 33, 15 S. W. 164.

Plaintiffs declared upon a verbal contract to furnish cars. Defendant contended that the shipment was under a certain written contract or bill of lading. The court, besides instructing that if the jury believed from the evidence that defendant's agent made such a contract, and had authority to do so,

and that defendant failed to furnish the cars to plaintiffs' damage they should find a verdict in their favor, gave correct instructions as to the measure of damages. Held, that the court fairly submitted the issue under the verbal contract. *McCarty v. Gulf, C. & S. F. Ry. Co.*, 79 Tex. 33, 15 S. W. 164.

In an action against a railroad for failure to furnish cars, the petition alleged the making of a contract with defendant's agent in one county to furnish cars at a point in another county. There was evidence of an application for cars as alleged, but no direct evidence of the agent's authority to make such a contract. The agent testified that no request had been made of him, but that his books showed that the request was made of his clerk, and recited that the message had been sent to the agent in the other county. The court, in its general charge, submitted the issue of contract *vel non*, as alleged, and in its special charge stated that the local agent had no authority to bind defendant to furnish cars in the other county, but had the right to place an order with the local agent in the other county, for cars to be furnished there, and that, if he did place the order, defendant would be bound thereby. Held, that the general charge, together with the special charge, was confusing. *Texas & P. Ry. Co. v. Ray Bros. & Hughes*, 84 S. W. 691, 37 Tex. Civ. App. 622.

The special charge was also on the weight of the evidence. *Texas*, etc., R. Co. v. *Ray Bros.*, 37 Tex. Civ. App. 622, 84 S. W. 691.

The special charge also presented an issue and ground of recovery not presented by the pleadings. *Texas*, etc., R. Co. v. *Ray Bros.*, 37 Tex. Civ. App. 622, 84 S. W. 691.

Where the record fails to disclose any evidence that defendant's agent agreed to furnish cars at a particular

day named, it is error to charge that, if the jury believe from the evidence that the agent failed to furnish the cars as agreed, plaintiff is entitled to recover damages suffered by reason of such failure. *Texas, etc., R. Co. v. Avery* (Civ. App.), 33 S. W. 704.

In an action for breach of contract by a carrier's agent to furnish cars, where the evidence was conflicting as to what the agent told plaintiff, a requested charge that the agent's statement that he would try to have the cars furnished would not be an agreement to do so, and the verdict should be for defendant, was properly refused, as assuming that the statement was as stated. *St. Louis, etc., R. Co. v. Boshear*, 102 Tex. 76, 113 S. W. 6.

### 2. Contract for Transportation beyond Carrier's Own Line.

The doctrine is now firmly established, and has been long acquiesced in and acted upon, that a railroad company may, by contract, bind itself to transport passengers or property beyond its own line. The railroad company having power to bind itself by such contracts, and the general passenger agent being the party through whom they are usually and ordinarily made, and the contract made by that agent with the plaintiff being of this character, it must be held binding upon the carrier, and the latter is liable upon its breach for such damages as are allowed by law for the violation of contracts of this character. *Houston, etc., R. Co. v. Hill*, 63 Tex. 381, 384.

**Authority of Agent.**—Where a local station agent has been for six months issuing bills of lading to points beyond his company's line, a contract made by him for transportation over a connecting line is binding on the agent's company, though it has instructed him not to make such contracts, in the absence of actual or constructive knowledge of such instructions by the shipper. *Gulf, C. & S.*

*F. Ry. Co. v. Cole*, 8 Tex. Civ. App. 635, 28 S. W. 391.

A local freight agent of a railroad ordinarily has no authority to bind the railroad to carry freight beyond its line, unless it is shown that the railroad has engaged in the business of carrying freight beyond its line. *Gulf, C. & S. F. Ry. Co. v. Jackson & Edwards*, 99 Tex. 343, 89 S. W. 968, reversing judgment (Civ. App.), 86 S. W. 47; *Same v. Brown & Williamson*, 99 Tex. 349, 89 S. W. 971; *Same v. Zimmerman*, Id. Reversing judgment (Civ. App.), 86 S. W. 54, 99 Tex. 343.

The fact that a station agent exceeds his authority in making a through contract for transportation, does not invalidate such contract for such part of it as lies within his authority. *Gulf, C. & S. F. Ry. Co. v. Hodge & Long*, 10 Tex. Civ. App. 543, 30 S. W. 829.

### 3. Contracts as to Route.

See the title CARRIERS OF GOODS.

### 4. Contracts to Furnish Freight.

A contract with a proposed railroad, securing to it a percentage of all the tonnage moved by rail, incident to the operation of salt-works, and referring in a clause to tonnage into and out of Grand Saline, contemplates both the incoming and outgoing tonnage to the operation of the works. *Lone Star Salt Co. v. Texas Short Line Ry. Co.* (Civ. App.), 86 S. W. 355.

Plaintiff railroad agreed to construct a road to the town wherein defendant's salt works were located, to give defendant the benefit of competition in rates; defendant agreeing to furnish plaintiff for transportation "for the full term of 20 years, 66 per cent. of all the tonnage moved by rail incident to the operation of its said works." The contract was silent as to the times when and the quantities in which the tonnage was to be delivered, but provided for the payment of liquidated

damages for each year in which defendant should fail to tender to plaintiff 66 per cent. of its tonnage. It was shown that plaintiff's road was only nine miles in length, and passed through an unsettled territory, in which the traffic originating, besides that derived from defendant's business, was not sufficient to justify the building of the road, and that without such business it would be operated at a heavy loss. It also appeared that defendant's business required the constant transportation of its product and its supplies, and that the prompt filling of some of its orders could be better accomplished by shipment over a road other than plaintiff's. Held, that the contract did not obligate defendant to deliver to plaintiff for transportation by regular and continuous delivery 66 per cent. of its tonnage as it accrued. *Lone Star Salt Co. v. Texas Short Line Ry. Co.*, 90 S. W. 863, 99 Tex. 434. See the title SPECIFIC PERFORMANCE.

An apparent clerical error in writing a shipping contract or copying it into the record, by which the shipper is made to agree to pay any loss or damage, to his own property, etc., will be disregarded and the agreement treated as one on part of the company to pay the loss if any as therein limited. *St. Louis, etc., R. Co. v. Rogers*, 49 Tex. Civ. App. 304, 108 S. W. 1027, affirmed, no op.

##### 5. Contracts for Drayage or Hauling.

A railway company was liable for breach of a contract whereby plaintiff was to haul to its depot all freight for shipment over its road originating within certain limits, for a fixed compensation, and can not escape liability for depriving plaintiff of the right to perform the service at the price agreed upon by having it delivered to another road at the initial point and hauled by that road to another point on its line before receiving it, where the person controlling the routing of

the shipment designated defendant's and not the other road as the route. *Gulf, etc., R. Co. v. Dennison*, 25 Tex. Civ. App. 127, 60 S. W. 281, distinguishing *Gulf, etc., R. Co. v. Dennison*, 22 Tex. Civ. App. 89, 58 S. W. 834.

An agreement between defendant railway and plaintiff that the latter should haul to the depot of the former, for a named price agreed to be paid by it, all freight that local shippers might desire to have transported over its railroad, did not bind defendant to furnish such hauling to plaintiff unless the shippers selected defendant's road. Where they shipped by another road to an adjoining town, and there transferred to defendant's road, plaintiff could not recover for loss of the profits of hauling to defendant's depot. *Gulf, etc., R. Co. v. Dennison*, 22 Tex. Civ. App. 89, 58 S. W. 834.

Defendant railroad company contracted with plaintiff to pay the latter for all freight carried to its depot for persons living in a certain city who wished to ship freight on defendant's line. Plaintiff commenced to deliver a large quantity of freight at defendant's depot, but was stopped by the latter, and paid for what he had delivered; the shipper having made arrangements to deliver the freight to another road, at another station, to be delivered to defendant at a connecting point. Held that it was error to instruct that the defendant had agreed by such contract to pay the plaintiff for hauling such freight, since the contract did not bind the shipper to deliver the goods to defendant company. *Gulf, C. & S. F. Ry. Co. v. Dennison*, 58 S. W. 834, 22 Tex. Civ. App. 89.

Plaintiff suing for damages from being denied the right to perform his contract for lucrative service, assumes the burden of showing that he was able and willing to perform his part,

had defendant permitted. *Gulf, etc., R. Co. v. Dennison*, 22 Tex. Civ. App. 89, 58 S. W. 834.

In an action for breach of a railroad's contract to pay plaintiff certain rates for hauling and delivering to defendant's depot for shipment, freight originating within a specified radius, a consignor was entitled to testify that the consignee was entitled to route a shipment by rail. *Gulf, Colorado & S. F. Ry. Co. v. Dennison*, 25 Tex. Civ. App. 127, 60 S. W. 281.

#### **6. Contracts Enlarging Carrier's Liability.**

See ante, "Stipulations Enlarging Common-Law Liability," VIII, B. 2, b, (5).

**Clear and Precise Language.**—To make a contract which enlarges a carrier's liability so as to waive the limited protection which the law affords him when entered into, it "must be done by clear and precise language; for the law will not imply from any doubtful language such an intention, but will rather presume, when the meaning of the contract is doubtful, that it was not his intention to waive a protection so reasonable and so important to him. Express language will be required to impose upon a party the responsibility of an insurer beyond his legal obligation, or to prevent the operation of the customary rule in cases where the act of God or inevitable accident excuses the non-performance of a contract." *International, etc., R. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 14, 27 S. W. 680, affirmed in 87 Tex. 311.

Statements by the commercial agent of a common carrier duly authorized to solicit shipments of freight in response to a statement by the shipper that he "wanted a quick run," that "it would take four days" to get the freight to the Wednesday morning market, and that he would give the shipper a quick run and as he had ten cars he could run them as special;

does not constitute an express contract on the part of the carrier to ship and deliver within four days. *International, etc., R. Co. v. Wentworth*, 87 Tex. 311, 28 S. W. 277, affirming 27 S. W. 680, 8 Tex. Civ. App. 5.

#### **7. Contracts Limiting Carrier's Liability.**

See ante, "Limitation of Carrier's Common-Law Liability," VIII.

### **X. Bills of Lading.**

#### **A. DEFINITION AND NATURE.**

Bill of lading is a receipt (for the freight) as well as a contract of carriage in writing. *East Line, etc., R. Co. v. Hall*, 64 Tex. 615, 620; *Dwyer v. Gulf, etc., R. Co.*, 69 Tex. 707, 710, 7 S. W. 504. See post, "As Contract," X, D. 1.

#### **As Property and Evidence of Rights.**

—A bill of lading is property and evidence against a railroad company of valuable rights. *Gulf, etc., R. Co. v. Brown*, 4 Tex. Civ. App. 435, 23 S. W. 618.

#### **B. FORM, CONTENTS AND PAPERS WHICH ARE PART.**

##### **1. The Law.**

What the law inserts is as much a part of a bill of lading as what is expressly written therein. *Ryan & Co. v. M. K. & T. R. Co.*, 65 Tex. 13, 19.

##### **2. Published Tariffs to Which Reference Made.**

Where a bill of lading by a railway company states that it is "subject to the published tariff of said company and its connections," and said tariff is well known to the shipper, rates in the tariff, when applicable, will form part of the freight contract. *Atchison, etc., R. Co. v. Roberts & Co.*, 3 Tex. Civ. App. 370, 22 S. W. 183.

##### **3. Expense Account Furnished by Carrier.**

An expense account, furnished by

the carrier, and showing the amount of freight, constitutes no part of the bill of lading, and can not be used in aid of it unless referred to therein. *Texas & P. R. Co. v. Wood* (Civ. App.), 23 S. W. 744.

#### 4. Under Texas Penal Statute.

See ante, "Penalty under Statute Prescribing Form and Contents of Bill of Lading," VII, D.

#### 5. Proof of Contents by Parol Evidence.

##### a. In General.

The bill of lading is the best evidence of the contract for the shipment and delivery of goods and it was error to permit parol evidence thereof. *St. Louis Southwestern Ry. Co. v. Cates*, 15 Tex. Civ. App. 135, 38 S. W. 648. See *Missouri, etc., R. Co. v. Cocreham*, 10 Tex. Civ. App. 166, 30 S. W. 1118; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

##### b. Production of Bill of Lading.

Where a suit against a common carrier is founded on a bill of lading, then the bill of lading must be produced in evidence, or its nonproduction must be accounted for, and its substance proved as alleged. *Missouri Pac. Ry. Co. v. Nicholson*, 2 Willson, Civ. Cas. Ct. App. § 169; *Texas, etc., R. Co. v. Wheat*, 2 App. Civ. Cases, § 165.

If an action to recover for injury to live stock is founded on the carrier's common-law liability, and not on the bill of lading, it is not necessary for plaintiff to produce the bill of lading in evidence. *Missouri Pac. Ry. Co. v. Nicholson*, 2 Willson, Civ. Cas. Ct. App. § 169.

Where an action for injury to live stock is based on the bill of lading, plaintiff can not recover unless he produce the bill in evidence, or account for its nonproduction and prove its substance as alleged. *Texas & P. Ry. Co. v. Wheat*, 2 Willson, Civ. Cas. Ct. App. § 165; *Missouri Pac. Ry. Co. v. Nicholson*, Id. § 169.

In an action against a common carrier founded on the common-law liability of such carrier, it is not necessary to produce in evidence a bill of lading of the property alleged to have been lost or injured, as, if there was a special contract restricting the common-law liability of the carrier, it devolved on the carrier to allege and prove it. *Missouri Pac. Ry. Co. v. Nicholson*, 2 Willson, Civ. Cas. Ct. App. § 169.

An action for damage to goods, founded on a bill of lading, can not be maintained, if the bill is not produced in evidence, or its nonproduction not accounted for. *Galveston, H. & S. A. Ry. Co. v. Van Winkle*, 3 Willson, Civ. Cas. Ct. App. § 444; *Texas, etc., R. Co. v. Logan*, 3 App. Civ. Cases, § 186.

When a petition alleged that a shipment was made on through bills of lading, and at agreed and through rates, for the "whole route," it was founded on special contract evidenced by bill of lading, and not on common-law liability of the carrier. *Texas, etc., R. Co. v. Wheat*, 2 App. Civ. Cases, § 165.

Where, in an action against a carrier for injuries to a shipment, there was an issue as to ownership, it was error to permit plaintiff to testify to the contents of the bill of lading, in order to show that he was the owner; the bill not having been produced, and no notice given to defendant to produce it. A bill of lading is the best evidence of its contents, and secondary evidence will not be admissible, unless its absence is accounted for. *Texas Cent. R. Co. v. Fowler* (Civ. App.), 102 S. W. 732.

A petition alleged that plaintiff shipped cattle from Memphis, Tenn., to Ft. Worth, Tex., over several lines of connecting railroad, one of which was defendant's line; that said shipment was made "on through bills of lading, and at agreed and through

rates, for the whole route, the contracts and bills of lading of each of said railroads in regard to the shipment of cattle being recognized and carried out by the other;" that the cattle were damaged by the negligence of defendant, etc. Held, that the petition was founded on the special contract evidenced by the bill of lading, and not on the liability of the carrier at common law. *Texas & P. Ry. Co. v. Wheat*, 2 Willson, Civ. Cas. Ct. App. § 165.

A petition alleged that plaintiff shipped cattle from Memphis, Tenn., to Ft. Worth, Tex., over several lines of connecting railroad, one of which was defendant's line, and that said shipment was made "on through bills of lading, and at agreed and through rates for the whole route, the contracts and bills of lading of each of said railroads in regard to shipment of cattle being recognized and carried on by the other;" that the cattle were damaged by the negligence of defendant, etc. Held that, the suit being upon the bill of lading, plaintiff was not entitled to recover without introducing the same in evidence, or accounting for its nonproduction, and then establishing its substance as alleged. *Texas & P. Ry. Co. v. Wheat*, 2 Willson, Civ. Cas. Ct. App. § 165.

### C. ISSUANCE OF BILLS OF LADING.

#### 1. Necessity.

See ante, "Issuance or Ratification of Bill of Lading," VII, H, 2, b, (1), (a). See the title CARRIERS OF GOODS.

#### 2. Receipt of Goods as Prerequisite to Issuance.

The general rule of law is that the bills of lading issued by the carrier are not conclusive as between the parties, and are subject to explanation, to the extent that the carrier may show that in fact it has never received the property for transporta-

tion, and therefore its liability as a carrier never existed. *Missouri, etc., R. Co. v. Union Ins. Co.* (Civ. App.), 39 S. W. 975, 976.

The master is not authorized to give a bill of lading until freight is placed aboard his vessel. And it is no doubt true as a general rule, that the master can not, by receipting for freight which never in fact comes to the ship as freight, or into his custody or control as master, bind the ship or its owner. *Adoue v. Seeligson & Co.*, 54 Tex. 593, 604.

#### 3. Authority of Agent or Clerk.

A bill of lading is a private instrument which, if it does not constitute in whole or in part the basis of the pleading, is not admissible in evidence, if the same purports to be signed by a clerk or a servant, without his proving the agency of such clerk or servant. *Western Union Tel. Co. v. Bertram*, 1 App. Civ. Cases, §§ 1152, 1153.

### D. CONSTRUCTION, OPERATION AND EFFECT.

#### 1. As Contract.

See ante, "Definition and Nature," X, A.

A bill of lading given under art. 280 of the Rev. Civil St., providing that common carriers are required, when they receive goods for transportation, to give to the shipper, when it is demanded, a bill of lading or memorandum in writing, stating the quantity, character, order and condition of the goods, is a contract entered into between the parties at the time the goods are delivered, and is equally binding upon both parties. *Schloss v. Atchinson, T. & S. F. Ry. Co.*, 85 Tex. 601, 22 S. W. 1014. See ante, "Penalty under Statute Prescribing Form and Contents of Bill of Lading," VII, D.

Bills of lading, and drafts attached, sent by a consignor to the consignee through a bank, on payment of which drafts the consignee received the bills



of lading, and, on presentation thereof to the carrier, received the consignments in H. county pursuant to the terms thereof, constitute a written contract between the consignor and consignee to deliver the consignments in H. county. *Callender, Holder & Co. v. Short*, 78 S. W. 366, 34 Tex. Civ. App. 364.

## 2. As Receipt.

See post, "Recitals," X, D, 7; "In General," X, D, 12, a.

## 3. Blanks.

The blanks in a bill of lading are not to be considered in construing the instrument. *Grayson County Nat. Bank v. Nashville, C. & St. L. Ry.* (Civ. App.), 79 S. W. 1094.

## 4. Usage and Custom.

See post, "Person to Whom Delivery Authorized," X, D, 6; "Evidence as to Usage and Custom," X, D, 12, c.

## 5. Person to Whom Goods Consigned.

A bill of lading recited the receipt from the consignor of the goods to be delivered "to his or their assigns," and stipulated that each package of freight should be marked with the name of the consignee and destination, except shipments in car load lots to one consignee. In the margin was written, "S. W. 6746," indicating the number of the car, followed by the name and location of the consignee and the name of the connecting carrier. The blanks in the body of the bill for the name of the place of destination and consignee were not filled. Held, that the goods were consigned to the person named as consignee. Judgment (Civ. App.), 91 S. W. 1106, reversed. *Nashville, C. & St. L. Ry. Co. v. Grayson County Nat. Bank*, 93 S. W. 431, 100 Tex. 17.

## 6. Person to Whom Delivery Authorized.

A bill of lading recited the receipt from the consignor of the goods, to be

delivered "to his or their assigns." In the margin was written "S. W. 6,746," to indicate the number of the car, and the name and location of the consignee, with a designation of the connecting carrier. There was sufficient space in the unfilled blanks to have written the consignee's name. Held, that the bill authorized delivery only to the assigns of the consignor, and the designation of the assignee in the margin could not be construed to change the effect of the express language of the bill. *Grayson County Nat. Bank v. Nashville, C. & St. L. Ry.* (Civ. App.), 79 S. W. 1094.

Such words written where they are, in the margin, simply indicate, when all the facts connected with the transaction are considered, the name and address of the consignee. They were evidently written where they were, so that it might clearly appear that the goods were to be delivered at the point of destination to the assigns of the consignor. *Grayson County Nat. Bank v. Nashville, etc., Railway* (Civ. App.), 79 S. W. 1094, 1096.

Where a bill of lading expressly stipulates for delivery to the consignor or his assigns, evidence that, according to the rules and customs of all railroads, a bill of lading, written as it was, would be considered to authorize delivery by the carrier to the consignee without production or surrender of the bill of lading, is inadmissible. *Grayson County Nat. Bank v. Nashville, C. & St. L. Ry.* (Civ. App.), 79 S. W. 1094.

Usage and custom can not make a contract, can not prevent the effect of a settled rule of law nor be invoked by a party and introduced into a contract as an element of it, when such usage or custom is contrary to law. *Gulf, etc., R. Co. v. McCown* (Civ. App.), 25 S. W. 435; *Dwyer v. Gulf, etc., R. Co.*, 69 Tex. 707, 7 S. W. 504; *Missouri Pac. R. Co. v. Fagan*, 73 Tex. 127, 9 S. W. 749; *Grayson County*

*Nat. Bank v. Nashville, etc., Railway* (Civ. App.), 79 S. W. 1094, 1097.

## 7. Recitals.

### a. Receipt of Goods.

Bills of lading are not commercial or negotiable paper in the hands of an innocent party, which precludes or estops the carrier from denying that the freight was received as therein admitted. *Adoue v. Seeligson & Co.*, 54 Tex. 593, 604.

In an action against a carrier for failure to deliver all the articles mentioned in the bill of lading, the carrier may defend on the ground that its agent made a mistake in making out the bill. *Cohen Bros. v. Missouri, K. & T. Ry. Co. of Texas*, 98 S. W. 437, 44 Tex. Civ. 381.

Thus, under its general denial, it can show that it had not in fact received 55 cases of shoes, as called for in the bill of lading, but only 49 cases, which was the number delivered by it to plaintiff. Plaintiff's cause of action was based upon the fact that the 55 cases had been delivered for shipment. Defendant had a right to show, notwithstanding the bill of lading, which was only, in this respect, a receipt for the goods, that only 49 cases had been so delivered. This necessarily involved the fact that the bill of lading, as a receipt for so many cases, had been executed by mistake. *Cohen Bros. v. Missouri, etc., R. Co.*, 44 Tex. Civ. App. 381, 382, 98 S. W. 437.

As to plea setting up fraud of shipper and mistake against, see "Plea or Answer," X, G, 2, in the title CARRIERS OF GOODS.

### b. Recitals as to Quality or Condition.

#### (1) Received in "Good Condition" or "Good Order."

It is well settled, that statements contained in receipts and bills of lading to the effect that the goods mentioned therein were received in "good order," or "good condition," are in the nature of mere admissions—mere

written declarations—not conclusive or nonexplainable as against the party making them, much less as against one who did not. *Bath v. Houston, etc., R. Co.*, 34 Tex. Civ. App. 234, 237, 78 S. W. 993; *Missouri Pac. Co. v. Ivy*, 79 Tex. 444, 15 S. W. 692; *Missouri Pac. Co. v. Fennell*, 79 Tex. 448, 15 S. W. 693.

A clear bill of lading as one in which the carrier acknowledges that the goods were received by him in good order, is prima facie evidence of that fact and renders him prima facie liable for the damage if they are lost or injured. *Austin v. Talk*, 20 Tex. 164, 166.

Where defendant, a connecting carrier, receipted for certain furniture to a steamship company as received in good condition, such receipt, while subject to explanation, was evidence that the goods were received by defendant from the steamship in good condition. *International, etc., R. Co. v. Shands* (Civ. App.), 93 S. W. 1105.

Where a carrier's receipt states that the goods, when received, were not in bad order, but they are damaged when delivered to consignee, the presumption is that the damage occurred while they were under the carrier's control. *International & G. N. Ry. Co. v. Blanton*, 63 Tex. 109.

In such case there is no requirement that the owner should prove by evidence aliunde that the goods were not damaged when the carrier received them. *I. & G. N. R. Co. v. Blanton, etc., Co.*, 63 Tex. 109, 112.

Where it was an issue whether certain cotton, receipted for by a shipper as in good order, was injured by water before being received on the ship or afterwards, it was competent for the mate of the ship to testify that he remembered some cotton being wet when loaded, though he could not state positively it was the cotton in question, and to state further that as a general rule cotton was receipted

for as being in good condition if it was apparently so, although he had testified that he did not know why the cotton was receipted for in good condition. *Bath v. Houston, etc., R. Co.*, 34 Tex. Civ. App. 234, 78 S. W. 993.

A remark made by the court in sustaining objections to the evidence of the mate, to the effect that the expressions "in good order" and "in good condition" meant substantially the same, was on the weight of the evidence. *Bath v. Houston, etc., R. Co.*, 34 Tex. Civ. App. 234, 78 S. W. 993.

In an action for injuries to cotton shipped, the giving of a requested instruction that bills of lading issued by the initial carrier for a part of the shipment, stating that the cotton was in good order, were not evidence in the case that the cotton was in good order, cures any error, as against a connecting carrier, by the admission of such bills containing such stipulation in the evidence. *Houston, etc., R. Co. v. Bath*, 40 Tex. Civ. App. 270, 90 S. W. 55, affirmed in 101 Tex. 641, no op.

**(3) Contents Unknown and in "Apparent Good Order."**

As a general rule, the recital in a bill of lading that the goods were received in apparent good order, makes a prima facie case against the carrier when the goods are delivered by it in an injured condition. *Gulf, etc., R. Co. v. Holder & Co.*, 10 Tex. Civ. App. 223, 225, 30 S. W. 383.

If the goods are open to inspection when received by the carrier, then the production of his receipt reciting that they were in apparent good order, throws the burden upon him to rebut it. But should the goods be incased in boxes, and such are delivered without there being any external evidence of injury, and are in apparent good order, the plaintiff must show the good condition when delivered to the initial carrier. *Gulf, etc., R. Co. v. Holder*

*& Co.*, 10 Tex. Civ. App. 223, 225, 30 S. W. 383.

A recital in a bill of lading that the contents of certain boxes are unknown, and "in apparent good order," does not make a prima facie case, as against the carrier, that the goods were in good order when received, and were injured during transportation, where they were not exposed to view, and the boxes were delivered in apparently the same condition as when received. *Gulf, C. & S. F. Ry. Co. v. Holder*, 10 Tex. Civ. App. 223, 30 S. W. 383.

The words "in apparent good order" in a bill of lading refer only to the external apparent condition of the goods, and such words create no contract with reference to the condition of the contents of the packages, bales, boxes, etc., *Gulf, etc., R. Co. v. Holder & Co.*, 10 Tex. Civ. App. 223, 224, 30 S. W. 383.

**8. Effect as Vesting Title in Consignee.**

The prima facie effect of a bill of lading as regards the consignee is to vest the ownership of the goods consigned by it in him. *Cobb v. Beall*, 1 Tex. 342, 349. See, also, *Prendergast, etc., Co. v. Williamson*, 6 Tex. Civ. App. 725, 731, 26 S. W. 421; *Campbell v. Alford*, 57 Tex. 159.

A bill of lading evidences prima facie ownership of goods in transit by the consignee but the proof may show that the consignor is still the owner. *Craig v. Marx & Kempner*, 65 Tex. 649.

Where there is an oral contract for the sale of wheat, and the wheat is delivered to a common carrier and the bill of lading for it is delivered to the buyer, the title rests in him, and the transportation is at his risk. *Orthwein's Sons v. Wichita Mill, etc., Co.*, 32 Tex. Civ. App. 600, 75 S. W. 364, affirmed in 97 Tex. 643, no op.; *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608.

G. contracted with a railway company to furnish it with a certain number of cross ties, for which, on their being inspected and accepted by the general superintendent, he was to receive 55 cents each, the ties to be inspected monthly and paid for with notes of the company at ninety days, on pay day following the delivery. Defendants agreed to pay drafts drawn on them by G. to a certain amount, to enable him to fulfill his contract; bills of lading with inspector's certificates were to be attached to the drafts, and the notes of the railroad were to be delivered and paid to defendants. G. executed drafts on defendants in favor of plaintiff, and attached, as collateral security, bills of lading for sufficient ties to cover the drafts. Defendants refused to pay the drafts, and appropriated the proceeds of the ties to the payment of a debt due them from G. Held, that if the ties had been accepted and received by the railroad when the drafts were drawn, the property in them had passed to the road, and G.'s delivery of the bills of lading to plaintiff conferred no right in or lien upon them, nor a superior right to their proceeds. If G. could be considered the owner, at the time the bill of lading was transferred, then plaintiff's ties, and not G.'s were accepted and received by the railway company, and plaintiff was entitled to the proceeds; he could not recover from defendants, however, unless they had notice of his right. Defendants' contract with G. fully explained plaintiff's possession of the bill of lading, and the knowledge of such possession need not have excited in their minds any suspicion that plaintiff was the owner of the ties, or entitled to their proceeds. *Craig v. Marx*, 65 Tex. 649. See the title SALES.

Prior to the presentation of the two drafts described in the plaintiff's petition, the appellees had paid two drafts drawn by Goodhue in favor of Craig. One of these they deferred paying, on

the ground that no certificate of inspection accompanied it, until the railroad company received the ties and passed the price to the credit of Goodhue. The other they declined to pay until Craig guaranteed indemnity. The payment of these drafts, under these circumstances, can not be held to have established a course of business imposing upon appellees an obligation to accept or pay the drafts involved in this suit, which were neither accompanied by certificates of inspection, nor by Craig's guaranty against loss. *Craig v. Marx*, 65 Tex. 649, 656.

**Where a seller takes a bill of lading, stipulating for delivery at the point of destination to himself, his order or assigns, it is evidence that, notwithstanding an appropriation of the goods which might be sufficient to transfer title to the buyer, the goods are retained within the seller's control, and the mere fact that the buyer is named as consignee does not pass title to him.** *Grayson County Nat. Bank v. Nashville, etc., Railway (Civ. App.)*, 79 S. W. 1094.

Where a bill of lading taken to the order of the seller is indorsed by him, and attached to a draft upon the purchaser for the price, and the draft is delivered to a bank for collection, or is discounted by the bank in reliance on the security of the bill of lading, title does not pass to the purchaser until, by payment of the draft, he has obtained possession of the bill. *Grayson County Nat. Bank v. Nashville, etc., Railway (Civ. App.)*, 79 S. W. 1094.

**A shipment of goods billed by the consignor to himself, to be delivered, with the bill of lading, to another on his payment of draft attached to it for the price, retains the title, prima facie, in the shipper till such payment, but subject to evidence of the real intent of the parties as to when title is to pass.** See charge on this subject held erroneous. *Texas Cent. R.*

Co. v. Dorsey, 30 Tex. Civ. App. 377, 70 S. W. 575.

### 9. Duplicate or Triplicate Bill.

A duplicate bill of lading in the hands of a consignee possesses all the validity of the original; it is as to him an original, not a copy; the word "duplicate" stamped on the instrument indicates to him no more than that the bill of lading had been executed in duplicate; and by its transfer for value the shipper is precluded from exercising the right of stoppage in transitu. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 200, 17 S. W. 608.

When the bill inclosed to the consignee was by them transferred it was not the less to be regarded by the transferrer as an original because it was stamped "duplicate." It is to be presumed that he understood the word "duplicate" according to its legal signification, and he is to be considered as being affected with such notice, and no other, as the word so interpreted would give him. In law the word "duplicate" does not mean a mere copy. It differs from a copy in that a duplicate has all the validity of an original. Instruments are executed in duplicate that the parties may each retain an original. *Black's Law Dic.*, word "Duplicate," p. 401; see also *Burrill*. And so *Mr. Greenleaf*, volume 1, § 558, lays it down that "if the instrument was executed in duplicate or triplicate, or more parts, the loss of all the parts must be proved to let in secondary evidence of its contents," thus indicating that all the parts are upon the same plane—each is to be regarded as an original. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 200, 17 S. W. 608.

### 10. Open and Closed Shipments.

Upon an open shipment the consignee can obtain possession of the property without first making payment, while upon a "closed" one he can not obtain possession of the ship-

ment without first making payment. *Smith v. Landa*, 45 Tex. Civ. App. 446, 101 S. W. 470, affirmed, no op.

Defendant shipped a car load of corn to R. on the order of plaintiff, the shipment being an "open" one, so that R. was able to obtain possession of the corn without payment. Defendant's clerk wrote into defendant's copy of the bill of lading, "shipper's order notify," thereby indicating a "closed" shipment, and attached the same to a draft which was paid by plaintiff. Thereafter plaintiff learned that the car had been delivered on an "open" shipment without payment, and endeavored to obtain payment from R. but before he did so R. became insolvent. Thereupon plaintiff sought to recover the value of the corn from defendant on the ground that the shipment should have been a "closed" one according to custom, but defendant claimed that the order called for an "open" shipment. Held, that plaintiff was not entitled to recover on the theory of an estoppel because of the form of the bill of lading sent to him by defendant. *Smith v. Landa*, 45 Tex. Civ. App. 446, 101 S. W. 470, affirmed, no op.

In the suit the court instructed that if, when plaintiff discovered that the corn was delivered to R., R. was solvent, and by the exercise of ordinary prudence plaintiff could have collected the price from R. before insolvency, but did not exercise such care, he could not recover against defendant on an estoppel. Held, that the instruction was not objectionable on the theory that it was confused and misleading, and calculated to induce the jury to believe that, if they found against plaintiff on the issue of the estoppel, they would find for defendant also on all the other issues, the charge preceding the portion in question having stated that, if the jury believed the shipment was ordered "closed" according to custom, they should find

for plaintiff on that issue, and that, if the jury believed that the shipment was ordered "open," yet plaintiff was misled by defendant's act in transmitting a "closed" bill of lading, they should find for plaintiff on that issue. *Smith v. Landa*, 45 Tex. Civ. App. 446, 101 S. W. 470, affirmed, no op.

The issue of estoppel was not properly in the case. If the shipment was in fact ordered closed, and the plaintiff thereby lost his money, he should have recovered; but if in fact ordered open, then the sale was a credit sale to the Rice Company. The plaintiff does not pretend that he suspected their insolvency up to the time of the delivery of the car, and there is nothing to indicate that he suspected it for some time thereafter. Whether the shipment was ordered open or closed, he would have paid Landa's draft when presented, for, as between them, the money was due upon demand. It therefore follows obviously that, if the shipment was in fact ordered open, the plaintiff's course would not have been different from that which he in fact pursued. He would have paid the draft as he did. He would not and could not have stopped the shipment in transitu, for he had no grounds to justify such a course. For a like reason he would not have sought to recover the car after delivery. He would have had no recourse either against Landa or the railway companies. It is thus apparent that the issue of estoppel was not in the case and the errors, if any, relating to its submission are against the appellee. *Smith v. Landa*, 45 Tex. Civ. App. 446, 101 S. W. 470, 472, affirmed, no op.

**Evidence.**—In such case there was no prejudice to plaintiff in permitting defendant to testify that he had frequently made shipments to plaintiff's father-in-law, who was wealthy, and that all the shipments were "open." *Smith v. Landa*, 45 Tex. Civ. App. 446, 101 S. W. 470, affirmed, no op.

A clerk in the employ of defendant having testified that the railway agent agreed to so make the shipment that the consignee could not obtain possession thereof without first making payment and the agent having denied such agreement, it was proper to permit defendant to testify as to what shipping instructions he had given his office force. *Smith v. Landa*, 45 Tex. Civ. App. 446, 101 S. W. 470, affirmed, no op.

It was proper to refuse to permit defendant's clerk who attended to the shipment to testify that he would not have made the shipment on plaintiff's credit; it not appearing that he had authority to determine the character of shipments. *Smith v. Landa*, 45 Tex. Civ. App. 446, 101 S. W. 470, affirmed, no op.

#### 11. Fraud or Mistake.

A shipper cannot allege fraud or mistake in bills of lading prepared by himself. *Wm. H. Bessling & Co. v. Houston & T. C. Ry. Co.*, 80 S. W. 639, 35 Tex. Civ. App. 470.

**Recital as to Receipt of Goods.**—See ante, "Receipt of Goods," X, D, 7, a.

#### 12. Parol Evidence to Vary or Contradict Bill of Lading.

##### a. In General.

Parol evidence tending to show a prior agreement or an understanding between carrier and shipper in executing bill of lading and which is intended to contract or vary the terms or legal import of the written instrument is inadmissible. *Arnold v. Jones*, 26 Tex. 335, 337; *Bessling & Co. v. Houston, etc., R. Co.*, 35 Tex. Civ. App. 470, 472, 80 S. W. 639, affirmed in 98 Tex. 610, no op.; *Wells, etc., Express v. Fuller*, 4 Tex. Civ. App. 213, 23 S. W. 412 (see 93 Tex. 742, no op.); *Galveston, etc., R. Co. v. Silegman (Civ. App.)*, 23 S. W. 298; *Cross v. Graves*, 4 App. Civ. Cases, §§ 100, 158, 159, 16 S. W. 102; *International, etc., R. Co. v. Griffith (Civ. App.)*,

103 S. W. 225, affirmed in 102 Tex. 585, no op.

A bill of lading is twofold in character. It is a receipt as to the quality and description of the goods shipped, and a contract to carry and deliver the goods to the consignee upon the terms specified in the instrument. While it may not be varied by parol evidence (in the absence of fraud or mistake) so far as it embodies the terms of the contract, yet, so far as it constitutes a receipt, it is, like other receipts, subject to be contradicted or explained by proof of the facts. *Cohen Bros. v. Missouri, etc., R. Co.*, 44 Tex. Civ. App. 381, 383, 98 S. W. 437; *Horse v. Holland*, 15 Tex. Ct. Rep. 544.

Except in the recital of the receipt of the goods, and of their quantity and condition, bills of lading are strictly written contracts, within the rule prohibiting parol evidence to contradict or vary such contracts. *Galveston, etc., R. Co. v. Silegman* (Civ. App.), 23 S. W. 298.

The bill of lading as a receipt establishes prima facie the receipt of the quantity of goods named by the carrier, having in that regard the same effect as parol testimony as to that fact, which may be overthrown by proper evidence contradicting the fact, and this may be done under the general denial. *Cohen Bros. v. Missouri, etc., R. Co.*, 44 Tex. Civ. App. 381, 383, 98 S. W. 437. See ante, "Receipt of Goods," X, D, 7, a.

The receipt given by the express company purports to state the terms upon which the shipment was made, and though signed only by the carrier, when accepted by the shipper he became a party to it, bound by its terms. It contains all the necessary elements of a shipping contract, and under well-established principles it must be treated as the final agreement of the parties, into which all parol negotiations and understandings were merged, and by its terms the duties

and liabilities of the parties thereto must be determined. "Resort can not be had to prior or contemporaneous parol negotiations or agreements to vary its terms." And this rule applies not only to its express provisions, but to the legal import of the contract—the further provisions which the law makes for the parties, such as the right of the carrier to route the shipment when the contract in its express terms is silent upon that point. *Wells, etc., Express v. Fuller*, 4 Tex. Civ. App. 213, 222, 23 S. W. 412 (see 93 Tex. 741, no op.); *Arnold v. Jones*, 26 Tex. 335.

Not only is parol evidence inadmissible to vary the express terms of the contract contained in a bill of lading, but it is inadmissible to vary the obligations as to which the contract is silent, but which are implied from its nature; and therefore, as a bill of lading for shipment of cattle raises an implied obligation to furnish suitable cars, and to transport the cattle within a reasonable time, parol evidence is inadmissible to show a parol agreement prior to the bill of lading to furnish "bedded" cars and to make close connection with another line of carriers, though it could be shown that bedded cars were the only suitable cars to be used, and that transportation with reasonable dispatch would have made the close connection. *Galveston, etc., R. Co. v. Silegman* (Civ. App.), 23 S. W. 298.

A bill of lading given by an express company, though signed by the express company only, constitutes a contract, which can not be varied by parol. *Wells, Fargo & Co.'s Express v. Fuller*, 4 Tex. Civ. App. 213, 23 S. W. 412.

The defendants, being sued as common carriers, offered to prove by a witness that he was present when the bill of lading was executed by the defendants and that it was the express contract and understanding between them and the plaintiff that they were

not to be responsible for any risk or loss that might unavoidably befall the boat or freight in descending the river. Held, that the evidence was properly excluded as tending to contradict or vary the bill of lading. *Arnold v. Jones*, 26 Tex. 335.

Proof that a waybill issued by the carrier for the guidance of its employees stipulated delivery at a certain packing house was inadmissible to add that provision to the written contract between the carrier and shipper. *International, etc., R. Co. v. Griffith* (Civ. App.), 103 S. W. 225, affirmed in 102 Tex. 585, no op.

#### **b. Recital of Quantity of Goods.**

See ante, "Receipt of Goods," X, D, 7, a; "In General," X, D, 12, a.

#### **c. Evidence as to Usage and Custom.**

##### **(1) In General.**

Evidence of custom is not admissible to vary or control an express contract contained in a bill of lading. Nor is usage admissible to control the legal effect of a state of facts which the law declares creates a contract between the parties. A case might arise in which evidence of custom may be admissible to ascertain in whom rests the title of property shipped, and which is claimed under a bill of lading. *Mercantile Banking Co. v. Landa* (Civ. App.), 33 S. W. 681. See, also, *Moore v. Kennedy*, 81 Tex. 144, 16 S. W. 740.

Where claimant alleges title to a carload of grain, attached as the property of the shipper and consignee, by indorsement and transfer of the bill of lading prior to the attachment, plaintiff who joins issue, in effect asserting that the indorsement was subsequent to the levy, can not give evidence of custom to overcome claimant's showing of title by such indorsement and transfer; any evidence of custom given by claimant having simply amounted to a statement of what his legal rights were by reason of the indorsement and transfer. *Mercantile Banking Co. v. Landa*

(Civ. App.), 33 S. W. 681.

The case as presented raises the issue as to when the indorsement was executed. If before the levy of attachment, then the title is in appellant, if at the time the bill of lading was delivered to it. If after the levy of the writ, then the property was subject to the attachment, and the lien should be foreclosed. *Mercantile Banking Co. v. Landa* (Civ. App.), 33 S. W. 681.

##### **(2) Custom as to Right of Inspection and Rejection.**

A contract for the sale of perishable produce stipulated that the prices were f. o. b. cars. The bill of lading contained the notation "inspection allowed." Evidence showed a custom that the buyer could inspect the goods on arrival, and, if not in good condition, reject them. The custom was known to the agent of the seller who made the sale. Held, in an action by the seller for the price, that the evidence of the custom was admissible to show that the same was a part of the contract of sale, and to explain the significance of the quoted words in the bill of lading, and give the buyer the right of inspection before delivery, and refuse acceptance on the goods being damaged. *Ft. Produce Co. v. Dissen*, 45 Tex. Civ. App. 403, 101 S. W. 477.

The purpose of the evidence as to the custom referred to was not to create a warranty when none was created by the contract. The buyer did not contend that there was any warranty. No warranty was needed to protect him. The right of inspection and rejection gave him all the protection he needed. Such a custom was not in violation of the terms of the contract and of established rules of law. The custom being known to the agent of seller, and being in fact of such a general character that the buyer, in dealing with produce dealers at the point of destination, would be required to take notice of it, became a part of



the contract, which is shown to have been made with reference to it. *Ft. Produce Co. v. Dissen*, 45 Tex. Civ. App. 403, 101 S. W. 477.

It would not have violated any rule if the parties had contracted for inspection and rejection, and under the undisputed evidence as to the custom referred to, which became a part of the contract, this is what was done. *Ft. Produce Co. v. Dissen*, 45 Tex. Civ. App. 403, 101 S. W. 477.

"Evidence of the custom referred to was further admissible to explain the full significance of the notation on the bill of lading, 'Inspection allowed.' No attempt is made by appellant to give these words any other signification than that given them by appellee and his witnesses, as explained by the custom referred to, that they referred to the right of inspection, and rejection if found in bad condition. We have been unable to see what other signification could be attached to these words in the bill of lading. They necessarily meant a right of inspection before delivery. After delivery appellee had no need of permission to inspect, and inspection before delivery would have been an idle ceremony unless some right was to accrue to appellee upon such inspection if the goods were not in good condition. Really the only reasonable interpretation to be given this language in the bill of lading taken by appellant, and inserted, of course, by its direction, is in accordance with the custom proven by appellee. We are of the opinion that the court did not err in admitting the testimony." *Ft. Produce Co. v. Dissen*, 45 Tex. Civ. App. 403, 101 S. W. 477.

#### 13. Parol Evidence to Explain Ambiguity or Misrecital.

Parol evidence is admissible to show that a lower rate of freight named in a bill of lading is the regular rate charged all persons under the same circumstances, as this does not tend

to vary or contradict the written contract, but merely to explain an ambiguity. *Cross v. Graves*, 4 App. Civ. Cases, § 100, 16 S. W. 102.

Instance where parol evidence was properly admitted to show that San Antonio was the carrier's terminus instead of Junction City, Kansas, misrecited as such in the shipping contract, where other provisions of the contract showed such recital to be inconsistent with the main provisions of the contract. *Swank v. San Antonio, etc.*, R. Co., 1 Tex. Civ. App. 675, 681, 23 S. W. 249.

#### 14. Merger of Prior Verbal Contract by Bill of Lading.

Where goods are shipped under a verbal contract, delivery afterward to shipper of bill of lading, his attention not being called to its terms or conditions, does not conclude him from showing what agreement under which shipment was made. *Atchinson, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 681, 26 S. W. 286, affirmed in 93 Tex. 699, no op. See ante, "Merger of Verbal in Subsequent Written Contract," IX, B, 4, c.

**Conclusiveness as to Rate.**—Where plaintiff claims that he entered into a verbal agreement with a railroad company for the shipment of cattle at a fixed rate, parol evidence is admissible to show what that agreement was, though plaintiff signed a bill of lading showing a different rate; both parties testifying that plaintiff received the bill of lading just as the train with the cattle, which he was to accompany, was leaving, and that he signed it on the assurance of defendant that it was all right. *Galveston, H. & S. A. Ry. Co. v. House*, 4 Tex. Civ. App. 263, 23 S. W. 332.

#### 15. Final Carrier Bound by Bill of Lading Issued by Initial Carrier Vel Non.

A final carrier, having accepted a shipment for transportation from an initial carrier, under a bill of lading

issued by the initial carrier, is bound by such bill in so far as the same is a contract for carriage. *Texas, etc., R. Co. v. Kelly* (Civ. App.), 74 S. W. 343.

In so far as a bill of lading issued by an initial carrier is a receipt for goods, a final carrier, on receiving the goods for transportation from the initial carrier, is not bound by the admissions contained therein. *Texas, etc., R. Co. v. Kelly* (Civ. App.), 74 S. W. 343.

The recitals of a bill of lading are not binding upon a carrier not a party to the bill of lading. *St. Louis, etc., R. Co. v. Watkins*, 45 Tex. Civ. App. 321, 100 S. W. 162; *International, etc., Co. v. Diamond Roller Mills*, 36 Tex. Civ. App. 590, 82 S. W. 660.

The bill of lading being the act of defendant railroads as partners, its recitals as to the condition of the goods when received were binding upon them. *St. Louis, etc., R. Co. v. Watkins*, 45 Tex. Civ. App. 321, 100 S. W. 162.

A bill of lading may be used against the carrier that is not connected with its execution in some respect as a contract between the consignee and the carrier that issued the bill, as an evidence of right in the consignee to demand the shipment from the last carrier. The bill of lading is evidence of right in the consignee, and upon tender of that bill to a carrier who is not a party to it, but who has possession of the property, the shipper or consignee, as the case may be, who has possession of the bill and is the owner of the property, can demand possession of the same by virtue of the ownership displayed by the bill of lading. *Grayson County Nat. Bank v. Nashville, C. & St. L. Ry. Co.*, 3 Texas Law Journal, 979, 79 S. W. Rep., 1096. But as said in the case of *Texas, etc., R. Co. v. Kelly* (Civ. App.), 74 S. W. 343: "Defendant having accepted the shipment for transportation from Tex-

arkana under said bill of lading, was bound by it, in so far as it was a contract; but in so far as it was a mere receipt for the goods, the rule is different. As a receipt of the stoves from the shipper it was the act and admission of the carrier that so receipted, and prima facie evidence against it. It seems to us an indefensible proposition that another or connecting carrier is affected by such an admission. *Railway Co. v. Benjamin*, 63 Ill. 283; *Evans v. Railway Co.*, 56 Ga. 498." *International, etc., R. Co. v. Diamond Roller Mills*, 36 Tex. Civ. App. 590, 82 S. W. 660.

## E. TRANSFER.

### 1. Negotiability and Assignability Generally.

Bills of lading are not considered negotiable in the sense that bills, notes, etc., are considered. *Campbell v. Alford*, 57 Tex. 159; *Adoue v. Seeligson & Co.*, 54 Tex. 593, 595; *Osborn v. Koenigheim*, 57 Tex. 91; *National Bank v. Citizens' Nat. Bank*, 41 Tex. Civ. App. 535, 93 S. W. 209, 210, affirmed in 101 Tex. 650, no op.

A bill of lading is regarded as a quasi negotiable instrument. It symbolizes the property which it describes. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 199, 17 S. W. 608.

A bill of lading, even when, in terms, running to order or assigns, is not negotiable, like a bill of exchange, but a symbol or representative of the goods themselves; and the rights arising out of the transfer of a bill of lading correspond, not to those arising out of the indorsement of a negotiable promise to pay money, but to those arising out of a delivery of property itself under similar circumstances. *Grayson County Nat. Bank v. Nashville, etc., Railway* (Civ. App.), 79 S. W. 1094; *Adoue v. Seeligson & Co.*, 54 Tex. 593, 594; *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608.

Bills of lading are not commercial or negotiable paper in the hands of an innocent party. *Adoue v. Seeligson & Co.*, 54 Tex. 593, 604.

Bills of lading are not, in strict sense of the term, negotiable under the law merchant, but their possession by shipper is regarded as prima facie evidence of the ownership of property shipped, and their delivery upon advances made as symbolical delivery of such property. *Prendergast, etc., Co. v. Williamson*, 6 Tex. Civ. App. 725, 731, 26 S. W. 421; *Campbell v. Alford*, 57 Tex. 159.

## 2. Mode.

### a. Delivery.

"Delivery, in order to be effectual, should be followed by an acceptance of possession; and methods of delivery and acceptance differ, according to the subject matter and the local situation of the thing. But constructive delivery and acceptance are now much favored in such transactions. The transfer of the bill of lading of a ship at sea, or the delivery of a warehouse key, have long been esteemed sufficient for legally transferring possession of the thing so symbolized. And so, in modern times, the delivery in pledge of bills of lading of goods on transit, whether inland or by water, usually suffices to make the pledgee's title good against the world." *Campbell v. Alford*, 57 Tex. 159, 162.

### b. Necessity for Formal Indorsements or Assignments.

See post, "In General," X, E, 3, a.

The delivery of the bill of lading without formal indorsement or assignment, in deference to the mutual intent of the parties, and the loose usages of business, is a sufficient constructive delivery. *Campbell v. Alford*, 57 Tex. 159, 161.

It would seem that an indorsement or assignment of the bill of lading would be necessary where the person to whom it is delivered is not recognized upon the face of the bill of lad-

ing as the person entitled to the ultimate possession of the goods; but where such recognition exists upon the face of the bill of lading, there is much less reason for holding that an assignment is necessary. *Campbell v. Alford*, 57 Tex. 159, 161.

## 3. Effect of Transfer.

### a. In General.

"While the transfer of bills of lading may pass the title to the goods, unless the common law has been modified by statute, these instruments are not negotiable, in the sense in which that term is applied to bills and notes and other negotiable instruments of a like character. Although it has sometimes been said that a bill of lading is negotiable, nothing more is meant by this than that the transfer of the bill of lading passes to the transferee the title of the transferor to the goods described therein. Negotiability may be predicated of bills of exchange and promissory notes, because they are the representatives of money, which is itself negotiable, to the extent that it can not be reclaimed from anyone who receives it in good faith for value. On the other hand, bills of lading do not stand as representatives of money, but of the goods therein described, and as chattels are not negotiable, that quality can not be given to the symbol; no greater effect can be given to the transfer of the symbol than to that of the thing which it represents." *Landa v. Lattin Bros.*, 19 Tex. Civ. App. 246, 249, 46 S. W. 48.

Bills of lading under the law are regarded as representatives of the property covered by them, and when delivered, with or without indorsement, in deference to the agreement of parties, is a sufficient constructive delivery. *Campbell v. Alford*, 57 Tex. 159; *Adoue v. Seeligson & Co.*, 54 Tex. 593, 595; *Osborn v. Koenigheim*, 57 Tex. 91; *National Bank v. Citizens' Nat. Bank*, 41 Tex. Civ. App. 535, 93 S. W. 209, affirmed in 101 Tex. 650, no op.

In commercial transactions bills of lading, to a very large extent, are regarded as the representatives of the goods covered by them, and where they are indorsed and delivered with the intention of passing the title to them, it is a symbolic or constructive delivery of the goods themselves. *Campbell v. Alford*, 57 Tex. 159, 161.

The law gives to a transfer by indorsement of a bill of lading, accompanied by a delivery of it, the effect of passing title to the property shipped. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 199, 17 S. W. 608. A title thus acquired is as effectual in law as it would be if based upon an express and completed contract of sale. *Mercantile Banking Co. v. Landa* (Civ. App.), 33 S. W. 681.

Bill of lading by indorsement or transfer passes to transferee the title of transferor to property described therein and nothing more. *Landa v. Lattin Bros.*, 19 Tex. Civ. App. 246, 250, 252, 46 S. W. 48.

Transfer of bill of lading is equivalent to the actual delivery of the property. *Adoue v. Seeligson & Co.*, 54 Tex. 593, 602.

A transfer of the ownership of the property covered by a bill of lading as well as of the right of possession is made as effectually by the transfer of the bill as it could be by a physical delivery of the property. The delivery of the bill of lading transfers the property to the consignee and it seems that the assignment of it by the consignee, by way of sale or mortgage will pass the property though no actual delivery of the goods be made (provided they were then at sea). *Chandler v. Fulton*, 10 Tex. 2, 20.

A bill of lading represents the property shipped and is assignable, the assignment thereof for a valuable consideration placing the title of the property in the assignee. (Civ. App.) *Nashville, C. & St. L. Ry. Co. v. Grayson County Nat. Bank*, 91 S. W. 1106.

judgment reversed 93 S. W. 431, 100 Tex. 17.

#### b. Rights of Bona Fide Holder.

##### (1) General Rule.

"The transfer of a bill of lading, then, by the person in possession of the instrument, can give no higher title than would the transfer of the property itself by the same person. Hence it may be stated, as a general rule, that where bills of lading are made negotiable by statute, the holder of a bill of lading, in the absence of either title to the goods or authority to transfer them in himself, can not, by a transfer of the instrument pass the right of property in the goods, even to a bona fide purchaser for value; he can convey no greater rights than he himself has." *Landa v. Lattin Bros.*, 19 Tex. Civ. App. 246, 249, 46 S. W. 48. See *Blaisdell v. Citizens Nat. Bank*, 96 Tex. 626, 75 S. W. 292.

Where a transfer of a bill of lading is made to a bank without notice of a third person's claim against the transferor, its title to corn is not affected by such claim. *Freeman v. Bank*, 3 App. Civ. Cases, § 338.

##### (2) Exceptions Resting upon Estoppel.

There are exceptions to this general rule, but they rest more on the ground of estoppel than the negotiability of bills of lading. *Landa v. Lattin Bros.*, 19 Tex. Civ. App. 246, 250, 46 S. W. 48.

Such, notably, is the case of *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608. In that case, the consignor, the party who sold the goods to the consignee, received from the railway company duplicate bills of lading. One of these was forwarded to the consignee and received by him, and during the transit of the goods the consignee transferred and sold the goods to Heidenheimer, and turned over and delivered to him the bill of lading which he had received therefor. The consignee was then insolvent, and the consignor attempted to assert the right of stoppage in transitu, and re-

cover possession of the goods. The real contest in the case was whether the goods belonged to Heidenheimer or the consignor. The effect of the ruling upon this question in that case was that a transfer and assignment of the bills of lading was sufficient to invest the assignee with title to the goods called for in the bill of lading; and as the consignor had, by delivering to the consignee the bill of lading, the evidence of the right to the goods, by investing him with the apparent evidences of title, put the consignee in a position to mislead third parties, a transfer by the consignee under such circumstances would preclude a recovery by the consignor of the goods from such purchaser. *Landa v. Lattin Bros.*, 19 Tex. Civ. App. 246, 250, 46 S. W. 48.

### (3) Rights against Consignor.

#### (a) In General.

If an assignee takes an assignment bona fide without notice of any such circumstances as would render the bill of lading not fairly and honestly assignable, he acquires a good title against the consignor. *Chandler v. Fulton*, 10 Tex. 2, 20.

#### (b) Goods in Transit.

##### aa. In General.

The assignment of a bill of lading, indorsed thereon, accompanied by delivery of the instrument, passes to the assignee title to the goods, though actually in transit, as complete as if they had passed through the buyer's hands and been delivered bodily to the assignee. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 199, 17 S. W. 608.

##### bb. As Defeating Stoppage in Transitu.

When by such an assignment the consignee transfers it for value to a third party acquiring it in good faith, the right of "stoppage in transitu" is defeated. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 199, 17 S. W. 608.

The assignment of a bill of lading,

bona fide, for a valuable consideration to an assignee without notice of the insolvency of the consignee, defeats the right of stoppage in transitu. *Chandler v. Fulton*, 10 Tex. 2, 19.

In an action against a carrier for goods received, but returned by order of the consignor, it appeared that the bill of lading was sent to T. Bros. & Co., consignees, and by them transferred to plaintiff for value. Held that, though T. Bros. & Co. were insolvent, their transfer to plaintiff defeated the consignor's right of stoppage in transitu. *Missouri Pac. Ry. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608.

Where the transfer of a bill of lading is by way of mortgage or pledge, the right to stop the goods is not absolutely defeated; for if the mortgage should be held to have been made bona fide, the vendor may still resume his interest in them subject to the rights of the mortgagee and will have the right to the residue after satisfying the mortgage. *Chandler v. Fulton*, 10 Tex. 2, 23. See the title STOPPAGE IN TRANSITU.

**Duplicate Bill.**—A shipper is precluded from exercising his right of "stoppage in transitu," by the transfer for value by the consignee of a duplicate bill of lading. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 200, 17 S. W. 608; *Landa v. Lattin Bros.*, 19 Tex. Civ. App. 246, 250, 46 S. W. 48.

If at that time the goods had reached the point of destination, and the consignees or any assignee from them had presented the duplicate and demanded delivery of the carrier, he could not have declined because they produced a bill of lading stamped "duplicate." The carrier could not have exacted the production of the original on the ground that it had been retained by the consignor with a view to the exercise of its right of "stoppage in transitu," in the event of the insolvency, though unsuspected, of the consignees, or of their failure to pay the remainder of

the purchase money, though not due within sixty days. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 200 17 S. W. 608.

The fact that the assignee knew that the goods were not paid for, is not sufficient to defeat his rights as against the right of the consignor to reclaim the goods. In order to defeat such right of the assignee, he must have had notice of such circumstances as would render the assignment of the bill of lading defeasible. *Chandler v. Fulton*, 10 Tex. 2, 20.

#### (4) Pledge, Mortgage or Collateral Security.

The indorsement and delivery of a bill of lading as collateral security for paper discounted, operates the same as the delivery of the goods, and the bank to which the same was delivered could hold the property to secure its debt, against the consignee or any other person. *Campbell v. Alford*, 57 Tex. 159, 162.

Where a bill of lading is assigned as collateral security, the rights of the pledgee thereunder are the same as those of an actual purchaser of the goods for value, so far as the exercise of those rights is necessary for the holder's protection. *Campbell v. Alford*, 57 Tex. 159, 162; *Adoue v. Seeligson & Co.*, 54 Tex. 593, 594; *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 199, 17 S. W. 608.

A bill of lading represents the property, and any bona fide title, for valuable consideration, obtained through a pledge of the bill of lading, is as valid and effectual a title to the goods as could be obtained by an actual delivery of the goods themselves. *Grayson County Nat. Bank v. Nashville, etc., Railway (Civ. App.)*, 79 S. W. 1094, 1096; *Adoue v. Seeligson & Co.*, 54 Tex. 593, 594; *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608.

Where a bank furnished money for the purchase of cotton, and received from the railroad company by which

the cotton was shipped the bills of lading to hold as security for the money expended for the cotton, the bank was entitled to hold the cotton until its debt was paid. *National Bank of Cleburne v. Citizens' Nat. Bank*, 93 S. W. 209, 41 Tex. Civ. App. 535, citing *Campbell v. Alford*, 57 Tex. 159.

A bank furnished money to a buyer of cotton and received the bills of lading for the cotton to hold as security. The railroad company deposited the cotton with a compress company, which issued receipts stating on their face that they were nonnegotiable. These receipts were exchanged by the railroad company for the bills of lading. Held, that, though the receipts were nonnegotiable, they nevertheless gave the bank a right to the possession of the cotton. *National Bank v. Citizens' Nat. Bank*, 41 Tex. Civ. App. 535, 93 S. W. 209, affirmed in 101 Tex. 650, no op.

A bank furnished money to a buyer of cotton, and received the bills of lading for the cotton to hold as security. The railroad company deposited the cotton with a compress company, which issued receipts stating on their face that they were nonnegotiable. These receipts were exchanged by the railroad company for the bills of lading. The bank sold the cotton, accepting the buyer's note, but retaining the compress company's receipts as security. Held, that, even though the note were good, the acceptance of it did not deprive the bank of the right to the possession of the cotton. *National Bank v. Citizens' Nat. Bank*, 41 Tex. Civ. App. 535, 93 S. W. 209, affirmed in 101 Tex. 650, no op.

When the cotton was shipped to Cleburne, the railroad executed its bills of lading therefor, and these bills of lading were delivered to appellee in pursuance of said agreement. The appellee, by this dealing, had the right to hold the cotton as against all comers until its debt was paid.

*Campbell v. Alford*, 57 Tex. 159. The railroad delivered the cotton to the Cleburne Compress Company, which executed and delivered to the railroad its receipts for same. These receipts were exchanged to appellee for the bills of lading held by it. The status of the property was not changed by this exchange, except the compress became the bailee of the cotton, instead of the railroad. *National Bank v. Citizens' Nat. Bank*, 41 Tex. Civ. App. 535, 93 S. W. 209, 210, affirmed in 101 Tex. 650, no op.

B. having received advances from C. & C., of Galveston, on the faith of his agreement to ship them certain goods, delivered the goods to a carrier to be transported to Liberty, the carrier executing duplicate bills of lading specifying that the goods were to be delivered to the care of W. at Liberty, to be forwarded to C. & C. After delivering without indorsement one of these bills of lading to C. & C., B. procured from A. & Co. advances on the same goods they having inquired of W., and being informed by him that he held the goods subject to the order of B. W. had never seen or had notice of the bill of lading. Held: That the rights of the pledgees attached when the goods were delivered to the carrier under a bill of lading declaring that the goods were to be forwarded to them; that thereafter the rights of the pledgees were superior to those of the original owner, or any acquired through him, and this, too, although the warehouseman, and forwarding agent at Liberty, having no notice of the bill of lading, held the goods subject to the order of the shipper. *Campbell v. Alford*, 57 Tex. 159.

**One who makes a temporary advance to the vendee, taking the bill as his security, has the same rights as the buyer of the goods.** *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 199, 17 S. W. 608.

**Stoppage in Transitu.**—In any event if the transfer of a bill of lading by way of pledge or mortgage, or as collateral security for a loan, does not absolutely defeat the right of "stoppage in transitu," the seller can not exert that right until he has discharged the debt secured by the transfer, as his right is subject to that of the mortgagee or pledgee. *Chandler v. Fulton*, 10 Tex. 2; *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 199, 17 S. W. 608. See ante, "As Defeating Stoppage in Transitu," X, E, 3, b, (3), (b), bb.

**Priority against Attachment.**—See post, "Priority against Subsequent Attachment Lien," X, E, 3, b, (6).

**(5) Against Person Subsequently Advancing Money to Shipper.**

A delivery, without indorsement, of a bill of lading of goods in transit, to the consignee, who had made advances, was a sufficient delivery of the goods to constitute a pledge, and a person afterwards advancing money on the goods to the shipper obtained no right superior to those of the consignee, although, at the time of making the advances, the goods were in the hands of a warehouseman who did not know of the consignee's rights. *Campbell v. Alford*, 57 Tex. 159.

The fact that bills of lading named the same persons both as consignors and consignees was not sufficient to put one taking them as security on inquiry as to a lien claimed by persons who furnished money for the purchase of the goods. *Prendergast v. Williamson*, 6 Tex. Civ. App. 725, 26 S. W. 421.

That bills of lading taken by shipper were in name of consignee is not sufficient to put a bank on notice of claims of person advancing money to shipper. *Prendergast v. Williamson*, 6 Tex. Civ. App. 725, 731, 26 S. W. 421.

A. advanced money to W. with which to buy cotton with the verbal understanding that the cotton bought

should stand pledged for the money advanced. Afterwards a quantity of the cotton so bought by W. was contracted to be sold to B. & Co., with the agreement by A., W., and B. & Co. that the money should be paid to A. W. took bills of lading for the cotton, naming B. & Co. as consignor and consignees. Instead of sending the bills of lading to A., as he had agreed to do, he procured an advance upon the cotton from the First National Bank of Corsicana, to which he executed his draft on B. & Co. with the bills of lading attached. B. & Co. declined to pay the draft and set up no further claim to the cotton. After the institution of this suit the cotton was delivered by the receiver of the railway company to said bank upon the bills of lading, and sold for its account for less than the amount advanced by it to W. In an action by A. for the value of the cotton, it was held, that if A. had a verbal lien which might be good as between the parties yet, as they were not in actual possession of the property, such lien would not, under art. 3190b, Sayles' Stat., be valid as against the First National Bank, which was a subsequent purchaser in good faith with no actual notice of A.'s claim. As the bills of lading were never delivered to B. & Co., nor to A., the former never secured title to the property by a perfected purchase, and the latter never secured a perfected lien; for they had neither actual or symbolical possession of the property, or any instrument of writing whatever showing a valid lien. *Prendergast v. Williamson*, 6 Tex. Civ. App. 725, 26 S. W. 421.

**(6) Priority against Subsequent Attachment Lien.**

See the title ATTACHMENT, vol. 2, p. 454.

Where property in transitu is pledged by the delivery of bills of lading

therefor, such delivery is a constructive delivery of the property by which a lien in the way of pledge is created, which is superior to an attachment lien upon the property. *Campbell v. Alford*, 57 Tex. 159, 162.

A cotton factor in Galveston procured an advance of money from a banker on "cotton in press," for which he gave his order on the press to deliver the cotton to a vessel then in port loading for Liverpool. The order was notified to the press, and the master of the vessel made and delivered to the cotton factor, as the shipper, a bill of lading for the cotton, which the factor indorsed and delivered to the banker, with his exchange on Liverpool, in favor of the banker, attached. Afterwards a third party, who was a creditor of the cotton factor, sued out an attachment against him and levied it on the cotton, which was still in press. In a contest between the banker, as claimant of the cotton, and the attaching creditor, held, the execution of the bill of lading for the cotton by the master of the vessel in favor of the cotton factor, and the transfer and delivery thereof by the factor to the banker, constituted constructive delivery of the cotton. *Adoue v. Seeligson & Co.*, 54 Tex. 593.

An actual manual delivery of the cotton was not necessary to pass its possession, nor was it necessary that the delivery should have been made to the pledgee in person. *Adour v. Seeligson & Co.*, 54 Tex. 593.

The special requisite of delivery is, no matter in whose hands the property was a deposit, that it be no longer subject, in fact or in law, to the dominion, possession or control of the pledgor, but to that of the pledgee. *Adour v. Seeligson & Co.*, 54 Tex. 593.

The execution of the delivery order by the factor to the vessel for the cotton in press, and the recognition and acceptance thereof by the press,



before the levy of attachment, constitutes a delivery of the cotton, so as to except it from attachment by the creditor. *Adour v. Seeligson & Co.*, 54 Tex. 593.

The transfer of the bill of lading to the banker was as effectual a transfer of the cotton as its manual delivery could have been. *Adour v. Seeligson & Co.*, 54 Tex. 593.

The attaching creditor acquired no greater right in the attached property than the factor had at the time of attachment. *Adour v. Seeligson & Co.*, 54 Tex. 593.

**(7) Holder of Duplicate Bill.**

Where a bill of lading is issued in duplicate, one marked "Original" and one "Duplicate," the duplicate is, in effect, an original; and the holder of the duplicate may recover the goods from the carrier, though the consignor had retained the original, and had ordered the goods returned to him. *Missouri Pac. Ry. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608.

**(8) Priorities Among Transferees of Triplicate or Duplicate Bills.**

Where there are several bills of lading, each is a contract in itself as to the holder, but there is one contract as to the masters and owners. Therefore, if the several numbers of the set of bills of lading be indorsed to different persons, and there be competition for the goods, the rule is that if the equities be equal the property passes by the bill first indorsed. "The usual course is to issue bills in triplicate originals, one to be retained by the carrier, one to be delivered to the shipper, and one to the consignee; and the person who first gets one of the three gets the property which it represents." *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 199, 17 S. W. 608.

**(9) Purchaser of Goods from Agent of Transferee.**

Where a bank agreed with cotton

dealers to advance money to them to pay for cotton purchased, taking the bills of lading as security, and the uniform course of the business had been for such dealers to sell the cotton, and, after sales were made, to receive the bills from the bank, and on receiving payment to deposit the amount in the bank, such dealers were authorized to sell the cotton before receiving the bills therefor, the bank trusting to them to make payment; and after they had sold and delivered such cotton the bank could not refuse to surrender the bills, and recover the cotton from the railroad company. (*Civ. App.*), *First Nat. Bank v. San Antonio & A. P. Ry. Co.*, 72 S. W. 1033. Modified 77 S. W. 410, 97 Tex. 201.

**(10) Subsequent Transferees.**

The sellers of cotton took bills of lading in their own names and sent drafts for the price to a correspondent for collection, and the purchaser paid the drafts by checks on a bank, which had agreed to pay the checks and take bills of lading as security, and the purchaser, on so paying the drafts, received the bills of lading, and delivered them to the bank under the agreement. Held, that the purchaser of the cotton did not become the absolute owner thereof on paying the drafts of the seller by taking and receiving the accompanying bills of lading, and that by delivery of the bills of lading to the bank it acquired a lien on the cotton. Judgment (*Civ. App.*), 72 S. W. 1033, modified. *First Nat. Bank v. San Antonio & A. P. R. Co.*, 77 S. W. 410, 97 Tex. 201, citing *Bank v. San Antonio, etc., Ry. Co.*, 6 Tex. Ct. Rep. 388.

**c. Liability of Bona Fide Holder.**

**(1) Liabilities to Transferrer.**

**(a) In General.**

See ante, "General Rule," X, E, 3, b, (1).

**(b) Holder of Bill of Lading and Draft for Collection.**

Where plaintiffs consigned a carload of oats to shipper's orders, attaching drafts for the price to the bills of lading and making payment a prerequisite to the surrender of the bill or delivery of the oats, and a bank holding the draft for collection surrendered the bill of lading to the buyer and he, after examining the oats thus placed under his control, refused to take them, and it appeared that he would have paid the draft but for such unauthorized surrender of the bill of lading, the bank was liable to plaintiff for the amount of the draft, less the freight charges. *Gulf, etc., R. Co. v. North Texas Grain Co.*, 32 Tex. Civ. App. 93, 74 S. W. 567.

The oats having been converted by the railway company through an illegal sale for the freight charges, plaintiff could not, since it had elected hold the bank liable for negligence in failing to collect the draft, hold the railway company liable for conversion, but such right existed on the part of the bank. *Gulf, etc., R. Co. v. North Texas Grain Co.*, 32 Tex. Civ. App. 93, 74 S. W. 567.

A bank receiving from the shipper of a carload of apples a draft on the consignee for the purchase price, with the bill of lading attached, without surrendering the draft, took from the consignee, who was insolvent, a draft for the price on third parties, and delivered the bill of lading to him. The third parties having refused payment, the bank was liable to the shipper for the loss of the apples caused by its surrender of the bill of lading, but the measure of damages was not the amount of the draft, but the value of the apples at their destination, less freight charges. *People's Nat. Bank v. Brogden*, 98 Tex. 360, 83 S. W. 1098, citing *Thomas v. Morse*, 80 Tex. 289, 290, 16 S. W. 48; and *Brightman v. Reeves*, 21 Tex.

70, 77, affirming *People's Nat. Bank v. Brogden* (Civ. App.), 84 S. W. 601, 602.

**(2) Liability to Consignee.**

A bank purchasing from the shipper his draft on the consignee for the price of cotton shipped under contract of sale, secured by the assignment of the bill of lading therefor, to the shipper's order, attached to it, does not, it being accepted and paid, assume the obligations of the drawer to the drawee, nor become liable to the latter in case the property, coming to his hands after his payment of the draft, is short in weight of the amount called for in the bills and for the price of which the draft was drawn. *Blaisdell v. Citizens Nat. Bank*, 96 Tex. 626, 75 S. W. 292, disapproving *Landa v. Lattin Bros.*, 19 Tex. Civ. App. 246, 46 S. W. 48. And see *Blaisdell & Co. v. White & Co.* (Civ. App.), 76 S. W. 70, 71, affirmed in 97 Tex. 626, no op.

In an action by a consignee to recover from a bank money paid on drafts purchased by the bank from the consignor, with bills of lading attached, plaintiff alleged that the drafts and bills of lading were indorsed in blank by the consignor and transferred to and purchased by the bank. Held, that the allegation showed the transaction to have been a mere purchase of the drafts, with the bills of lading as security, and not a purchase of the bills of lading so as to in any way make the bank liable for the performance of the consignor's contract. *S. Blaisdell, Jr., Co. v. Citizens' Nat. Bank*, 75 S. W. 292, 96 Tex. 626, 62 L. R. A. 968, 97 Am. St. Rep. 944.

Plaintiff alleged a purchase by him of cotton to be shipped with a draft accompanying a bill of lading; that after the shipment defendant bank purchased the draft, and became the actual owner of the bill of lading and of the cotton which it represented, and thereby undertook to carry out

the contract of sale between plaintiff and consignor; that plaintiff was compelled to pay the draft before the arrival of the cotton; and that when the cotton arrived it was found short weight. Held, that the complaint was demurrable. *Blaisdell & Co. v. White & Co.* (Civ. App.), 76 S. W. 70.

An allegation that the bank, by purchasing the draft, with assignment of the bill of lading of the property for the price of which it was drawn, attached to and securing it, became the owner of the property and assumed the relation of seller thereof to the person on whom the draft was drawn, was a mere conclusion of the pleader, not to be taken as an averment that the transaction was other than an ordinary purchase of a draft secured by bill of lading attached. *Blaisdell v. Citizens National Bank*, 96 Tex. 626, 75 S. W. 292.

A bank holding a draft attached to a bill of lading, for the price of corn shipped, which holds the draft for collection only, and not as a purchaser, is not liable to the drawee after receiving payment for a deficiency in quantity of the corn purported to be shipped, and for the drawer's failure to pay the freight as agreed, and as shown by the invoice attached to the draft and bill of lading. *Gregory v. Sturgis Nat. Bank* (Civ. App.), 71 S. W. 66.

### (3) Liability to Third Person.

See ante, "General Rule," X, E, 3, b, (1).

#### d. Holder with Notice of Defect in Transferrer's Title.

Indorsements on a draft attached to a bill of lading held to put the drawee on inquiry that the bank presenting it was a holder for collection only and not a purchaser. *Gregory v. Sturgis Nat. Bank* (Civ. App.), 71 S. W. 66.

Where a draft attached to a bill of lading was indorsed, "Pay to the or-

der of American National Bank," and by the latter indorsed, "Pay any bank or banker or order American National Bank," and was presented by defendant bank to the drawee, such indorsements were sufficient to put the drawee on inquiry that defendant was a holder for collection only, and was not a purchaser of the draft payable to bearer. *Gregory v. Sturgis Nat. Bank* (Civ. App.), 71 S. W. 66.

#### Effect of Fraudulent Assignment.—

If the assignee be aware that the consignee is unable to pay, then the assignment will be deemed fraudulent as against the rights of the consignor. *Chandler v. Fulton*, 10 Tex. 2, 20.

Collusion or fraud between the consignee and his assignee will enable the consignor to assert his right to reclaim the goods. *Chandler v. Fulton*, 10 Tex. 2, 20.

### F. PERFORMANCE, DISCHARGE OR RELEASE.

A sale of cotton by the pledgor of the bills of lading, pursuant to the uniform custom with the pledgee, held to release the carrier issuing the bills from liability to the pledgee. *First Nat. Bank v. San Antonio, etc., R. Co.* (Civ. App.), 72 S. W. 1033, affirmed in part and reversed in part in 97 Tex. 201.

A bank agreed with cotton dealers to advance money to them to pay for cotton purchased, taking the bills of lading as security, and the uniform course of business had been for such dealers to sell the cotton, and, after sales were made, to receive the bills from the bank, and on receiving payment, to deposit the amount in the bank. Held that the bank's lien on cotton which was sold was terminated by the delivery of the proceeds of the sale to it. Judgment (Civ. App.), 72 S. W. 1033, modified. *First Nat. Bank v. San Antonio & A. P. R. Co.*, 77 S. W. 410, 97 Tex. 201.

Where the sellers of cotton took

bills of lading in their own name, and sent them, with drafts for the price, to a correspondent for collection, and the purchaser paid the drafts by checks on a bank which had agreed to pay the checks and take the bills of lading as security, and the purchaser, on so paying the drafts, received the bills of lading, and delivered them to the bank under the agreement, the bills did not become *functus officio* in the hands of the bank, but still represented the cotton, on which it had a lien for the advances. (Civ. App.), *First Nat. Bank v. San Antonio & A. P. Ry. Co.*, 72 S. W. 1033, modified in 77 S. W. 410, 97 Tex. 201.

On the indorsement of a bill of lading to a bank by a shipper of corn, it paid a draft drawn on the consignee for the price without any notice of claim by the drawee against the drawer on account of a previous transaction. The draft being returned unpaid it was presented to the shipper, who satisfied the same by giving the bank another draft on the consignee, for a less amount, paying the difference between the two drafts in money. Held, that the bank's right with respect to the corn was acquired by the transfer to it of the bill of lading, which was made without notice to it of the consignee's claim against the shipper, and hence its right to the corn could not be defeated in whole or in part by the consignee's claim against the shipper, nor did the subsequent change of drafts between the bank and shipper in any way interrupt or impair its rights. *Freeman*

*v. Bank of Commerce*, 3 Willson, Civ. Cas. Ct. App. § 340.

## G. ACTIONS.

### 1. By and against Transferee.

**Venue.**—See the titles SALES; VENUE. See, also, the titles APPEARANCES, vol. 2, pp. 7, 16; COURTS.

**Parties—Intervention.**—See the title CARRIERS OF GOODS.

### 2. Action for Taking and Withholding Bills.

Bill of lading is property and evidence against a railroad company of valuable rights and taking and withholding it from plaintiff for six months warranted an action for damages. *Gulf, etc., R. Co. v. Brown*, 4 Tex. Civ. App. 435, 23 S. W. 618.

## XI. Way Bills and Shipping Receipts.

**Way Bills.**—See ante, "Presumptions and Burden of Proof," VII, H, 4, d, (1); "Parol Evidence to Vary or Contradict Bill of Lading," X, D, 12.

**Shipping Receipts.**—A statement in a receipt for goods signed by the consignee that the goods were delivered to him by the carrier in good condition is a mere admission, and is not conclusive. *Missouri Pac. Ry. Co. v. Fennell*, 79 Tex. 448, 15 S. W. 693; *Missouri Pac. R. Co. v. Ivy*, 79 Tex. 444, 15 S. W. 692.

**Evidence of Delivery or Acceptance.**—See ante, "Evidence," IX, E, 1, e, (4). See, also, the title CARRIERS OF GOODS.

# CARRIERS OF GOODS.

BY A. P. WALKER.

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### CROSS REFERENCES.

See the titles CARRIERS, ante, p. 304; CONNECTING CARRIERS, and cross references there given.

### I. Definitions and General Consideration.

#### A. DEFINITION, CHARACTERISTICS, AND PERSONS WHO ARE COMMON CARRIERS OF GOODS.

All persons who transport goods from place to place for hire, for such persons as see fit to employ

them, whether usually or occasionally, whether as a principal or an incidental and subordinate occupation, are common carriers and incur all their responsibilities. *Chevallier v. Straham*, 2 Tex. 115, 121; *Haynie v. Baylor*, 18 Tex. 498; *House v. Soder*, 36 Tex. 629, 634. See, to the same effect, *Missouri Pac. R. Co. v. Harris*, 1 App. Civ. Cases, § 1257; *Hahl v.*

Laux, 42 Tex. Civ. App. 182, 185, 93 S. W. 1080.

If one is accustomed to undertake, for hire, to transport the goods of those who choose to employ him, though it be not his constant or usual, but only an occasional occupation, he is a common carrier, at least whenever he holds himself out in any way to the public as a carrier, or undertakes as a matter of business and profit, the transportation of goods. Haynie v. Baylor, 18 Tex. 498, following and approving Chevallier v. Straham, 2 Tex. 115.

A distinctive characteristic of a common carrier is that he transports goods for hire for the public generally, and it is immaterial whether this is his usual or occasional occupation. Chevallier v. Straham, 2 Tex. 115, 119, 122.

The constitutional and statutory provisions relating to carriers do not alter the rule that a common carrier of certain kinds of goods is not liable as such where he transports other kinds of goods, which he does not transport for the public generally. Missouri Pac. Ry. Co. v. Harris, 1 White & W. Civ. Cas. Ct. App. § 1263.

Rev. St., art. 278, prohibiting "common carriers of goods, wares, and merchandise" from limiting their common-law liability, does not either limit or extend the class of property to be embraced by the carrier transporting goods for hire. Missouri Pac. Ry. Co. v. Harris, 1 White & W. Civ. Cas. Ct. App. § 1262.

Where a carrier agreed to carry merchandise to a suitable market and sell it, and, having brought it to a market, it was seized by the shipper's creditors, held, that the undertaking of the defendant was neither that of a common nor a private carrier, that he was merely an agent of the plaintiff, and that if, in the exercise of a sound discretion, defendant used such diligence and care as a prudent man

would have used with his own cotton, he was not liable for its subsequent loss. Williams v. O'Daniels, 35 Tex. 542.

**Persons Occasionally Pursuing Occupation of Carriers.**—Defendants, whose usual business was farming, but who during the season of hauling, employed a term in transporting goods for hire between two places, were common carriers. Chevallier v. Straham, 2 Tex. 115, 47 Am. Dec. 639.

A farmer who occasionally carries goods at certain seasons only does not incur the responsibility of carrier at all seasons and in reference to every contract he may make to carry goods and under whatever special circumstances. Haynie v. Baylor, 18 Tex. 498, 507; Chevallier v. Straham, 2 Tex. 115, 118.

Suppose he were applied to during the planting season, when he did not wish the employment, and did not accept it as a matter of profit, but consented as a matter of accommodation to a neighbor, and at a sacrifice to himself, though he received the usual compensation; such a case would not come within the reason or policy of the law; and the party could not be held to incur the responsibility of a common carrier. It would be difficult to assign any reason why he should be held to any other responsibility than that of a private carrier, or one who undertakes to carry for hire in a particular instance and under a special contract. Haynie v. Baylor, 18 Tex. 498, 508. See post, "Private Carriers," I, B.

The mere fact that the defendant was solicited to carry the goods is entitled, it is true, to but little weight. If a common carrier in fact, it could make no difference whether he solicited the particular employment, or was solicited to accept it. His responsibility would arise from the fact that he undertook, for hire, the carriage of the goods of those who chose

to employ him, and his being solicited to carry for a particular individual would not lessen his responsibility. *Haynie v. Baylor*, 18 Tex. 498, 509.

**Question for Jury.**—In an action to recover for loss of goods by fire while in possession of defendant under contract for transportation, where it appeared that the defendant's principal occupation was farming, but that at certain seasons of the year he made contracts for transportation of goods with those who chose to employ, the question whether defendant was a common or private carrier is for the jury. *Haynie v. Baylor*, 18 Tex. 498.

**Persons Who Are Carriers.**—See the title CARRIERS, ante, p. 304.

**Wagoners.**—A wagoner who carries goods for hire is a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment. *Chevallier v. Straham*, 2 Tex. 115, 118. See, also, *Barrow v. Philleo*, 14 Tex. 345.

A transporter of goods in a covered wagon is a common carrier. *Philleo v. Sanford*, 17 Tex. 227, 231.

## B. PRIVATE CARRIERS.

A private, as distinguished from a common, carrier is one who does not pursue the occupation of transporting goods for hire, but is employed by special contract to transport goods for a particular person. *Chevallier v. Straham*, 2 Tex. 115, 121; *Haynie v. Baylor*, 18 Tex. 498, 508.

It is not the mere undertaking to carry goods for hire that will involve a person in all the risks of the public carrier. A private person may contract with another for the carriage of his goods, and incur no responsibility beyond that of an ordinary bailee for hire; that is to say, the responsibility of ordinary diligence. *Chevallier v. Straham*, 2 Tex. 115, 119.

A private person contracting with another for carriage of latter's goods is not liable as a common carrier.

*Chevallier v. Straham*, 2 Tex. 115, 119.

A private carrier, though he undertakes the transportation of goods as an accommodation, has no discretionary power over the goods transported, but to carry them within a reasonable time, with ordinary care and diligence, and to deliver the same to the consignee at a specific place of destination. *Williams v. O'Daniels*, 35 Tex. 542, 543.

## II. Duty to Receive and Carry.

### A. GENERAL RULE.

Where goods are properly tendered to a common carrier for shipment, the common law requires it to receive them. *Missouri, etc., R. Co. v. Stoner*, 5 Tex. Civ. App. 50, 52, 53, 23 S. W. 1020.

In the absence of a contract previously entered into, the carrier is bound under its common-law duty to receive for shipment property when tendered within reasonable hours and upon reasonable notice. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 690, 29 S. W. 565.

### B. UNDER TEXAS STATUTES.

See post, "Refusal to Receive or Transport," II, G. See the title CARRIERS, ante, p. 304.

Under Rev. St., art. 4227, providing that in case of refusal by a common carrier "to take and transport any passenger or property, or to deliver the same, or either of them, at the regular or appointed time, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of suit," a carrier is liable for receiving the goods of one shipper after rejecting those of a prior applicant. *Houston & T. C. Ry. Co. v. Smith*, 63 Tex. 322.

### C. EXPLOSIVES AND OTHER DANGEROUS SUBSTANCES.

Common carriers are under legal

obligation to receive and properly carry explosives. The mere fact of such carriage does not render the carrier guilty of a nuisance. *Ft. Worth, etc., R. Co. v. Beauchamp*, 95 Tex. 496, 68 S. W. 502. See the titles **NUISANCES; RAILROADS.**

A railroad must carry freight of this character over its road, and such dangers as necessarily result to others from the proper and reasonable performance of this duty must be borne by them as an unavoidable incident of the proper transaction of legitimate business. But a nuisance may result from the negligent exercise of a right, or performance of a duty, with respect to one's own property or property in his charge. A nuisance to others may thus arise from the careless discharge by a common carrier of its duty in the transportation of such dangerous articles as are here in question. The right to carry them does not include the right to subject persons along the route to dangers from explosions for a longer time or in a greater degree than is reasonably necessary to the proper performance of the carrier's duty. *Ft. Worth, etc., R. Co. v. Beauchamp*, 95 Tex. 496, 500, 68 S. W. 502.

#### **D. HOW DUTY ARISES.**

The duty of the carrier to accept and carry the goods may arise either upon his common-law obligation to that effect or upon some express contract made by him in that behalf. *Missouri, etc., R. Co. v. Webb & Co.*, 20 Tex. Civ. App. 431, 438, 49 S. W. 526. See "Special Contracts," IX, in the title **CARRIERS**, ante, p. 304.

#### **E. REGULATIONS AS TO RECEIVING FREIGHT.**

**Receiving Damaged Goods from Connecting Lines.**—A regulation of a railway company that it will not receive damaged goods from a connecting carrier unless indemnified against

liability for damage is reasonable. *Missouri Pac. R. Co. v. Weisman*, 2 Tex. Civ. App. 86, 87, 21 S. W. 426; *Gulf, etc., R. Co. v. Frank Co.* (Civ. App.), 48 S. W. 210.

In such case where the loss by delay arose through the fault of the other lines, for whose acts the defendant road is not responsible, the owner can not recover. *Missouri Pac. R. Co. v. Weisman*, 2 Tex. Civ. App. 86, 21 S. W. 426.

#### **F. LIMITATION BY PUBLIC NOTICE.**

A carrier may relieve himself from obligation to transport particular kinds of goods by giving public notice, but this privilege does not extend to railroads. *Missouri Pac. R. Co. v. Harris*, 1 App. Civ. Cases, § 1257.

A common carrier is only such as to goods of the kind to which his business is confined, but as to them he must hold himself out to the public generally, and engage in it as a business, and not as a casual occupation. *Missouri Pac. R. Co. v. Harris*, 1 White & W. Civ. Cas. Ct. App. §§ 1257, 1262.

Railroad companies can not, as other carriers, relieve themselves from their obligation to carry any property which they are adapted to transport. *Missouri Pac. Ry. Co. v. Harris*, 1 White & W. Civ. Cas. Ct. App. § 1263.

A railroad can not limit its business with respect to any property which it is adapted to transport, and which the public have a right to expect it to transport, since it is a common carrier for the benefit of the people as to all such property as, according to modern usage, railroads are accustomed to transport. *Missouri Pac. Ry. Co. v. Harris*, 1 White & W. Civ. Cas. Ct. App. §§ 1257, 1262.

#### **G. REFUSAL TO RECEIVE OR TRANSPORT.**

##### **1. Excuses for Refusal to Receive.**

A carrier may refuse to take goods

if he does not carry to the place to which the owner wishes to send them. *Inman & Co. v. St. Louis, etc., R. Co.*, 14 Tex. Civ. App. 39, 47, 37 S. W. 37, affirmed in 93 Tex. 643, no op. See ante, "Under Texas Statutes," II, B.

By articles 2226 and 2227, Rev. Stat., a duty is imposed on railway companies to furnish sufficient transportation to carry all property offered, though when the carrier, from an unexpected and unprecedented press of business, is unable to do so, this in general, will furnish a legal excuse for refusing to accept freight. *H. & T. C. Ry. Co. v. Smith*, 63 Tex. 322.

A carrier is not ordinarily bound beyond its own line, but it may by contract become bound for delivery at the final destination of the shipment, although it extends beyond its line. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 690, 29 S. W. 565. See the title CARRIERS, ante, p. 304.

If it is made to appear that the vehicle, vessel or other means used by the carrier for that purpose did not have the capacity to transport safely the property tendered, that would be a sufficient answer to the suit to recover either the damages or penalty. *Houston, etc., R. Co. v. Smith*, 63 Tex. 322, 325.

An unusual pressure of business may in some instances justify the refusal by the carrier to receive freight. *International, etc., R. Co. v. Anderson*, 3 Tex. Civ. App. 8, 21 S. W. 691. See the title CARRIERS, ante, p. 304.

Not, however, that the company must accept at the time the offer is made, whether it has the capacity to then transport the property or not. But if, by unprecedented and unexpected press of business, the company has already received more property than it can then transport, and the warehouses at the point are full and the company has no present means of

taking care of the property offered, then it would be unreasonable to hold that under such conditions the company must accept the property when offered, or else incur the liability prescribed by the statute. *Houston, etc., Ry. Co. v. Smith*, 63 Tex. 322, 325, 326.

But the company will not be allowed to take advantage of such a condition, so as to extend advantages to one customer to the injury of another. It must, under such circumstances, as at all other times in dealing with the public, act upon the rule of equality. To permit the company to take advantage of a press of business to deal out favors to certain customers to the detriment of others, might result in perpetuating that condition upon the line. For instance, suppose the property offered for transportation by other customers was more than could be transported promptly by the particular line, that would not authorize the company to refuse to take and transport, in the order tendered, the property of others, as soon as this could be reasonably done. *Houston, etc., R. Co. v. Smith*, 63 Tex. 322, 327. See the title CARRIERS, ante, p. 304.

## 2. Damages.

**Duty of Owner to Avert or Mitigate Loss.**—When a railroad wrongfully refuses to take and transport property when offered, the owner must care for and preserve his property pending the delay, and he may recover reasonable expenses so incurred from the company. *Houston, etc., R. Co. v. Smith*, 63 Tex. 322, 328.

Where plaintiff negligently left cotton with a railroad company after its refusal to take it, he can not recover for damages to it. *Houston, etc., R. Co. v. Smith*, 63 Tex. 322, 328.

**Measure of Damage.**—The measure of damages occasioned a shipper by a common carrier's refusal to receive his goods would be the loss occasioned by the delay, and the cost of keeping



the goods during the delay. *Houston & T. C. Ry. Co. v. Smith*, 63 Tex. 322.

Railroad company which wrongfully refuses to take and transport cotton offered for shipment is liable, in addition to other damages, for the amount lost by a decline in the market pending delay, which is to be estimated by ascertaining its price there, when it should have arrived, had it been taken when offered, and its price at the time when it did arrive. *Houston, etc., R. Co. v. Smith*, 63 Tex. 322, 329.

The measure of damages for a carrier's refusal to accept goods for shipment as routed by the shipper, where the property is wanted only because of its salability, is the difference between the market value at the destination to which it was to have been carried at the time when it should have arrived there, and its value at the same time at the place from which it was to have been carried, less the freight. *Inman v. St. Louis S. W. R. Co.* (Tex. Civ. App.), 37 S. W. 37, 14 Tex. Civ. App. 39.

The measure of damages for the refusal of a carrier to accept and transport grain tendered to it by one who had sold it under contract, is the difference between the contract price and the value of the grain at the point of shipment, less the cost of shipment, if the contract required the shipper to pay the same, if the contract price was less than the market value at destination, whether the carrier knew of the contract or not. *Missouri, etc., R. Co. v. Witherspoon*, 18 Tex. Civ. App. 615, 45 S. W. 424.

Where freight is tendered to a carrier by delivery at the depot, and the carrier wrongfully refuses to accept it, the expense incurred in carrying it a second time to the depot, from which the owner had received it, may be recovered as damages. *Inman v. St. Louis S. W. R. Co.*, 37 S. W. 37, 14 Tex. Civ. App. 39.

Where the action was brought on

account of any one specific failure to transport any one lot of lumber, the difference between the price of the lumber at the point of departure and the price at its place of destination, less the freight, is the proper measure. *Central, etc., R. Co. v. Morris*, 68 Tex. 49, 60, 3 S. W. 457.

### 3. Action—Pleading.

In an action against a railroad company to recover damages caused by its continuous failure to furnish transportation for freight, it is sufficient in alleging a basis for damages to charge what could have been realized from sales if transportation had been furnished and the loss which resulted from being compelled to keep it at a point where it could not be sold, with a specific statement of the expenses incident to its detention. *Central & Montgomery R. Co. v. Morris & Crawford*, 68 Tex. 49, 3 S. W. 457.

In an action against a railroad for refusal to transport plaintiff's lumber, it is not necessary to allege to what place the lumber was tendered for transportation, or its market value at such place, had it been transported by the railroad, the action being, not for failure to carry one specific lot of lumber, but plaintiff's lumber generally. *Central & M. R. Co. v. Morris*, 68 Tex. 49, 3 S. W. 457.

Plaintiffs, under the circumstances, could make no contracts to deliver because they could not get the necessary transportation, and hence could not have averred the points to which it was to have been carried. *Central, etc., R. Co. v. Morris*, 68 Tex. 49, 58, 3 S. W. 457.

In such suit allegations of tender and refusal of freight to the points to which it was desired to ship the lumber are not necessary. *Central, etc., R. Co. v. Morris*, 68 Tex. 49, 58, 3 S. W. 457.

The reason for the refusal of transportation is alleged to be that the

Gulf, Colorado and Santa Fe Company desired that the lumber should accumulate until they completed a junction between their road and the other defendant, so that it would earn the profit on the transportation beyond the proposed point of connection. This shows that the refusal to carry was not on account of the non-payment of freights, and, therefore, a tender was not necessary to be alleged. *Central, etc., R. Co. v. Morris*, 68 Tex. 49, 58, 3 S. W. 457.

#### H. DUTY TO FURNISH CARS OR MEANS OF TRANSPORTATION.

See post, "Facilities, Means and Mode of Transportation, Vehicles, etc.," V, D.

Under the common law it is the duty of a carrier to provide all necessary facilities and means for transporting such property as may be offered, at least to the extent that would ordinarily be expected to seek transportation by the particular line. *Houston, etc., R. Co. v. Smith*, 63 Tex. 322, 326.

It is the duty of a common carrier, independent of statutory obligation, to provide reasonable facilities and appliances to transport, when requested, such goods as it held itself out ready to carry; the law implies an agreement to furnish necessary cars on a particular day when a request has been in due time made by the shippers of a station agent, who for that purpose has the authority of a general agent. *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 49, 99 S. W. 418.

A railroad company is bound to furnish a suitable car for the transportation of freight, and is not relieved of such liability because the shipper examined the car, and did not object to its fitness. *Hunt v. Nutt* (Civ. App.), 27 S. W. 1031.

Six days' notice allowed railways by

statute in which to procure cars is a safe-guard given them to prevent them from being pressed for time in obtaining cars for transportation of property, and being a privilege granted to them, they can waive it at any time. The fact that the company did not have the full six days' notice, is matter of defense to be proved by it. *International, etc., R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186, 188, 23 S. W. 754.

Where the petition of a shipper against a carrier for delay in furnishing cars for a shipment from P. alleged as ground for recovery that the cars were ordered of the station agent at P., and it appears that the only order was made of a station agent at another station, recovery can not be had, even if, though the station agent of another station had no implied authority to order cars for P., the order given to such other station agent would have constituted a sufficient basis for recovery under a complaint based thereon, in view of the carrier having furnished cars pursuant to such order, though tardily. *Southern Kansas Ry. Co. of Texas v. Cox*, 47 Tex. Civ. App. 84, 103 S. W. 1122.

#### Damage—Measure and Elements.—

A railroad refusing without reasonable excuse to furnish cars to an applicant for the shipment of an article under a contract, of which it had knowledge, is liable to the applicant for the loss of his profits by cancellation of the contract by the purchaser. *Houston, etc., R. Co. v. Campbell* (Civ. App.), 40 S. W. 431, reversed in 91 Tex. 551.

In an action against a railroad for failure to provide cars for the shipment of plaintiff's corn, the latter can not recover both the profits he might have made if the corn had been shipped and the expenses incurred in preparing it for transportation. *Gulf, C. & S. F. Ry. Co. v. Hodge*, 10 Tex. Civ. App. 543, 30 S. W. 829.

### III. Special Contracts for Carriage or to Furnish Cars, Bills of Lading, Shipping Receipts, etc.

See the title CARRIERS, ante, p. 304. See, also, the title CARRIERS OF LIVE STOCK.

### IV. Delivery to and Acceptance by Carrier.

#### A. NECESSITY FOR DELIVERY.

In a suit for the value of cotton destroyed by fire from defendant's locomotive, while awaiting shipment on a platform, where no issue was raised as to the delivery of the cotton for shipment, negligence is the only ground for recovery and if the defendant shows that it used the best appliances which were in good repair and carefully managed by competent engineers, the plaintiff should not recover. *Gulf, etc., R. Co. v. Courtney* (Civ. App.), 23 S. W. 226, 227.

Where, in an action against a railway company for cotton destroyed by fire on its platform, the only negligence charged in the petition was that "the defendant, by the negligent manner in which it operated and managed said platform and \* \* \* its trains in passing said platform, caused said cotton to be destroyed by fire conveyed and imparted to it by sparks \* \* \* from said trains," this did not charge negligence upon defendant in failing to put out the fire after its discovery; and an instruction imposing liability upon the defendant if the accident was caused by its negligence in operating its engines, "or from some other negligent act or omission," was not warranted. *Gulf, etc., R. Co. v. Pool*, 10 Tex. Civ. App. 682, 31 S. W. 688.

#### B. WHEN LIABILITY ATTACHES.

##### 1. In General.

At common law the liability as carrier began whenever the goods were delivered to the carrier for immediate

transportation. *International, etc., R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186, 23 S. W. 754, distinguishing *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491, 495, and *Gulf, etc., R. Co. v. McCorquodale*, 71 Tex. 41, 46, 9 S. W. 80, and following *E. L. & R. R. Co. v. Hall*, 64 Tex. 615 and *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 274, 15 S. W. 568, 19 S. W. 948; *Texas, etc., R. Co. v. Wheat*, 2 App. Civ. Cases, § 165.

There is an apparent conflict between the authorities above cited and the cases of *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491, 495, and *Gulf, etc., R. Co. v. McCorquodale*, 71 Tex. 41, 46, 9 S. W. 80; but in those two cases the railway had contracted to receive and ship the cattle at certain dates, but refused to receive them when presented for shipment, and it was held that the railways were responsible as mere individuals for breach of their contract. *International, etc., R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186, 188, 23 S. W. 754.

Liability of a railway as a common carrier attaches whenever the shipper has done all that is required of him to prepare his property for shipment, and has delivered the same to the railway company and it has been accepted. *International, etc., R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186, 188, 23 S. W. 754, distinguishing *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491, 495 and *Gulf, etc., R. Co. v. McCorquodale*, 71 Tex. 41, 46, 9 S. W. 80, and following *E. L. & R. R. Co. v. Hall*, 64 Tex. 615, and *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 274, 15 S. W. 568, 18 S. W. 948; *Gulf, etc., R. Co. v. Pool*, 10 Tex. Civ. App. 682, 31 S. W. 688; *Martin v. Ft. Worth, etc., R. Co.*, 3 Tex. Civ. App. 556, 22 S. W. 1007; *Ft. Worth, etc., R. Co. v. Martin*, 12 Tex. Civ. App. 464, 35 S. W. 21, affirmed in 93 Tex. 660, no op.; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716.

In other words, whenever all the ar-

rangements for transportation have been made by the would-be shipper, and there is nothing to do but to transport the property to its destination, then the liability of the railway company attaches as a carrier. So long as anything further is to be done or orders to be given by the owner to enable the company to perform its duty, it would be a bailee of a different character than as carrier, and the question of ordinary care on the part of the company might become a prime factor in the determination of the suit. In the latter case the depository or warehouseman would only be liable for negligence or want of ordinary care of the property, and the burden would be on the plaintiff as to negligence. In the other case, the *onus probandi* as to due care would be upon the defendant whenever the damage is proved. *International, etc., R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186, 188, 23 S. W. 754.

## **2. Necessity for Bill of Lading, Shipping Receipt or Written Contract.**

### **a. In General.**

Unless a bill of lading is demanded by the shipper none need be issued by the carrier; if he accepts the goods and puts them upon their voyage on a verbal contract, he is liable as a common carrier. *E. L. & R. R. Co. v. Hall*, 64 Tex. 615, 619; *Gulf, etc., R. Co. v. Compton (Civ. App.)*, 38 S. W. 220; *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491; *Martin v. Ft. Worth, etc., R. Co.*, 3 Tex. Civ. App. 556, 22 S. W. 1007; *Missouri Pac. R. Co. v. Douglass & Sons*, 2 App. Civ. Cases, § 28; *Ft. Worth, etc., R. Co. v. Martin*, 12 Tex. Civ. App. 464, 35 S. W. 21, affirmed in 93 Tex. 660, no op.; *Texas, etc., R. Co. v. Wheat*, 2 App. Civ. Cases, § 165; *Missouri, etc., R. Co. v. Beard*, 34 Tex. Civ. App. 188, 78 S. W. 253; *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 363, 366, 27 S. W. 830; *International, etc., R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186, 23 S. W.

754; *Missouri Pac. R. Co. v. Graves*, 2 App. Civ. Cases, §§ 676, 680; *Texas, etc., R. Co. v. Hamm*, 2 App. Civ. Cases, §§ 491, 494.

Liability as a common carrier does not attach until a bill of lading is given or until the goods have been delivered to and received by the carrier. *Texas, etc., R. Co. v. Wheat*, 2 App. Civ. Cases, § 165.

A carrier may enter into a contract without a bill of lading, a part of which is to be performed before the goods are in a course of actual transportation by him, and in so far as such contract would be binding upon other persons it will be binding upon him also. *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491, 495.

The fact that a person is a common carrier by occupation does not relieve him from all accountability because he has not signed a bill of lading. *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491, 495.

If goods are delivered to a carrier and received by it for shipment, they may be transmitted without the issuance of a bill of lading, and may be regarded as in the possession of the carrier from the time received, though there was no instruction nor intention that the carrier should immediately make the shipment. *Missouri, K. & T. Ry. Co. of Texas v. Beard*, 78 S. W. 253, 34 Tex. Civ. App. 188, citing *E. L. R. R. Co. v. Hall*, 64 Tex. 615, 619; *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 274, 15 S. W. 568, 18 S. W. 948.

The fact that no receipt was given and no written contract of shipment made with an express company, does not prevent a shipper from recovering damages for delay in delivery in such shipment where the express company accepted the package for shipment. *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 363, 366, 27 S. W. 830.

Plaintiff delivered a wagon to defendant road for shipment after 5 o'clock p. m. The shipping clerk had left, but the wagon was received, and

plaintiff was informed that the bill of lading would be made out the next day. Held, that the relation of carrier was assumed by defendant, though the bill of lading was not yet issued. *Gulf, C. & S. F. Ry. Co. v. Compton* (Tex. Civ. App.), 38 S. W. 220.

**Custom and Usage.**—In an action for cotton alleged to have been delivered to the defendant as a common carrier and destroyed by fire, evidence tending to show that the course of dealing and custom was to place goods to be shipped on the platform where the cotton was destroyed, and that it was the expectation and intention of the owner and also of the railway company that they were placed there for shipment, and would ultimately be shipped when instructions were given or when the party was ready for shipment, but not showing that such goods were, by virtue of the custom or course of dealing, to be thereafter regarded as in the actual possession of the railway, was insufficient to authorize submission to the jury of the question of delivery by reason of such custom. *Missouri, K. & T. Ry. Co. of Texas v. Beard*, 78 S. W. 253, 34 Tex. Civ. App. 188. See post, "Constructive Delivery—Usages and Customs," IV, C, 2.

Plaintiff, having a verbal agreement with a railway company for the shipment of certain cotton, delivered it for shipment by placing it upon the depot platform, within the knowledge of the company's agent, as was the custom of delivery at that place; and before a bill of lading was given, the cotton was destroyed by fire, caused by matches being ignited on the platform by small boys allowed to play there. Held, that the defendant's liability as a common carrier had attached, and plaintiff was entitled to recover the value of the cotton. The court said: "We adhere to the view expressed by us on a former appeal of this case (*Martin v. Ft. Worth, etc., R. Co.*, 3 Tex. Civ. App. 556, 22 S. W. 1007), and hold that the petition—substan-

tially the same now as then—alleges facts which attach liability to the defendants as common carriers." *Ft. Worth, etc., Co. v. Martin*, 12 Tex. Civ. App. 464, 35 S. W. 21, affirmed in 93 Tex. 660, no op. See, also, *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491; *E. L. & R. R. Co. v. Hall*, 64 Tex. 615.

"No bill of lading was necessary to render the company responsible for negligence in taking care of the property thus delivered and in its custody. *E. L. & R. R. Co. v. Hall*, 64 Tex. 615; *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491; *Hutch. on Carr.*, § 118." *Martin v. Ft. Worth, etc., R. Co.*, 3 Tex. Civ. App. 556, 557, 22 S. W. 1007.

A petition alleging, in substance, that plaintiff, under agreement of through shipment with the local agent of the defendant railway company at R., had delivered certain cotton, the property of plaintiff, to defendant for shipment by placing it on the railway platform at R., which was the usual method there of delivering cotton for shipment, and of receiving it by defendant, and that through the negligence of defendant in permitting small boys to play with lighted pipes on the platform, the cotton was destroyed by fire, shows a cause of action, and negligence, for which defendant was liable, though no bill of lading may have been issued for the cotton. *Martin v. Ft. Worth, etc., R. Co.*, 3 Tex. Civ. App. 556, 22 S. W. 1007.

**Breach of Parol Contract.**—A parol contract by which a railroad company agrees to receive cattle on its cars for transportation on a certain day, and which is violated by its failure to have the cars ready, may be made the basis of a recovery against the company for all damages caused thereby. *Texas & P. Ry. Co. v. Hamm*, 2 Willson, Civ. Cas. Ct. App., § 494.

**Production of Bill in Evidence.**—See post, "Production and Surrender of Bill of Lading and Receipt for Goods," VIII, A, 4, b.

A bill of lading is not requisite to prove a delivery of articles to a common carrier for transportation. *Missouri Pac. Ry. Co. v. Graves*, 2 Willson, Civ. Cas. Ct. App., § 680.

**b. Under Texas Statute.**

See post, "Liability of Carrier in Capacity of Warehouseman," VI, C, 2.

A statutory provision that the transportation of goods by a common carrier shall be considered as commenced from the time the bill of lading is signed does not preclude the liability from commencing before, viz. from the time of the delivery of the goods, so as to make the carrier liable for loss when no bill is issued. *East Line & R. R. Ry. Co. v. Hall*, 64 Tex. 615.

Article 283, Rev. Stat., providing that the trip or voyage shall be considered as having commenced from the time of the signing of the bill of lading, and the liability of the common carrier shall attach as at common law from and after such signing, does not change the common-law rule. *International, etc., R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186, 23 S. W. 754; *E. L. & R. R. Co. v. Hall*, 64 Tex. 615; *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 274, 15 S. W. 568, 18 S. W. 948.

Articles 281, 282 and 283, Rev. Stat., merely provide that the carriers' common-law liability as such shall commence from the time the bill of lading is signed; and that previous thereto they shall be liable only as warehousemen for goods placed in their depots or warehouses to be thereafter transported. They do not in terms or in effect exempt the carrier from such liabilities as he is subject to in common with all other persons, no matter what occupation they may pursue. *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491, 495.

This court in the case of the *E. L. & R. R. Co. v. Hall*, 64 Tex. 615, 620, construing art. 283, Rev. Stat., as to when the liability of a railway com-

pany began as a common carrier in the case of a shipment of cotton bales, treated it as having attached, notwithstanding no bill of lading had been signed, when the plaintiff by direction of the station agent had put the cotton (187 bales) upon the platform, thirty bales of which had been tagged by a servant of the defendant under an order from the station agent to tag the whole lot, and seven of which had been actually loaded upon the car. *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 274, 15 S. W. 568, 18 S. W. 948; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567.

Rev. St., arts. 281-283, making a carrier's liability begin when the bill of lading is signed, do not apply in case of a parol contract by a railroad company to receive cattle for transportation on a certain day, and the company is liable for breach, though no bill of lading is signed. *Texas P. Ry. Co. v. Nicholson*, 61 Tex. 491.

A custom of a railroad, as common carrier, to receive freight on its platform, at a certain point, and to transport it therefrom without delivering a bill of lading therefor, can not change or modify the proviso contained in Rev. St., art. 283, "that the trip or voyage [of a common carrier] shall be considered as having commenced from the time of signing the bill of lading, and the liability of the common carrier shall attach, as at common law, from and after such signing." *Missouri Pac. Ry. Co. v. Douglas*, 2 Willson, Civ. Cas. Ct. App., § 32.

In an action against defendant, as a common carrier, to recover the value of goods alleged to have been shipped on defendant's road and not afterwards delivered to plaintiff, the petition alleged that the goods were delivered to defendant on its platform, it being the custom of defendant at that point to receive freight on its platform, and that, by reason of said custom, plaintiff delivered the

goods without demanding, or receiving, a bill of lading, or receipt therefor. Held that, under Rev. St., art. 283, providing "that the trip or voyage shall be considered as having commenced from the time of signing the bill of lading, and the liability of the common carrier shall attach, as at common law, from and after such signing," the petition was insufficient, as defendant, if liable at all, was liable as a warehouseman, and not as a common carrier. *Missouri Pac. Ry. Co. v. Douglas*, 2 Willson, Civ. Cas. Ct. App., § 30.

**When Liability as Warehousemen Ceases.**—Under Rev. St., art. 283, declaring when the liability of warehousemen ceases and that of common carriers attaches, liability as a common carrier does not attach until a bill of lading is given, or until the goods have been delivered to, and received by, the carrier. *Texas & P. Ry. Co. v. Wheat*, 2 Willson, Civ. Ct. App., § 167. See, also, *Missouri Pac. R. Co. v. Douglas & Sons*, 2 App. Civ. Cases, § 28.

## C. WHAT CONSTITUTES FORM AND REQUISITES.

### 1. In General.

The liability of a railway company for goods destroyed while in its possession depends on whether or not it has accepted them, and not on whether or not it has been done that ought to precede acceptance. If a carrier takes control of goods and puts its agents to preparing them for shipment, it has accepted them. *East Line & Red River Ry. Co. v. Hall*, 64 Tex. 615.

In cases where the carrier is notified of the fact that a car placed by it on a side track to receive goods for transportation is loaded and ready for shipment, its liability as a carrier will begin. *Yoakum v. Dryden* (Civ. App.), 26 S. W. 312, 313; *Houston, etc., R. Co. v. Hodde*, 42 Tex. 467.

**Must Be for Immediate Transportation.**—"The delivery must be to the

carrier or his agent for immediate transportation; for, if the goods are delivered to him to be stored by him for a certain time, or until the happening of a certain event, or until something further is done to prepare them for transportation, or until further orders are received from the owner, the carrier becomes a mere depositary or bailee until the appointed time has expired or the other contingency happened upon which the carriage is to commence, or until further orders have been given, as the case may be; for nothing could be more unjust than to permit the owner of the goods to impose upon a mere depositary or warehouseman, whether he has yet become related to the goods as carrier or not, the extremely hazardous responsibility of the common carrier as long as it might suit his interest or convenience to do so. But the moment such orders are given, or such other conditions are fulfilled, the carrier having accepted them with that understanding, his duties and responsibilities as carrier begin." *Gulf, etc., R. Co. v. Pool*, 10 Tex. Civ. App. 682, 683, 31 S. W. 688.

### 2. Constructive Delivery—Usage and Custom.

"But, while it is the undoubted general rule that the delivery, to bind the carrier, must be made either to him or to some one with authority from him, or who may be rightfully presumed to have such authority, it is not to be understood that it is not subject to such conventional arrangements between the parties as they may choose to make in regard to the mode of delivery, or that it may not be varied by usage, or by a particular course of dealing between them. They may make such stipulations upon the subject as they see fit, and when such stipulations are made, they, and not the general law, are to govern." *Gulf, etc., R. Co. v. Pool*, 10 Tex. Civ. App. 682, 31 S. W. 688. See ante, "Necessity for Bill of

Lading, Shipping Receipt or Written Contract," IV, B.

The general rule is that there must be an actual delivery to the carrier, in order to create its common-law liability for carriage; but this does not mean, in all instances, an actual delivery. It may mean such a delivery as the parties among themselves may agree upon as sufficient, in placing the property under the control of the carrier, or the custom and habit of dealing in shipments of a particular character may establish the liability of the carrier, when in fact there has been no actual delivery. *Missouri, etc., R. Co. v. Union Ins. Co.* (Civ. App.), 39 S. W. 975, 976.

A delivery is said to be made if the parties agree that the goods may be deposited for transportation at any particular place, and without express notice to the carrier, and proof of a constant and habitual practice and usage of the carrier to receive goods when they are deposited for him in a particular place, without special notice of such deposit, is sufficient to show a public offer by the carrier to receive goods in that mode, and to constitute an agreement between the parties by which the goods when so deposited shall be considered as delivered to him. *Yoakum v. Dryden* (Civ. App.), 26 S. W. 312; *Gulf, etc., R. Co. v. Pool*, 10 Tex. Civ. App. 682, 683, 31 S. W. 688.

"Such a practice and usage are tantamount to an open declaration, a public advertisement by the carrier, that such delivery should, of itself, be deemed an acceptance by him; and to permit him to set up, against those who had been thereby induced to omit it, the want of the formality of an express notice, which had been thus waived, would be sanctioning injustice and fraud. As where, for instance, the delivery was upon a private wharf or dock, used exclusively by the carrier, and upon which it had been its custom and constant usage to receive

goods left there for transportation by it, such a deposit, in the usual and accustomed manner, would be constructive notice, and would be regarded as a sufficient delivery, though the goods were not left in charge of any of its servants." *Gulf, etc., R. Co. v. Pool*, 10 Tex. Civ. App. 682, 683, 31 S. W. 688.

A railway company is bound by a custom acquiesced in by it under which timber is piled up on its right of way for shipment. If it is destroyed by fire originating from one of the company's trains, and without the contributory negligence of the owner of the timber, the railway company is liable in damages. *Gulf, etc., R. Co. v. McLean*, 74 Tex. 646, 12 S. W. 843.

Placing cotton on the wagon or car of a carrier, or near his boat or warehouse, without notice to him, is not a delivery, unless made so by custom, or by some regulation of the carrier. *Houston & T. C. Ry. Co. v. Hodde*, 42 Tex. 467; *Yoakum v. Dryden* (Civ. App.), 26 S. W. 312, 313.

Loading goods on a car standing on a side track does not constitute a delivery to the railroad company, where the station agent, on being notified thereof, declines to ship the goods, and there is no custom or regulation of the railroad company making such loading a delivery. *Yoakum v. Dryden* (Civ. App.), 26 S. W. 312. See, also, *Houston, etc., R. Co. v. Hodde*, 42 Tex. 467.

**Cotton in Possession of Compress Company.**—The liability of a carrier for cotton burned in actual possession of a compress company to which it has been delivered for compression and subsequent shipment, and for which the carrier has issued bills of lading to the shipper, may be established by custom of dealing between the parties, whereby the property is treated as under control of the carrier from the time it issues said bills. *Missouri, K. & T. Ry. Co. v. Union Ins. Co.* (Tex. Civ. App.), 39 S. W. 975.



### 3. Authority of Agent to Accept.

Frequent exercise by person of power of which principal may be presumed to have notice, is presumed evidence of power to act; hence, where railroad employees habitually receive packages for delivery by express company, they are agents of such express company. *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 363, 366, 27 S. W. 830, citing *Hull v. East Line, etc., R. Co.*, 66 Tex. 619, 620, 2 S. W. 831; *Prince v. I. & G. N. R. Co.*, 64 Tex. 144; *Friedlander & Co. v. Cornell*, 45 Tex. 585.

### 4. Necessity for Bill of Lading.

See ante, "Necessity for Bill of Lading, Shipping Receipt or Written Contract," IV, B, 2.

### 5. Question of Fact.

Whether goods were delivered to carrier or not is a question of fact for the jury to find from the evidence. *Houston, etc., R. Co. v. Hodde*, 42 Tex. 467, 471.

In a suit against a common carrier for damage to cotton bales, where the issue is, whether the cotton bales were received or in effect delivered to defendant, and where the testimony on such point is conflicting, it is error in the court in the charge to the jury to call attention to evidence about which there could be no doubt, and instruct that such facts prove a delivery, and the consequent liability of defendant. *Houston & Texas Central Ry. Co. v. Hodde & Werner*, 42 Tex. 467.

## D. EFFECT.

### 1. In General.

At common law the liability as carrier commenced whenever the delivery to him for immediate transportation was completed. *E. L. & R. R. Co. v. Hall*, 64 Tex. 615, 618.

Where it is shown that by local custom placing goods on a depot platform for shipment by a carrier was a delivery to the carrier, a railroad company is liable to the owners for the

value of cotton placed on its platform for shipment, with the knowledge of its agent, and destroyed while there by fire set by a boy who was playing on the platform, and could have been seen by the agent from the depot office. *Ft. Worth & D. C. Ry. Co. v. Martin*, 12 Tex. Civ. App. 464, 35 S. W. 21.

### 2. Concealment or Misrepresentation of Nature or Value.

When goods are shipped as freight, the carrier is discharged from liability if the shipper practices fraud or artifice to deceive the carrier whereby the risk is increased or vigilance lessened. *Missouri Pac. R. Co. v. York*, 2 App. Civ. Cases, § 638; *Texas Exp. Co. v. Dupree*, 2 App. Civ. Cases, §§ 318, 319.

Where the shipper of goods practices a fraud on the carrier, either by his acts or omissions, as to the value of the goods, fraudulently concealing their value from the carrier, such fraud operates to discharge the carrier from liability. *Texas Exp. Co. v. Scott*, 2 Willson, Civ. Cas. Ct. App., § 74; *Houston, etc., R. Co. v. Burke*, 55 Tex. 323, 333; *Pacific Exp. Co. v. Pitman*, 30 Tex. Civ. App. 626, 71 S. W. 312.

"If there be fraud or imposition in misrepresenting the nature or value of the thing to be carried, the shipper ought to be held to forfeit his right to indemnity in case the carrier is thereby induced to bestow less care in its transportation than he would had he been advised of its true nature and value;" but when no misrepresentation is made or concealment practiced, and the carrier has means as ample as the shipper to ascertain its nature and value, and therefore to properly estimate the risk, it can not be held that the carrier is misled as to any fact which ought to influence his conduct, lull his vigilance, or shield him from full responsibility for his own failure to use due care. *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 308, 12 S. W. 815.

If there be a concealment of the thing to be carried or of its value by an agent, the owner is as fully responsible therefor as though the act were his own, and the same results would follow. *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 307, 12 S. W. 815.

The statute of Texas prohibiting a railway company from limiting its common-law liability does not in anywise restrict the operation of the common-law rule that where the shipper of valuables practices a fraud on the carrier, either by his acts or omissions, fraudulently concealing the value of the articles shipped, the carrier is discharged. *Houston, etc., R. Co. v. Burke*, 55 Tex. 323, 333; *Pacific Exp. Co. v. Pitman*, 30 Tex. Civ. App. 626, 71 S. W. 312. See, also, *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 308, 12 S. W. 815; *Texas Exp. Co. v. Scott*, 2 App. Civ. Cases, §§ 72, 74.

Where the agent of an express company fails to ask the value of the article received for transportation, the mere silence of the shipper as to the value of the article delivered will not discharge the carrier from liability for its loss, though it was of unusual value. *Texas Express Co. v. Scott*, 2 Willson, Civ. Cas. Ct. App., § 74.

Where the shipper of goods fraudulently conceals their value from the carrier, such fraud operates to discharge the carrier from liability, though a mere failure to inform the carrier as to the quality of the goods shipped would not, per se, be such fraud as would discharge the carrier. *Texas Exp. Co. v. Scott*, 2 Willson, Civ. Cas. Ct. App., § 72.

A mere failure on the part of the shipper to inform a carrier as to the value of goods shipped would not, per se, be such fraud as would discharge the carrier. *Texas Exp. Co. v. Scott*, 2 Willson, Civ. Cas. Ct. App., § 74.

Shipper is not bound to disclose value until asked. *Texas Exp. Co. v. Scott*, 2 App. Civ. Cases, § 72.

Where one ships a valise containing money by a common carrier, if he is guilty of any fraud or imposition in respect to the carrier, as by concealing the contents of the valise when called on to disclose them, the carrier will not be responsible for its loss while in his possession. *Texas Exp. Co. v. Dupree*, 2 Willson, Civ. Cas. Ct. App., § 319.

A shipper knowing the contents of the bill of lading in use by the company, and knowing that good faith to the company required him to give information in regard to jewelry, articles of gold and silver, etc., shipped by him, and concealing the fact and value of the shipment of such articles, shipping them in a way that would naturally lead the carrier to believe them of small value, he is guilty of a fraud on the carrier and which discharges him of liability. *Pacific Exp. Co. v. Pitman*, 30 Tex. Civ. App. 626, 71 S. W. 312.

Where articles consisting of bedding and clothing are shipped by a common carrier, marked "Bedding," the clothing being wrapped up in the bedding, and no value being placed on the goods at the time of shipment, in the absence of evidence that the clothing had been so placed to conceal its value, the carrier is liable for the loss of the clothing. *Gulf, C. & S. F. Ry. Co. v. Clark*, 2 Willson, Civ. Cas. Ct. App., § 515.

In a suit against a carrier for loss of goods shipped as "bedding," proof that the shipment contained some "clothing," was admissible in absence of proof that clothing had been fraudulently mixed in with bedding to conceal their value. *Gulf, etc., R. Co. v. Clark*, 2 App. Civ. Cases, § 512.

When goods are shipped as freight, the shipper must use no fraud or artifice to deceive the carrier, whereby his risk is increased, or his care or vigilance may be lessened; and, if there is any such fraud or concealment, it will exempt the carrier from responsibility under the contract, or, more

properly speaking, it will make the contract a nullity. *Missouri Pac. Ry. Co. v. York*, 2 Willson, Civ. Cas. Ct. App., § 638.

Plaintiff shipped valuable negatives of prehistoric cities, represented to be, and marked, "photo goods." If their character had been known, a higher transportation rate would have been charged. No inquiry or representations were made as to the value of the shipment. Held, that the evidence did not raise an issue of fraud or concealment as to the character and value of the goods. *Southern Pac. Co. v. D'Arcais*, 64 S. W. 813, 27 Tex. Civ. App. 57.

Where a carrier's charges for transporting packages, when the true value is stated in the receipt, and it exceeds \$50, are greater than when no value is stated, and the shipper knows this, and, for the purpose of obtaining a lower freight charge, does not insert the value in the receipt, and the carrier does not know the true value, and, if it did, would, besides making a greater charge, use greater precaution, this is a fraud on the carrier, releasing it from liability where the package is stolen. *Pacific Exp. Co. v. Pitman*, 71 S. W. 312, 30 Tex. Civ. App. 626.

**False Statement.**—Where one ships a valise containing money by a common carrier, if the agent of the carrier at the time of receiving the valise asked the shipper if it contained money, and he replied that it did not, the carrier will not be responsible for its loss while in his possession. *Texas Exp. Co. v. Dupree*, 2 Willson, Civ. Cas. Ct. App., § 319.

#### **E. PROPERTY NOT IN POSSESSION OR CONTROL OF CARRIER.**

There can be no recovery against a carrier for damages for loss of cotton destroyed by fire where the cotton at the time it was destroyed was not in the possession or under the control of the carrier, but was in the possession

and control of a compress company, which was independent of the carrier, though the cost of compression was included in the charge for transportation and paid by the carrier. (*Civ. App.*), *H. L. Edwards & Co. v. Texas Midland R. Co.*, 81 S. W. 800, reversed 84 S. W. 1097.

#### **F. PLEADING AND PROOF.**

**Allegation and Proof of Place.**—In an action against an express company for delay to deliver a package in which the defendant claimed that the package was not delivered at its office as alleged, it being in proof that at the time in question, and prior thereto, all the employees of the railroad at the depot received packages for the express company at the passenger depot, there is no material variance in the allegations and the proof. The allegation is that the package was received at the office of the defendant at its place of business. It did transact such business at the passenger depot, allowing the employees of the railroad to receive packages there, and shipping them as if received at the office by its regular agent. If there is a variance, it is not of that character that requires reversal. The place of delivery of the package need not be proved strictly as alleged. Delivery for shipment is the gist of the matter, and that was proved. *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 363, 365, 27 S. W. 830.

**Evidence.**—In an action against an express company for failure to deliver a package, evidence that the package was delivered at a railroad depot to a person in charge thereof, and that the employees of the railroad company were in the custom of so receiving packages for the express company, is sufficient to sustain an allegation that the package was received at the office of defendant, at its place of business. *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 363, 27 S. W. 830.

A receipt given by the carrier to a

transfer company, to whom consignor had delivered the goods, is sufficient to show a delivery by the consignor to the carrier. *New York & T. S. S. Co. v. Weiss* (Civ. App.), 47 S. W. 674.

Where cotton placed on a platform within 200 feet of a depot building at which defendant's agent transacted business, was destroyed by fire, the jury were warranted in finding that such agent knew of the presence of such cotton and was guilty of negligence, especially where defendant did not place him on the stand. *Fort Worth & Denver City Ry. Co. v. Martin, Wise & Fitzhugh*, 12 Tex. Civ. App. 464, 35 S. W. 21.

## V. Duties and Liabilities in Course of Transportation.

### A. WHAT LAW GOVERNS.

The liability of a common carrier in transporting goods from Mexico into the state is determined by the laws of Mexico. *Cantu v. Bennett*, 39 Tex. 303.

A common carrier's liability in Texas is determined by the common-law rule making the carrier liable as an insurer for the goods, where the goods are shipped from one point to another within the state. *Pacific Exp. Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 42 S. W. 795.

### B. CARE REQUIRED OF CARRIER.

#### 1. General Rule.

Except where a common carrier may by law contract against liability for his own negligence, a carrier must exercise such care as prudent persons would ordinarily use for the safety of a thing shipped even where a valid contract exists limiting its liability. *Southern Pac. Ry. Co. v. R. E. Maddox & Co.*, 75 Tex. 300, 301, 12 S. W. 815.

Generally, as to limitation of carrier's common-law liability, see the title CARRIERS, ante, p. 304.

Under Rev. St. 1895, art. 319, declaring that a common carrier's liabilities shall be the same as are prescribed by the common law, an instruction, in an action against a carrier for freight lost, limiting the carrier's duty to the exercise of ordinary care for the safe transportation and delivery of the freight at its destination within a reasonable time, was error. *Bibb v. Missouri, K. & T. Ry. Co. of Texas*, 37 Tex. Civ. App. 508, 84 S. W. 663.

Where a shipper makes no concealment or misrepresentation, and the carrier has means as ample as the shipper to ascertain the nature and value of the thing to be shipped, the carrier can not grade the degree of care to be used in transportation by the amount of freight to be paid therefor. *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 309, 12 S. W. 815.

A different rule would make the measure of care required to depend on the adequacy of the sum paid for transportation, this to be determined by the value of the thing to be carried. Such a rule has never been or ever ought to be established. Followed to its legitimate result such a rule would require the holding that a carrier by agreeing to transport freight gratuitously might by contract relieve itself from any liability whatever, and from obligation to exercise even the slightest care. In the case even of a gratuitous mandatory, not charged with any public duty, such a rule has been denied. *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 309, 12 S. W. 815.

#### 2. Liability as Insurer.

##### a. General Rule.

In the absence of restrictions in the contract, a common carrier is liable as an insurer for the loss of goods intrusted to it for transportation, unless such loss was caused by the act of God, a public enemy, some inherent

defect in the goods, or negligence on the part of the shipper. (Tex. Civ. App. 1905), *Gulf, C. & S. F. Ry. Co. v. Roberts* (Civ. App.), 85 S. W. 479; *Texas, etc., R. Co. v. Felker*, 40 Tex. Civ. App. 604, 90 S. W. 530; *International, etc., R. Co. v. Halloren*, 53 Tex. 46, 55; *Gulf, etc., R. Co. v. Browne*, 27 Tex. Civ. App. 437, 66 S. W. 341; *Houston, etc., R. Co. v. Burke*, 55 Tex. 323, 333, citing *Chevallier v. Stratham*, 2 Tex. 115; *Arnold v. Jones*, 26 Tex. 335, 337. And see, also, *Heaton v. Morgan's Louisiana & Texas R. R. & S. S. Co.*, Court of Appeals, 4 Tex. L. J., p. 375; *Pacific Exp. Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 42 S. W. 795; *International, etc., R. Co. v. Bergman* (Civ. App.), 64 S. W. 999; *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491, 495; *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475, 479; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 317, 4 S. W. 567; *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, 340, 13 S. W. 191; *Gulf, etc., R. Co. v. McCordquodale*, 71 Tex. 41, 47, 9 S. W. 80; *International, etc., R. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 11, 27 S. W. 680, affirmed in 87 Tex. 311; *Texas Cent. R. Co. v. Hunter & Co.*, 47 Tex. Civ. App. 190, 104 S. W. 1075; *Texas, etc., R. Co. v. Morse*, 1 App. Civ. Cases, § 411; *Texas Exp. Co. v. Scott*, 2 App. Civ. Cases, §§ 72, 73; *Houston, etc., Nav. Co. v. Dwyer*, 29 Tex. 376; *International, etc., R. Co. v. Hynes*, 3 Tex. Civ. App. 20, 21 S. W. 622; *Gulf, etc., R. Co. v. Levi* (Sup.), 12 S. W. 677; *Texas, etc., R. Co. v. Scrivener*, 2 App. Civ. Cases, § 328; *Texas Exp. Co. v. Dupree*, 2 App. Civ. Cases, § 318.

This principle has been applied in the following cases: *Fentiman v. Atchison, etc., R. Co.*, 44 Tex. Civ. App. 455, 98 S. W. 939; *Philleo v. Sanford*, 17 Tex. 227; *Missouri, etc., R. Co. v. Davidson*, 25 Tex. Civ. App. 134, 60 S. W. 278; *Gulf, etc., R. Co. v. Darby*, 28 Tex. Civ. App. 229, 67 S. W. 129; *Gulf, etc., R. Co. v. Compton* (Civ. App.), 38 S. W. 220; *Gulf, etc., R. Co. v. Levi* (Sup.), 12 S. W. 677.

A common carrier is an insurer against all damage to or loss of goods intrusted to him for transportation, except such as may arise from the act of God, the act of the enemies of the country, or the act of the owner himself. (Tex. 1862.) *Arnold v. Jones*, 26 Tex. 335, 82 Am. Dec. 617; (1881) *Texas & P. Ry. Co. v. Schneider*, 1 White & W. Civ. Cas. Ct. App., § 118; (1884) *Same v. Scrivener*, 2 Willson, Civ. Cas. Ct. App., § 328.

Common carriers are subject to the common-law liability of an insurer for goods committed to their charge for transportation and nothing but the act of God or the public enemy will excuse them for failure to deliver the goods at their destination. *Pacific Express Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 42 S. W. 795.

A carrier is bound to deliver goods in as good condition as he received them at the place to which he undertook to carry them, against all hazards, save a public enemy or act of God. *Missouri Pacific Ry. Co. v. William Barnes & Co.*, 2 Willson, Civ. Cas. Ct. App. 576.

A carrier is liable as an insurer for the loss of goods intrusted to him for transportation, unless the loss is caused by the act of God, the public enemy, inherent defects in the goods or negligence of the shipper. *Fentiman v. Atchison, T. & S. F. Ry. Co.*, 98 S. W. 939, 44 Tex. Civ. 455.

A common carrier is not responsible for act of God, the public enemy, or the fault of the party complaining. *House v. Soder*, 36 Tex. 629, 634; *Chevallier v. Stratham*, 2 Tex. 115.

Thus the carrier does not become an absolute insurer of the safe delivery at all events. *International, etc., R. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 11, 27 S. W. 680, affirmed in 87 Tex. 311.

This law has introduced this exception by implication into every contract for the carriage of goods. *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 317, 4 S. W. 567.

This is the rule as to inanimate property. *Texas Cent. R. Co. v. Hunter & Co.*, 47 Tex. Civ. App. 190, 193, 104 S. W. 1075. As to rule in case of live stock, see the title CARRIERS OF LIVE STOCK.

**Doctrine Not to Be Overturned by Courts.**—The general doctrines respecting the liability of common carriers are as clearly and firmly settled by the uninterrupted current of decisions in the English and American courts as any principles of the law can be; they are not to be overturned or shaken by anything short of legislative enactment. *Philleo v. Sanford*, 17 Tex. 227, 231.

**Origin.**—This rule was not a part of the ancient common law. It had its origin in what was supposed to be the commercial necessities of England at a time when the government afforded imperfect protection to goods in transit, and when robberies were of frequent occurrence. It was first recognized and received its first judicial announcement as a principle of law in the *Woodliffe and Curtis* case, decided in the thirty-eighth year of the reign of Elizabeth, now nearly three centuries ago. *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 94, 14 S. W. 913.

**Reason of Liability.**—The reason for imposing liabilities so onerous on the carrier is that this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their dealings. For else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon it in that point. *Chevallier v. Straham*, 2 Tex. 115, 122, 123.

"When goods are delivered to a carrier they are usually no longer under the eye of the owner; he seldom

follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carriers' servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves." But whatever may be the grounds on which this inflexible rule is based, there is no doubt but that it has been the law of England for ages and was therefore the law of Texas. *Chevallier v. Straham*, 2 Tex. 115, 123.

The old rule that a common carrier is answerable for all losses not occasioned by act of God or the public enemy is founded alike in justice and in sound policy, and ought never to be departed from. *Arnold v. Jones*, 26 Tex. 335, 337.

**Failure to Deliver.**—When a common carrier receives property for shipment, it is liable for its value if it fails to deliver to consignee or in accordance with the terms of its contract, unless it be shown that the loss was caused by an act of God or the public enemy or the fault of the owner or by reason of the seizure of the property under legal process. *Gulf, etc., R. Co. v. Belton Oil Co.*, 45 Tex. Civ. App. 44, 45, 99 S. W. 430.

**Presumptions and Burden of Proof.**—Where a shipper, suing a carrier for loss of goods received for transportation, makes out a prima facie case by proving that the goods were delivered to the carrier and were destroyed while in its possession, the burden is on the carrier to prove that the goods were destroyed proximately by an act of God, the public enemy, inherent defects in the goods, or negligence of the shipper. *Fentiman v. Atchison, T. & S. F. Ry. Co.*, 98 S. W. 939, 44 Tex. Civ. 455; *Ryan & Co. v. M. K. & T. R. Co.*, 65 Tex. 13; *Galveston, etc., R. Co.*

*v. Horne*, 69 Tex. 643, 9 S. W. 440; *Missouri Pac. R. Co. v. China Mfg. Co.*, 79 Tex. 26, 14 S. W. 785; *Galveston, etc., R. Co. v. Efron* (Civ. App.), 38 S. W. 639.

Where there has been a loss of goods in shipment by a carrier, in the absence of a contract limiting its liability, the carrier must show affirmatively that the loss resulted from a cause for which it was not responsible; such as the act of God or the public enemy. (*Tex. Civ. App. 1905*), *Gulf, C. & S. F. Ry. Co. v. Roberts* (Civ. App.), 85 S. W. 479.

Where, in an action against a carrier, it appears that loss or injury proceeded from an act of God, etc., the burden is on plaintiff to show that the injury or loss resulted nevertheless from the negligence or fault of the carrier. *Missouri Pacific Ry. Co. v. William Barnes & Co.*, 2 Willson, Civ. Cas. Ct. App. 576.

And, primarily, the question as to whether the carrier has discharged this burden of proof by overturning the prima facie case is one of fact for a jury to determine. If the question of whether a prima facie case of the plaintiff's right to recover can, upon any rebutting evidence of the defendant, however strong, ever be withheld from the jury and decided by the court as one of law, it can only be when the evidence in rebuttal is so overwhelming as to leave no room for a reasonable doubt in the mind of every man of ordinary intelligence that the prima facie case has been destroyed by clear proof of an absolute defense to it. *Fentiman v. Atchison, etc., R. Co.*, 44 Tex. Civ. App. 455, 460, 98 S. W. 939.

The burden is not on the shipper to prove negligence on the part of the carrier. *Gulf, etc., R. Co. v. Belton Oil Co.*, 45 Tex. Civ. App. 44, 99 S. W. 430.

#### **b. Under Texas Statute.**

Under the Texas statute when the bill is signed a railroad becomes re-

sponsible as a common carrier, and must answer for all losses to the goods not resulting from the act of God or the public enemy, whether they occur in his warehouse where they are stored, or in the cars or vessels upon which they are being transported. *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491, 495. See ante, "Necessity for Bill of Lading," IV, C, 4.

#### **c. Exceptions and Excuses.**

##### **(1) General Rule.**

See ante, "General Rule," V, B, 1.

##### **(2) Act of God or Other Vis Major.**

See ante, "General Rule," V, B, 1.

##### **(a) In General.**

The carrier is not liable for loss occasioned by the act of God or other vis major. *Texas, etc., R. Co. v. Felker*, 40 Tex. Civ. App. 604, 90 S. W. 530; *Chevallier v. Straham*, 2 Tex. 113, 123; *International, etc., R. Co. v. Halloren*, 53 Tex. 46, 55; *International, etc., R. Co. v. Wentworth*, 9 Tex. Civ. App. 5, 11, 27 S. W. 680, affirmed in 87 Tex. 311; *Texas Cent. R. Co. v. Hunter & Co.*, 47 Tex. Civ. App. 190, 193, 104 S. W. 1075; *Texas, etc., R. Co. v. Morse*, 1 App. Civ. Cases, § 411; *Texas Exp. Co. v. Scott*, 2 App. Civ. Cases, §§ 72, 73; *International, etc., R. Co. v. Hynes*, 3 Tex. Civ. App. 20, 21 S. W. 622; *Gulf, etc., R. Co. v. Levi* (Sup.), 12 S. W. 677; *Texas, etc., R. Co. v. Scrivener*, 2 App. Civ. Cases, § 328; *Fentiman v. Atchison, etc., R. Co.*, 44 Tex. Civ. App. 455, 460, 98 S. W. 939; *Albright v. Penn*, 14 Tex. 290; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567.

The foundation of the rule that the act of God excuses the failure to discharge a duty is the maxim, "Lex neminem cogit impossibilia." If by the use of reasonable care, prudence, and diligence under the circumstances of a particular case it is possible to discharge the duty, then those circumstances do not constitute a valid excuse for a failure to perform it. Nothing less than a fortuitous gathering of

circumstances preventing the performance of a duty as could not have been foreseen or overcome by the exercise of reasonable prudence, care, and diligence constitutes an act of God which will excuse the discharge of the duty. *Gulf, etc., R. Co. v. Boyce*, 39 Tex. Civ. App. 195, 196, 87 S. W. 395, affirmed in 101 Tex. 639, no op.

**(b) What Constitutes Act of God, etc.**

**aa. In General.**

An act of God is defined to be an accident produced by physical causes which are irresistible; such as a loss by lightening and storms, by the perils of the seas, inundations and earthquakes, or by sudden death or illness. *Chevallier v. Straham*, 2 Tex. 115, 124. See *International, etc., R. Co. v. Halloren*, 53 Tex. 46, 55.

Irresistible accident which excuses a carrier from liability for loss of goods is one springing from some physical agency alone, and not from human force or fraud, except that of a public enemy. *Chevallier v. Straham*, 2 Tex. 125.

**Questions of Fact.**—What constitutes an act of God, such as will relieve a common carrier from its common-law liability, is ordinarily a question for the jury, whose members may be presumed to be better acquainted with and more capable of judging the consequences of such acts than members of courts. *Fentiman v. Atchison, etc., R. Co.*, 44 Tex. Civ. App. 455, 460, 98 S. W. 939.

Whether the evidence in regard to an accident shows that it was directly caused by an act of God is a question of fact for the jury. *Gulf, etc., R. Co. v. Boyce*, 39 Tex. Civ. App. 195, 196, 87 S. W. 395, affirmed in 101 Tex. 639, no op.

**bb. Cold Weather.**

'Cold weather in the month of December in this latitude is not that act of God which would excuse a carrier from the performance of its contract.

The carrier must be held to have anticipated such weather at the time of entering into the contract. *Texas, etc., R. Co. v. Coggin*, 44 Tex. Civ. App. 423, 424, 99 S. W. 1052.

**cc. Fire.**

"The most resistless conflagration, if occasioned by human agency without any negligence whatever on the part of the carrier, will furnish no valid ground of exemption. *Chevallier v. Straham*, 2 Tex. 115, 123." *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, 340, 13 S. W. 191.

Defendants, who, as carriers, were hauling cotton, placed it at night within 15 feet of a camp fire. The fire was renewed at midnight, at which time no wind was blowing; but in the morning the cotton was found to be on fire, the wind having arisen and blown the fire into the cotton. Held, that the accident was not due to the act of God. *Chevallier v. Straham*, 2 Tex. 115, 47 Am. Dec. 639.

Where a contract of carriage contained no limitation of the carrier's common-law liability, the fact that the carrier used care to equip the engine, handling the car in which the goods were shipped, with the best spark arrester, and that such engine was operated by a skillful engineer, did not exempt the carrier from liability for destruction of the goods by fire communicated by a spark from the engine. *Gulf, C. & S. F. Ry. Co. v. Roberts* (Civ. App.), 85 S. W. 479.

In suit against a carrier for the loss of a shipment when the petition showed on its face that the claim was for cotton which plaintiff believed was destroyed by fire, and allegations were sustained by proof, defendant was liable under its common-law liability, though the evidence did not show the fire was caused by defendant's negligence. *Houston, etc., R. Co. v. Bath & Co.*, 17 Tex. Civ. App. 697, 712, 44 S. W. 595, affirmed in 93 Tex. 731, no op.



**Evidence.**—The burden is on a carrier to show that a fire destroying goods in its custody was not caused by its negligence (1896) *Texas & P. Ry. Co. v. Payne*, 38 S. W. 366, 15 Tex. Civ. App. 58; (1904) *St. Louis Southwestern Ry. Co. of Texas v. McIntyre*, 82 S. W. 346, 36 Tex. Civ. App. 399.

The mere fact that cotton was destroyed by fire while being transported by a carrier raises a presumption of the carrier's negligence. *Gulf, C. & S. F. Ry. Co. v. J. Zimmerman & Co.*, 81 Tex. 605, 17 S. W. 239.

Where one shipping goods over a common carrier sues to recover for their loss by fire, proof that the loss was caused by sparks from a locomotive, establishes a prima facie case of negligence, shifting the burden to the carrier to show a sufficient spark arrester, and a proper use thereof. *Fire Ass'n v. Loeb*, 25 Tex. Civ. App. 24, 59 S. W. 618, affirmed in 94 Tex. 690.

In an action against a railway company for the value of cotton which had been placed near its tracks for shipment and destroyed by fire, testimony of a witness that he saw sparks coming from defendant's engine and blowing in the direction of the cotton, either on the night in which the fire occurred or the night before, and about 2½ hours earlier than the hour at which the fire occurred, authorized the jury to conclude that the cotton was set on fire by the sparks seen by the witness. *Missouri, K. & T. Ry. Co. of Texas v. Beard*, 78 S. W. 253, 34 Tex. Civ. App. 188.

In a suit against a carrier for damage to a shipment, where witness testified he did not know the origin of the fire, it was error to admit an affidavit previously made by him that he supposed it was caused by passing engines. *Houston, etc., R. Co. v. Bath & Co.*, 17 Tex. Civ. App. 697, 711, 44 S. W. 595, affirmed in 93 Tex. 731, no op.

Evidence in action by a shipper against a carrier for loss of property

by burning of cars in which it was shipped, held sufficient to support judgment for plaintiff. *Ft. Worth & D. C. R. Co. v. Garrison* (Civ. App.), 79 S. W. 611.

Evidence held sufficient to sustain a finding that a shipment of cotton was destroyed by fire through a carrier's negligence. *Fire Ass'n v. Loeb*, 25 Tex. Civ. App. 24, 59 S. W. 617, affirmed in 94 Tex. 690.

#### dd. Floods and Washouts.

A railway company is required to so construct its road bed and track as to avoid those dangers which it could be reasonably foreseen by competent and skillful engineers might result from the ordinary rain fall and freshets peculiar to the particular section of country in which it is constructed. *International, etc., Railroad Co. v. Halloren*, 53 Tex. 46.

In *Gulf, etc., R. Co. v. Pomeroy*, 67 Tex. 490, 501, 3 S. W. 722, it is said, in effect, that even extraordinary floods, if they be such as may reasonably be anticipated, must be guarded against, without reference to the infrequency of their occurrence. The fact that floods not provided for have occurred only at long intervals constitutes no defense. *Atchison, etc., R. Co. v. Madden, etc., Co.*, 46 Tex. Civ. App. 597, 103 S. W. 1193, affirmed in 102 Tex. 578, no op.

A railway company is not liable in damages for culpable negligence, where the injury results from the failure of the company to provide in the construction of its road bed against extraordinary floods unknown to common experience, and which could not have been reasonably anticipated in the construction of the road. *International, etc., R. Co. v. Halloren*, 53 Tex. 46.

On the issue as to whether the defendant railroad company used due diligence in the construction of its road, so as to resist extraordinary inundations, it is error to instruct that defendant should have taken into ac-

count the history of previous floods within the memory of men then living, as due care may be shown in locating the road, though information from the inhabitants was not sought after. *St. Louis, I. M. & S. Ry. Co. v. Bland* (Civ. App.), 34 S. W. 675.

Where a shipper's goods, while in the carrier's possession for transportation, were, without negligence on its part contributing thereto, destroyed by an unprecedented flood, the destruction is attributed to the act of God, exempting it from liability, unless it could have, by the exercise of reasonable care, reasonably anticipated the occurrence of the flood and have kept the goods from being injured thereby. *Fentiman v. Atchison, T. & S. F. Ry. Co.*, 98 S. W. 939, 44 Tex. Civ. 455.

In an action against a carrier for loss of goods while in a railroad yard by a flood submerging the yard, evidence of a flood 59 years before and of the tradition of a flood about 100 years before, followed by proof that the high-water mark of the more recent flood was higher than the flood in question, and that, before the location of the yard, the chief engineer of the carrier had knowledge of the prior floods, was admissible on the issue of whether the flood in question might reasonably have been anticipated by the carrier. *Atchison, T. & S. F. Ry. Co. v. Madden, Sykes & Co.*, 103 S. W. 1193, 46 Tex. Civ. App. 597.

In an action against a carrier for loss of goods occasioned by a flood submerging the cars in which the goods were shipped, while in a yard awaiting further transportation, evidence examined, and held to support a finding of negligence in depositing the goods in the yard in view of the approaching flood. *Atchison, T. & S. F. Ry. Co. v. Madden, Sykes & Co.*, 103 S. W. 1193, 46 Tex. Civ. App. 597.

Although what constitutes an act of God is ordinarily a question for the jury, it will be assumed pro hac vice that the flood which destroyed plain-

tiff's goods was an act of God; for to say that it was not His act because as great a flood occurred at the same place in 1844 would be to hold that God is incapable of causing two floods of the same character at the same place. *Fentiman v. Atchison, etc., R. Co.*, 44 Tex. Civ. App. 455, 460, 98 S. W. 939.

On an issue as to the liability of a railroad company for goods damaged in an unprecedented storm, where there was no evidence as to the effect of the storm on its cars, or to show that they were broken or leaks caused as a result thereof, mere evidence that the cars containing the goods appeared to be good, close, dry cars, and the testimony of the conductor that the cars were in good condition at a certain point, was insufficient to clear the company of negligence, not excluding the possibility of their leaky condition. *Gulf, W. T. & P. Ry. Co. v. Browne*, 66 S. W. 341, 27 Tex. Civ. App. 437.

Where the motion to set aside a default judgment in an action against a carrier for goods destroyed in transportation did not state that the flood causing the damage was unprecedented, but that it was an extraordinary and unusual rainfall or flood, it was properly overruled, since it did not state a sufficient defense; it being the duty of railroads in constructing their road beds to guard against floods which may be anticipated, though some may be extraordinary and unusual. *Missouri, K. & T. Ry. Co. of Texas v. Davidson*, 60 S. W. 278, 25 Tex. Civ. App. 134.

Rain overflowing the road bed of a railroad and washing away a part of its embankment from under the cross ties can not be considered an act of God in such sense as to relieve the railroad from liability for not furnishing sufficient drainage to properly carry away the rain, unless it was so far outside the range of ordinary human experience that the duty of ex-

exercising reasonable care did not require the railroad to anticipate and provide against it. *Gulf, etc., R. Co. v. Boyce*, 39 Tex. Civ. App. 195, 196, 87 S. W. 395, affirmed in 100 Tex. 639, no op.

**ee. Lightning.**

Lightning is an act of God. See *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, 340, 13 S. W. 191.

**ff. Snowstorm.**

A snowstorm in Missouri in the winter season is not an "act of God" in the sense in which that term is used. *Texas, etc., R. Co. v. Smissen*, 31 Tex. Civ. App. 549, 550, 73 S. W. 42, affirmed in 97 Tex. 649, no op.

**gg. Unprecedented Storms, Tornadoes, Whirlwinds, etc.**

Where a common carrier merely fails to make prompt delivery of goods, and they are thereby lost in an unprecedented storm, it will be protected from liability, the act of God, and not its negligence, being the proximate cause. *International & G. N. R. Co. v. Bergman* (Civ. App.), 64 S. W. 999. See post, "Delay in Transportation or Delivery," VII.

Where railway received a carload of wheat for transportation, and, owing to delay in carriage and delivery at point of destination, it was still in possession of the company, when a large part of it was destroyed by an unusual storm, the company is not liable for conversion of the wheat so destroyed. *Gulf, etc., R. v. Darby*, 28 Tex. Civ. App. 229, 67 S. W. 129.

Where, in an action against a common carrier for goods lost in an unprecedented storm, it appeared that the place of storage was safe under usual conditions, and that though possible to have delivered them on the morning of the storm, the bad weather deterred the drayman, and it did not appear that there was any safer place after the danger became apparent, the company was not liable. *International*

*& G. N. R. Co. v. Bergman* (Civ. App.), 64 S. W. 999.

In order to charge a common carrier with goods lost in an unprecedented storm, plaintiff must show that by ordinary prudence it could have protected the goods after becoming aware of the impending danger. *International & G. N. R. Co. v. Bergman* (Civ. App.), 64 S. W. 999.

**A tempest** is an act of God. See *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, 340, 13 S. W. 191.

**Tornado.**—A carrier is not liable for the results of a tornado, with no concurring negligence on its part. *Gulf, C. & S. F. Ry. Co. v. Compton* (Civ. App.), 38 S. W. 220; *Galveston, etc., R. Co. v. Crier*, 45 Tex. Civ. App. 434, 100 S. W. 1177, affirmed in 102 Tex. 583, no op.

**Whirlwind.**—Carrier is not liable for injury to goods received by it for shipment and blown from its platform by an unprecedented whirlwind, where carrier was not concurrently negligent. *Gulf, etc., R. Co. v. Compton* (Civ. App.), 38 S. W. 220, 221.

**(c) Proximate and Remote Cause.**

**aa. Concurring Negligence of Carrier.**

The act of God will not excuse a carrier unless it was the proximate cause of the loss. *Missouri Pacific Ry. Co. v. William Barnes & Co.*, 2 Willson, Civ. Cas. Ct. App. 576.

The act of God will not excuse a carrier unless it was not only the proximate cause but without any concurrent negligence on the carrier's part. *Missouri Pacific Ry. Co. v. William Barnes & Co.*, 2 Willson, Civ. Cas. Ct. App. 576.

The rule is well settled in this state that where loss or damage is caused by the act of God, a common carrier is not liable for such loss or damage, though it may have been negligent, unless it can be made to appear that there was some causal connection recognized by the law between the negligence of the defendant and the loss

or damage incurred. *Fentiman v. Atchison, etc., R. Co.*, 44 Tex. Civ. App. 455, 98 S. W. 939, and authorities cited. *Galveston, etc., R. Co. v. Crier*, 45 Tex. Civ. App. 434, 439, 100 S. W. 1177, affirmed in 102 Tex. 583, no op.

A carrier is not liable for an injury caused by an act of God, where the attending circumstances show no concurring negligence of the defendant. It is not demanded of any person that he expect and take precaution against unprecedented and unforeseen natural events. *Gulf, etc., R. Co. v. Compton* (Civ. App.), 38 S. W. 220.

While it may be conceded that mere negligence will not render one person liable to another for a loss which the latter would not have sustained had there been no such negligence, unless the negligence was the proximate cause of the loss; yet, on the other hand, it is well settled that if the negligence of one person with reference to the duty he owes to another concurs with an accidental cause resulting in injury to one to whom such duty is owed, the negligent person must answer for the consequences as though his negligence were the sole cause of the loss. (*Gulf, etc., R. Co. v. Boyce*, 39 Tex. Civ. App. 195, 87 S. W. 395, affirmed in 101 Tex. 639, no op., and authorities cited.) The principle just stated is recognized by the decisions of this state as applicable to loss of goods by a common carrier caused by the act of God. For in *International, etc., R. Co. v. Bergman* (Civ. App.), 64 S. W. 999, it is said: "Inasmuch as it is undisputed that the loss of the cotton was occasioned by the storm of September the 8th, 1900, and as the catastrophe comes within the strictest definition of the act of God, it will serve to acquit the company, unless it is made to appear that there is some causal connection recognized by the law between the negligence of the company in failing to make timely delivery of the goods and their destruction by the storm," clearly implying that if such causal connection

were shown the defendant would not be relieved of liability by reason of the principle above enunciated. *Fentiman v. Atchison, etc., R. Co.*, 44 Tex. Civ. App. 455, 461, 98 S. W. 939.

In an action against a common carrier for loss of goods, delivered to it for transportation, when the carrier offers evidence to prove that loss was occasioned by act of God, it is competent for plaintiff to set it aside by proof of negligence, or other facts establishing that the loss was not in fact proximately caused by the act of God, without specially pleading the same. *Missouri Pac. Ry. Co. v. Barnes*, 2 Willson, Civ. Cas. Ct. App. §§ 576, 578.

**Where Negligent Delay Not Proximate Cause.**—In a number of cases it has been decided that the negligent delay of the carrier in transportation could not be regarded as the proximate cause of an ultimate loss by a casualty which in itself constitutes an act of God, as the term is used in defining the carrier's exemption from liability, although had the goods been transported with reasonable diligence they would not have been subject to such casualty. *Hunt Bros. v. Missouri, etc., R. Co.* (Civ. App.), 74 S. W. 69, affirmed in 97 Tex. 637, no op.; *International, etc., R. Co. v. Bergman* (Civ. App.), 64 S. W. 999; *Gulf, C. & S. F. Ry. Co. v. Darby*, 67 S. W. 129, 28 Tex. Civ. App. 229; *Gulf, etc., R. Co. v. North Texas Grain Co.*, 32 Tex. Civ. App. 93, 74 S. W. 567. On the other hand it has been held that the preceding negligent delay on the part of the carrier, in consequence of which the goods were overtaken by a flood, was sufficient ground for holding the carrier liable for the loss.

This conflict in the authorities is recognized by the text-writers, some inclining to the first rule stated and others to the last. As is seen from the authorities cited, the courts of this state hold with the first. *Fentiman v. Atchison, etc., R. Co.*, 44 Tex. Civ. App. 455, 461, 98 S. W. 939.

Wheat shipped by plaintiff over the defendant railroad was damaged, and a part of it totally destroyed, in an unprecedented storm, which occurred while the wheat was still in the possession of the railroad company. The railroad had been guilty of negligence in failing to place the wheat on the proper elevator tracks promptly, so that it could be unloaded, and in other ways; and, but for its negligence, the cars would probably have been unloaded when the storm occurred. Held, that the storm was the proximate, and the company's negligence the remote, cause of the injury to the wheat, and the company was not liable. *Hunt Bros. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.), 74 S. W. 69.

**Negligently Exposing Goods to Flood.**—In *Pinkerton v. Missouri Pac. R. Co.*, 93 S. W. 849 (a case where the goods were lost by a flood), it was held "though the flood was an act of God, that to excuse the carrier, this act of God must be the sole cause of the loss or injury, and whenever the negligence of the carrier mingles with the act of God, as a co-operating cause, he is liable provided the resulting loss is within the probable consequence of the negligent act; otherwise it would be too remote and disconnected to be considered the proximate cause." The court, then, after stating the evidence, which is similar to that in this case, proceeded as follows: "We can not say, without an exercise of arbitrary authority and unwarranted power, that the entire evidence leaves defendant so clearly without fault as to deprive the plaintiff of a right to the opinion of the jury." The court said: "Now, without discussing the evidence or intimating an opinion upon it, we are satisfied that it can not be said from it as a matter of law that the defendant, in view of the information it had in relation to the flood, was not guilty of such negligence in exposing plaintiff's goods to the danger of such flood which so concurred with the act of God in pro-

ducing their destruction as to render it liable for the loss of their value." *Fentiman v. Atchison, etc.*, R. Co., 44 Tex. Civ. App. 455, 461, 98 S. W. 939.

**Failure to Preserve and Care for Goods.**—See post, "Safe Custody and Preservation," V, I.

#### bb. Act of God Occurring after Breach of Contract.

A carrier can not avoid liability for damages resulting from its breach of contract, because of an act of God occurring after such breach. *Gulf, etc.*, R. Co. *v. McCorquodale*, 71 Tex. 41, 47, 9 S. W. 80.

#### (3) Acts of Public Enemy.

##### (a) In General.

A carrier who has exercised due diligence, is not liable for loss or damage arising from acts of the public (common) enemy. *Chevallier v. Straham*, 2 Tex. 115, 123; *International, etc.*, R. Co. *v. Wentworth*, 8 Tex. Civ. App. 5, 11, 27 S. W. 680, affirmed in 87 Tex. 311; *Texas Cent. R. Co. v. Hunter & Co.*, 47 Tex. Civ. App. 190, 193, 104 S. W. 1075; *Texas, etc.*, R. Co. *v. Morse*, 1 App. Civ. Cases, § 411; *Texas Exp. Co. v. Scott*, 2 App. Civ. Cases, §§ 72, 73; *International, etc.*, R. Co. *v. Hynes*, 3 Tex. Civ. App. 20, 21 S. W. 622; *Gulf, etc.*, R. Co. *v. Levi* (Sup.), 12 S. W. 677; *Texas, etc.*, R. Co. *v. Scrivener*, 2 App. Civ. Cases, § 328; *Albright v. Penn*, 14 Tex. 290; *Gulf, etc.*, R. Co. *v. Trawick*, 68 Tex. 314, 317, 4 S. W. 567.

There have been many definitions given of the phrase "public enemy," and it is universally understood to mean some power with whom the government is at open war. Pirates are included because they are at war with all mankind, but thieves, robbers, and insurgents are not. *Gulf, etc.*, R. Co. *v. Levi* (Sup.), 12 S. W. 677.

##### (b) Loss by Thieves and Robbers.

A carrier is liable for losses occasioned by secret theft or embezzlement, or inflicted by robbers. *Gulf, etc.*, R. Co. *v. Levi*, 76 Tex. 337, 13 S.

W. 191; *Gulf, etc., R. Co. v. Levi* (Sup.), 12 S. W. 677; *Chevallier v. Straham*, 2 Tex. 115, 123.

The only plausible reason of the rule furnished by the earlier decisions is that the shipper might lose his goods by collusion between the carrier and lawless persons, thieves, or robbers. The rule has been adopted by the American courts, and many of them, without regard to the reason of it, have been constrained by precedent to apply it in cases where its application worked the grossest injustice. *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 39, 95, 14 S. W. 913.

Under the laws of Mexico, a carrier is not liable for a shipper's goods stolen by robbers. *Cantu v. Bennett*, 39 Tex. 303.

**(c) Strikers, Mobs, Rioters and Insurgents.**

A carrier is liable for spoliation and outrages of mobs, rioters and insurgents. *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, 13 S. W. 191; *Chevallier v. Stratton*, 2 Tex. 115, 123.

A mob—an assembly of strikers and rioters—is not a public enemy. *Gulf, etc., R. Co. v. Levi* (Sup.), 12 S. W. 677.

Under Rev. St., art. 277, which declares that "the duties and liabilities of carriers in this state shall be the same as are prescribed by the common law," except when otherwise provided, an interstate carrier, in the absence of contract limiting its liability, is liable for goods destroyed by a mob of rioters. *Gulf, C. & S. Ry. Co. v. Levi* (Sup.), 12 S. W. 677.

**(d) Pirates.**

See ante, "In General," V, B, 2, c. (3), (a).

**(4) Loss Due to Fault of Owner.**

See ante, "General Rule," V, B, 1. A carrier is not liable for injuries to goods caused by any act or omission of the owner. *Missouri Pacific Ry. Co. v. William Barnes & Co.*, 2 Willson, Civ. Cas. Ct. App. 576.

A common carrier who has exercised due care is not responsible for loss or damage to goods carried due to the fault (act) of the owner (shipper or party complaining) thereof. *Chevallier v. Straham*, 2 Tex. 115, 123; *Texas, etc., R. Co. v. Scrivener*, 2 App. Civ. Cases, § 328; *Gulf, etc., R. Co. v. Levi* (Sup.), 12 S. W. 677; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 317, 4 S. W. 567.

A common carrier, is not liable for losses originating in the fraud of the plaintiff himself in relation to the goods, or arising from the negligence of the plaintiff in regard to their packing or delivering without the fault of the carrier. *Albright v. Penn*, 14 Tex. 290.

Where a shipment of vegetables was made in the month of February, when freezing weather is not unusual, and the consignors directed the carrier to leave open a vent in the car, they could not recover for loss caused by severe, but not unprecedented, cold weather. *Gillett v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.), 68 S. W. 61.

**(5) Loss or Injury from Inherent Defect or Vice of Goods.**

See ante, "General Rule," V, B, 1.

If the property be wholly lost or partially decayed, destroyed through some inherent quality, defect or vice of the goods, without fault on the part of the carrier, this will excuse the failure safely to carry and deliver, for the operation of the laws of nature working destruction or loss furnish the same excuse as do tempest, lightning, or other cause termed the act of God. *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, 340, 13 S. W. 191; *Texas Cent. R. Co. v. Hunter & Co.*, 47 Tex. Civ. App. 190, 193, 104 S. W. 1075; *International, etc., R. Co. v. Hynes*, 3 Tex. Civ. App. 20, 21 S. W. 622; *Gulf, etc., R. Co. v. Levi* (Sup.), 12 S. W. 677; *Albright v. Penn*, 14 Tex. 290; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567.

A carrier is not liable for losses or

injuries from inherent defects or vices. *Missouri Pacific Ry. Co. v. William Barnes & Co.*, 2 Willson, Civ. Cas. Ct. App. 576.

**(6) Seizure under Legal Process.**

A common carrier is not liable for failure to deliver or loss of the property caused by reason of the seizure of the property under legal process. *Gulf, etc., R. Co. v. Belton Oil Co.*, 45 Tex. Civ. App. 44, 99 S. W. 430.

A carrier is not liable for injuries to goods caused by seizure under process of law. *Missouri Pacific Ry. Co. v. William Barnes & Co.*, 2 Willson, Civ. Cas. Ct. App. 576.

**(7) Loss Unavoidable by Human Vigilance.**

For failure to carry and deliver, the carrier can not excuse himself by reason of the fact that, through human agency not under his control, this was prevented, without fault on his part. *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, 340, 13 S. W. 191.

"No force, however great, no accident however inevitable, no fraud however beyond his control, will excuse him." *Chevallier v. Straham*, 2 Tex. 115, 122.

Carriers of goods are insurers and not protected by the fact that loss could not have been avoided by any human vigilance. *Albright v. Penn*, 14 Tex. 290, 298.

**(8) Fraud.**

See ante: "Loss Unavoidable by Human Vigilance," V, B, 2, c, (7); post, "Ferryman," V, B, 2, c, (13), (c).

**(9) Rush of Business.**

A rush of business is no defense for failure of a carrier to transport freight or cattle with reasonable care and diligence, such failure being excused only by the act of God or other vis major. *Texas, etc., R. Co. v. Felker*, 40 Tex. Civ. App. 604, 90 S. W. 530. See ante, "General Rule," V, B, 1.

**(10) Injury Resulting from Delay.**

The rule is different when the property is transported and delivered, and

is sought to hold the carrier liable for injury resulting from delay. *International, etc., R. Co. v. Hynes*, 3 Tex. Civ. App. 20, 21 S. W. 622. See post, "Delay in Transportation and Delivery," VII.

**(11) Payment of Value by Insurer.**

See the titles CARRIERS; ante, p. 304; INSURANCE; MARINE INSURANCE; SUBROGATION.

**(12) Contractual Limitation of Common-Law Liability.**

See the title CARRIERS, ante, p. 304.

**(13) Carriers to Which Principle Applicable.**

**(a) Carriers by Water.**

The principle that persons engaged in the general transportation of goods for hire are responsible for all damages done them while in their charge, unless such injury be caused by the act of God or the public enemy, applies as well to common carriers by water as by land. *Houston, etc., Nav. Co. v. Dwyer*, 29 Tex. 376. See the title SHIPS AND SHIPPING.

**(b) Wagoner.**

It can not be pretended that goods may not be conveyed securely in a covered wagon, without being exposed to injury from rain; and he who undertakes their transportation in this way as a common carrier insures their carriage securely, and without injury from any such cause. *Philleo v. Sanford*, 17 Tex. 227, 67 Am. Dec. 654.

**(c) Ferryman.**

Some of these exceptions are scarcely applicable to ferryman, not being likely to arise in the transportation of goods across a river; but if all could be made available on some contingency or other, yet they do not embrace or extend any relief to the carrier on account of defects in his boat, its chains, ropes, and fastenings, however hidden or impenetrable they may be to human vision. The ferryman, as a carrier of goods, is liable not only

for losses occurring from his own negligence, but for all losses not attributable to supernatural agency, to a public enemy, or to the fault of the party who complains. "No force however great, no accident however inevitable, no fraud however beyond his control, will excuse him." He is insurer against all losses except those specified, and although he may exercise the utmost vigilance, he is nevertheless liable for actual losses. (2 Tex. R. 124.) *Albright v. Penn*, 14 Tex. 290, 298.

**(d) Persons Occasionally Pursuing Occupation of Carrier.**

An occasional carrier, who periodically abandons his other pursuits and assumes that of transporting goods for the public, is not exempted from any of the risks incurred, who make the carrying business their constant or principal occupation, and there is no reason why he should be exempted from such risks. *Chevallier v. Straham*, 2 Tex. 115, 122.

**3. Loss Caused by Negligence of Carrier.**

A loss caused by the negligence of the carrier constitutes a liability of the common carrier at common law. *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475, 479; *Gulf, etc., R. Co. v. Zimmerman & Co.*, 81 Tex. 605, 608, 17 S. W. 239.

Where loss actually results from concurring causes no one of them is remote, but all are proximate. A cause can not be concurrent with a proximate cause and remote at the same time. *Butterick Pub. Co. v. Gulf, etc., R. Co.*, 39 Tex. Civ. App. 640, 642, 88 S. W. 299. See, also, *Shelton v. Northern Texas Tract. Co.*, 32 Tex. Civ. App. 507, 75 S. W. 338.

**4. Where Contract of Carriage Illegal.**

A shipper of coin and bullion from Mexico to this state, during the Civil War, in violation of the proclamation of the president of the United States, can not recover of the carrier for

failing to deliver it. *Cantu v. Bennett*, 39 Tex. 303.

**5. Goods Refused Because Improperly Loaded.**

A common carrier is not liable, as a trespasser, to the owner of merchandise which it has refused to receive, as being badly packed, and which is destroyed, without negligence on its part, while being separated by it from other freight with which it has been improperly mixed, and which it is such carrier's duty to transport. *Gulf, C. & S. R. Ry. Co. v. Insurance Co. of North America* (Civ. App.), 28 S. W. 237.

**C. SELECTION OF ROUTE—DEVIATION AND DIVERSION.**

**1. Selection by Shipper.**

**a. Right to Select.**

The shipper usually has the right to select the route over which his goods are to be shipped. *Gulf, etc., R. Co. v. Irvine* (Civ. App.), 73 S. W. 540; *Wells, etc., Express v. Fuller*, 4 Tex. Civ. App. 213, 23 S. W. 412 (see 93 Tex. 242, no op.); *Texas, etc., R. Co. v. Eastin*, 100 Tex. 556, 102 S. W. 105; *International, etc., R. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 12, 13, 27 S. W. 680, affirmed in 87 Tex. 311.

**b. Deviation by Carrier.**

A shipper usually has the right to select the route over which his goods are to be shipped, and the carrier is liable for all damages resulting from deviation therefrom. *Gulf, C. & S. F. Ry. Co. v. Irvine & Woods* (Civ. App.), 73 S. W. 540; *Wells, etc., Express v. Fuller*, 4 Tex. Civ. App. 213, 222, 23 S. W. 412 (see 93 Tex. 742, no op.).

It is elementary law that, if a carrier deviates from the route fixed by his contract, he becomes responsible for all loss which occurs either on his own or his connecting lines. By the deviation he becomes an insurer of the goods. If instructed as to the route, he selects a different one, he becomes responsible for any loss that may oc-



cur in transit. *Texas, etc., R. Co. v. Eastin*, 100 Tex. 556, 102 S. W. 105.

If a common carrier deviates from his route, or forwards goods by different conveyances from those contemplated by his agreement, he becomes an insurer of the goods, and can not avail himself of any exemption in his behalf in the contract. *G., H. & H. Ry. Co. v. Allison*, 59 Tex. 193.

A carrier deprives itself of the exemptions when it deviates a shipment from the designated route in the shipping contract. *Pecos, etc., R. Co. v. Hughes*, 44 Tex. Civ. App. 135, 98 S. W. 410.

If a carrier becomes liable for all losses by a mere deviation from the route contracted for, for a stronger reason he should be held liable for all losses when shipped over a route contrary to the express instructions of the shipper. *Texas, etc., R. Co. v. Eastin*, 100 Tex. 556, 102 S. W. 105.

Where a railroad agent shipped over a certain route contrary to the express directions of the shippers, he was guilty of misfeasance, and liable for loss occurring by reason of the shipment over the route selected by him. *Texas, etc., R. Co. v. Eastin*, 100 Tex. 556, 102 S. W. 105.

Where plaintiffs requested defendant railroad to ship over a certain route, and defendant without any excuse, refused so to do, it became liable for all losses accruing to plaintiffs by reason of the shipment over the longer route. *Texas, etc., R. Co. v. Eastin*, 100 Tex. 556, 102 S. W. 105.

**Deviation from Necessity—Floods, etc.**—A contracting carrier is liable for injuries to a shipment diverted from the route contemplated by the contract, and this though the diversion was compelled by necessity. *Missouri, etc., R. Co. v. Leibold* (Civ. App.), 55 S. W. 368; *G. H. & H. R. Co. v. Allison*, 59 Tex. 193.

Whether or not a carrier should ship over other lines depends on the character of the freight, probable duration

of interruption, expense of such diversion and use of such care as an ordinarily prudent person would use under like circumstances. *St. Louis, etc., R. Co. v. Jones* (Civ. App.), 29 S. W. 695.

Where a carrier deviates without necessity from a regular and usual course, he is responsible for any loss which may occur, whether by act of God or from any other cause. *International, etc., R. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 12, 27 S. W. 680, affirmed in 87 Tex. 311.

The deviation by a carrier from the stipulated route, to save delay, because it was impassable by floods, does not render such carrier an insurer, and liable for delay caused by such deviation. *International & G. N. Ry. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 27 S. W. 680.

Because a carrier had notice that part of the stipulated route was dangerous, it did not assume all risks from unforeseen floods thereon. *International & G. N. Ry. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 27 S. W. 680.

**Damages—Liability as for a Conversion.**—A railway company is not liable in conversion for goods because it transports them to their destination by a route other than that over which they were shipped. *Southern Pac. Co. v. Booth* (Tex. Civ. App.), 39 S. W. 585.

Where the consignee of goods transported by a route different from that over which they were shipped refuses to take them, because he did not receive prompt notice of their arrival, and they are sold by the terminal carrier, he can not recover their value from the forwarding carrier. *Southern Pac. Co. v. Booth* (Civ. App.), 39 S. W. 585.

**Measure of Damages.**—The rule that a carrier is required to follow the shipper's instructions in routing, and that, on failure to do so, it becomes an insurer, in no way conflicts with the general rule for the measure of dam-

ages for breach of contract of carriage, which limits recovery to such damages as might reasonably be supposed to have been within the contemplation of the parties at the time the contract was made as the probable result of its breach. *St. Louis Southwestern Ry. Co. of Texas v. Louisiana & Texas Lumber Co.*, 50 Tex. Civ. App. 179, 109 S. W. 1143.

Where a carrier transports goods by a different route than that over which they were shipped, and, in consequence, the consignee fails to receive prompt notice of their arrival, he can recover from the company the difference between the market value of the goods at the time of their arrival and at the time he received the notice. *Southern Pac. Co. v. Booth* (Tex. Civ. App.), 39 S. W. 585.

Where a carrier was without notice of the provision of the contract of sale between consignor and consignee which authorized consignee to refuse to accept the shipment unless routed over a certain railroad, it was not liable, on failure by it to follow the routing instructions of consignor, resulting in refusal by consignee to accept shipment, for damages so sustained by consignor. *St. Louis Southwestern Ry. Co. of Texas v. Louisiana & Texas Lumber Co.*, 50 Tex. Civ. App. 179, 109 S. W. 1143.

**Evidence.**—On the issue as to who had the right to designate the route of a shipment by rail, the consignor may testify that the consignee had such right. *Gulf, etc., R. Co. v. Denison*, 25 Tex. Civ. App. 127, 60 S. W. 281.

Where shipping contract is silent as to the route, parol evidence as to the route agreed upon is inadmissible. *Wells, etc., Express v. Fuller*, 4 Tex. Civ. App. 213, 221, 222, 23 S. W. 412 (see 93 Tex. 742, no op.).

**Right of Initial to Recover from Connecting Carrier.**—Where an initial carrier shipped over certain connecting lines contrary to the express di-

rections of plaintiffs, thereby becoming an insurer, it was entitled to recover against a connecting carrier for negligence of the latter for which it was adjudged liable, and to be subrogated to the rights of plaintiff. *Texas, etc., R. Co. v. Eastin*, 100 Tex. 556, 102 S. W. 105.

## 2. Selection by Carrier.

### a. Right to Select.

In contracts of shipment which are silent in their express terms as to the matter of route, the carrier has the right, subject to certain restrictions, to choose the route. *Wells, etc., Express v. Fuller*, 4 Tex. Civ. App. 213, 222, 23 S. W. 412 (see 93 Tex. 742, no op.); *Gulf, etc., R. Co. v. Irvine* (Civ. App.), 73 S. W. 540.

In a contract of shipment which fails in express terms to provide the route, the right of the carrier to choose the route is, by force of law, impressed upon and becomes a part of the contract as effectually as if expressed therein. *Wells, etc., Express v. Fuller*, 4 Tex. Civ. App. 213, 222, 23 S. W. 412 (see 93 Tex. 742, no op.).

**Bills of lading specifying no particular route** for a certain shipment of cotton, give the carrier the right to choose the route. *Bessling & Co. v. Houston, etc., R. Co.*, 35 Tex. Civ. App. 470, 80 S. W. 639, affirmed in 98 Tex. 610, no op.

A bill of lading given by an express company, undertaking to forward to point nearest destination reached by the company, which was the point of destination, subject to condition that the company should not be liable except as forwarders only within their own line of communication, does not fix the route of shipment over the company's line, but leaves the company free to choose the route. *Wells, Fargo & Co.'s Express v. Fuller*, 4 Tex. Civ. App. 213, 23 S. W. 412.

Where there was no contract by the carrier for all rail transportation and the bill of lading was silent as to the

route, the selection of a route partly by water, whereon the goods were lost by act of God, did not make the carrier liable. *Bessling & Co. v. Houston*, etc., R. Co., 35 Tex. Civ. App. 470, 80 S. W. 639, affirmed in 98 Tex. 610, no op.

**b. Authority of Agent to Bind Carrier.**

The agent of a railway has authority to bind the company as to the routing of a through shipment in the absence of knowledge by the shipper of limitation on his powers; but where he notified a shipper demanding an all-rail shipment that the company would not regard such billing by him but would send it partly by water, this was notice to the shipper of his lack of authority to contract for an all-rail shipment. *Bessling & Co. v. Houston*, etc., R. Co., 35 Tex. Civ. App. 470, 80 S. W. 639, affirmed in 98 Tex. 610, no op.

Written instructions given the agent of a railway by a cotton shipper to send the cotton of such shipper by an all-rail route, to which the agent assented but at the same time told the shipper that the railway would disregard such instructions and send the cotton part way by a water route according to their custom, did not constitute a contract binding the company to an all-rail shipment, but amounted only to an instruction or direction of the shipper. *Bessling & Co. v. Houston*, etc., R. Co., 35 Tex. Civ. App. 470, 80 S. W. 639, affirmed in 98 Tex. 610, no op.

A railroad company is not bound by the assent of its station agent to a shipper's written instruction as to the selection of a connecting carrier, when the agent told the shipper that the "office at H. [the terminal] generally took their own route, and would not pay any attention to him." *Wm. H. Bessling & Co. v. Houston & T. C. Ry. Co.*, 80 S. W. 639, 35 Tex. Civ. App. 470.

A shipper's written instruction to a

station agent as to the selection of a connecting carrier is superseded by subsequent bills of lading containing no provision on the subject. *Wm. H. Bessling & Co. v. Houston & T. C. Ry. Co.*, 80 S. W. 639, 35 Tex. Civ. App. 470.

**c. Duties and Liabilities.**

When goods are delivered to a carrier for transportation to a designated point, it is his duty as a general rule to transport them by the safest and most direct route. *Texas*, etc., R. Co. *v. Eastin*, 100 Tex. 556, 102 S. W. 105.

This selection must be made with due regard for the rights of the shipper. *Wells*, etc., *Express v. Fuller*, 4 Tex. Civ. App. 213, 23 S. W. 412 (see 93 Tex. 742, no op.); *Gulf*, etc., R. Co. *v. Irvine* (Civ. App.), 73 S. W. 540.

The carrier must, at its peril, select a usual and reasonably safe and direct route. It can not arbitrarily select a known unsafe route, except at the risk of incurring liability for negligence. Neither can it arbitrarily choose a long, inexpedient route, without assuming the risk of delay incident to the choice. *Wells*, etc., *Express v. Fuller*, 4 Tex. Civ. App. 213, 23 S. W. 412 (see 93 Tex. 742, no op.).

If the carrier selects a longer and less expeditious route than the one desired by the shipper, it will be held responsible for all damages resulting from its action. *Wells*, etc., *Express v. Fuller*, 4 Tex. Civ. App. 213, 23 S. W. 412 (see 93 Tex. 742, no op.); *Gulf*, etc., R. Co. *v. Irvine* (Civ. App.), 73 S. W. 540.

Where a contract of shipment is silent as to the route, the carrier may choose the route subject only to its obligation to select at its peril a usual and reasonably safe and direct route. *Wells*, *Fargo & Co.'s Express v. Fuller*, 4 Tex. Civ. App. 213, 23 S. W. 412.

A carrier in selecting a route must do so with reference to the character and apparent object of the shipment.

*Wells, Fargo & Co.'s Express v. Fuller*, 4 Tex. Civ. App. 213, 23 S. W. 412.

The rule seems to be, that the carrier, in the exercise of this right, must use such care in relation to the shipment as an ordinarily prudent person would use under similar circumstances. The character of the goods shipped, whether perishable or not, the apparent object to be subserved by the shipment, and all the surrounding circumstances throwing light upon the shipment, must be considered by the carrier in the exercise of the right of routing, and if it fails to use that degree of care which an ordinarily prudent person would use under like conditions, it is held responsible for damages proximately resulting from its negligence in the selection of the route. *Wells, etc., Express v. Fuller*, 4 Tex. Civ. App. 213, 223, 23 S. W. 412 (see 93 Tex. 742, no op.).

Though by the bill of lading the carrier was entitled to choose the route, it could not select a route so obstructed that delivery could not be made over it, where another practicable route was open. *Houston & T. C. R. Co. v. Houx* (Tex. Civ. App.), 40 S. W. 327, 15 Tex. Civ. App. 502.

The carrier is liable for all damages resulting from its negligence in selecting the route. *Wells, etc., Express v. Fuller*, 4 Tex. Civ. App. 213, 223, 23 S. W. 412 (see 93 Tex. 742, no op.).

The action of the carrier in not selecting the most expeditious route is a question of negligence vel non, and should be submitted to the jury as such. *Wells, etc., Express v. Fuller*, 4 Tex. Civ. App. 213, 223, 23 S. W. 412 (see 93 Tex. 742, no op.).

**Deviation from Regular and Usual Route.**—Where a carrier's deviation from regular and usual course is caused by unprecedented floods, which render it absolutely necessary to change the route to prevent or reduce loss, the carrier is not held liable as an insurer.

*International, etc., R. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 12, 13, 27 S. W. 680, affirmed in 87 Tex. 311.

**Express companies** transport their freight usually upon railways and other public carriers which they do not own or control; and in some instances particular express companies have been cut off from the most direct and expeditious routes by railways refusing them accommodations or discriminating against them in charges. But since the enactment of what is known as the "equal facility statute" by the twentieth legislature, railways in Texas are compelled, under heavy penalty, to afford equal facilities to all express companies without discrimination in charges, and express companies have the privilege of transporting their express matter over any and all railway routes in the state. *Sayles' Civ. Stats.*, art. 4255a. With these facilities furnished them for transportation under laws of the state, if an express company, in exercising its right of routing when the shipper has failed to do so, chooses a long or inexpeditious railway route, when there is a direct and speedy line which it may use, and when the circumstances surrounding the shipment indicate that delay will be damaging, it should be held liable for any damage proximately resulting from the additional time consumed in the journey. *Wells, etc., Express v. Fuller*, 4 Tex. Civ. App. 213, 223, 23 S. W. 412 (see 93 Tex. 742, no op.).

#### d. Diversion by Order of Consignee.

Where a delivery carrier is sued for damage to fruit which was diverted from its original destination by the consignee's order, plaintiffs should account for their failure to produce the order itself as a predicate to the introduction of its contents. *Missouri, etc., R. Co. v. Mazzie & Co.*, 29 Tex. Civ. App. 295, 68 S. W. 56; *Railway v. Dilworth*, 4 Tex. Ct. Rep. 406.

**e. Change of Conveyance.**

See ante, "Deviation by Carrier," V, C, 1, b.

**D. FACILITIES, MEANS AND MODE OF TRANSPORTATION, VEHICLES, ETC.**

See ante, "Duty to Furnish Cars or Means of Transportation," II, H.

Where a carrier was bound to furnish a suitable car for the shipment of cabbages, and to sufficiently ice the same, and the cabbages were damaged by reason of the carrier's negligence, it was liable for damages so sustained, though some of the injuries resulted after the shipment had passed from its possession. *Houston & T. C. R. Co. v. Wilkerson Bros.* (Civ. App.), 82 S. W. 1069.

Where a carrier tendered a shipper a car in which to load a stock of goods and the shipper went to considerable trouble and expense in loading the car, and thereafter the carrier, because of the car's defective roof, offered to substitute another car, but finally, upon the shipper's objection to the substitution, undertook the transportation of the goods after ordering the roof repaired, the shipper, because of such objection, was not estopped from claiming damages for the destruction of his goods by water coming in through the roof of the car. *Texas & P. Ry. Co. v. Townsend* (Civ. App.), 106 S. W. 760.

**Latent or Hidden Defects.**—A ferryman is liable as a common carrier for a loss resulting from an internal defect in the forging of the hook and chain used to fasten the ferry boat, undiscoverable by the closest inspection, and unavoidable by human care, skill and foresight. *Albright v. Penn.*, 14 Tex. 290, 298.

**Effect of Custom—Loss Incident to Particular Mode of Transportation.**

A carrier is not responsible for a loss which occurred from a cause necessarily incident to the particular mode of transportation which was equally

well known to the carrier and the shipper. *Philleo v. Sanford*, 17 Tex. 227, 230.

A common carrier is not liable for damages caused by the elements, where goods are carried in the customary way, and consignor had notice of such custom. *Chevallier v. Patton*, 10 Tex. 344, 346.

In an action against a common carrier upon a bill of lading for a failure to deliver cotton in good order, a plea that it was the custom, known to the plaintiff, to transport cotton and other freight between the points named in the bill of lading in open boats, and that all the damage which the cotton sustained was caused by the rains which fell during the voyage, constitutes a good defense on demurrer. *Chevallier v. Patton*, 10 Tex. 344, approved in *Philleo v. Sanford*, 17 Tex. 227.

This implied exception seems to be limited to transportation in open flat boats. *Philleo v. Sanford*, 17 Tex. 227, 231.

The case of *Chevallier v. Patton*, 10 Tex. 344, was a particular and excepted case, having especial and exclusive reference to that particular mode of transportation. It was not intended, as the opinion shows, to unsettle any principle of the law respecting the liability of common carriers; and it is expressly stated that the exception was not to be extended so as to conflict in any degree with the doctrine respecting the liability of common carriers as laid down in the case of *Chevallier v. Straham*, 2 Tex. 115. *Philleo v. Sanford*, 17 Tex. 227, 231.

**E. LOADING AND PACKING.****1. When Done by Consignor.**

Where a consignor loads freight on a car or packs articles for shipment, the carrier receiving the car as loaded or the package as prepared is not liable for damages arising from a defect in the loading or packing. Judgment (Civ. App. 1907), 104 S. W. 424.

reversed. *Gulf, W. T. & P. Ry. Co. v. Wittnebert*, 101 Tex. 368, 108 S. W. 150, 14 L. R. A. (N. S.) 1227; citing *Texas, etc., R. Co. v. Klepper* (Civ. App.), 24 S. W. 567; *Mexican, etc., R. Co. v. Shean* (Sup.), 18 S. W. 151; and *Texas Cent. R. Co. v. O'Loughlin*, 37 Tex. Civ. App. 640, 84 S. W. 1104. See the titles CARRIERS OF LIVE STOCK; CONNECTING CARRIERS.

Plaintiffs brought suit to recover the value of corn shipped by them over defendant's road, and alleged to have been rendered worthless by delay in transportation. Plaintiffs had control of the loading of the car in which the corn was shipped, and they loaded the corn in the car themselves, while it was wet, and in a condition to be damaged by being bulked in the car. Held, that defendant was not responsible for damages occasioned thereby, notwithstanding the fact of a delay in the transportation thereof. *Galveston, H. & S. A. Ry. Co. v. Smith*, 2 Willson, Civ. Cas. Ct. App., § 138.

A shipper, having sole charge of the loading, loaded corn while it was wet. The car itself was secure against leakage from rain. There was a delay in transportation of about two days, caused by the drawhead of the car being broken. In an action by the shipper for damages, the court charged that if the corn was in a worthless condition when shipped, and the damage did not result from lack of proper care on the company's part, and the car was forwarded within a reasonable time, the jury should find for the company. Held insufficient, in failing to call attention to the act of plaintiff in loading the corn in a wet condition, and submitting to the jury to determine how far such action contributed to the loss complained of. *Galveston, H. & S. A. Ry. Co. v. Smith*, 2 Willson, Civ. Cas. Ct. App., § 138.

Where a shipper assumes the duty of loading cars for shipment, the car-

rier is not liable for damages arising from the improper loading of the goods, notwithstanding knowledge of the conductor of the improper loading. *International & G. N. R. Co. v. H. P. Drought & Co.* (Civ. App.), 100 S. W. 1011.

#### **Car Belonging to Connecting Line.**

—Where a shipper, in loading a car belonging to a connecting line, but which defendant company had placed on its switch track for the convenience of the shipper in so doing, was guilty of negligence causing plaintiff's injuries, the defendant was not liable therefor, since, as the statute authorizes railroad companies to commit the loading of cars to shippers, it can make no difference that the car so to be loaded belongs to a different company. *Washington v. Texas, etc., R. Co.*, 22 Tex. Civ. App. 189, 54 S. W. 1092, affirmed in 93 Tex. 742, no op.

#### **Inspection of Manner of Loading.**

It is not the duty of a railroad company which receives from the owner a loaded car to make an inspection of the manner of loading when the defect can not be discovered by an external examination. *Pecos, etc., R. Co. v. Evans-Snyder-Buel Co.*, 100 Tex. 190, 97 S. W. 466, affirming 42 Tex. Civ. App. 60.

The railroad company in the capacity of common carrier not being liable for property lost from a defect in packing or loading by the consignor, can not with regard to the same freight be under obligation to make an inspection in order to protect persons in the employ of the consignee when unloading the car. *Pecos, etc., R. Co. v. Evans-Snyder-Buel Co.*, 100 Tex. 190, 97 S. W. 466, affirming 42 Tex. Civ. App. 60.

**Live Stock—Overcrowding, etc.**—See the title CARRIERS OF LIVE STOCK.

**Owner's Loading Goods Which Are in Bad Condition.**—See post, "Goods

Received in Bad Condition and Misdirected Goods," VII, D.

Plaintiff was injured while attempting to unload an oil tank car because the unloading valve had been left open when the car was delivered by defendant, the ultimate carrier, to plaintiff's employer, the consignee. The condition of the valve was not discoverable by an external examination, but only after opening the cover of the dome on top of the car, which could only be done by means of a wrench. Held, that defendant was not negligent in failing to ascertain that the valve was open before delivering the car to the consignee. *Gulf, etc., R. Co. v. Wittebert*, 101 Tex. 368, 108 S. W. 150, reversing 104 S. W. 424.

## 2. When Done by Carrier.

**By Railroad under Contract with Shipper.**—A railway company may lawfully contract with the shipper to load or unload a car, and the company will not be held answerable for negligence in the loading or unloading of the car, in any controversy between the shipper and the carrier. *Washington v. Texas, etc., R. Co.*, 22 Tex. Civ. App. 189, 54 S. W. 1092, affirmed in 93 Tex. 742, no op.

**Place of Loading.**—It would seem clear that the railway company possessed the right to load the car at the point where it was shown to have been undertaken. Streets may be used for such unusual purposes whenever it is reasonably necessary. *Washington v. Texas, etc., R. Co.*, 22 Tex. Civ. App. 189, 191, 54 S. W. 1092, affirmed in 93 Tex. 742, no op.

## F. ORDER OF FORWARDING.

Railroad companies must take and transport property in the order in which it is offered and they can not exercise partiality in accepting the property tendered by some and rejecting that offered by others and violation of this rule renders the company liable for all damages resulting there-

from. *H. & T. C. Ry. Co. v. Smith*, 63 Tex. 322.

## G. DUTY TO FOLLOW INSTRUCTIONS OF SHIPPER.

A shipper has the right to place in the bill of lading directions concerning the conduct of the railway company towards the shipment, while the same is in its possession. *Gillett v. Missouri, etc., R. Co. (Civ. App.)*, 68 S. W. 61 (see 95 Tex. 681, no op.); *Texas, etc., R. Co. v. Dorsey*, 30 Tex. Civ. App. 377, 70 S. W. 575.

Carriers of goods are required to follow the instruction given by the owner of property concerning its transportation, whenever practicable. *Gulf, etc., R. Co. v. Irvine (Civ. App.)*, 73 S. W. 540.

Where a shipment of vegetables was made in the month of February, when freezing weather is not unusual, and the consignor directed the carrier to leave open a vent in the car, they could not recover for loss caused by severe, but not unprecedented, cold weather. *Gillet v. Missouri, etc., R. Co. (Civ. App.)*, 68 S. W. 61 (see 95 Tex. 681, no op.).

In *Gillett v. Missouri, etc., R. Co. (Civ. App.)*, 68 S. W. 61 (see 95 Tex. 681, no op.), the company was held not liable because there was no negligence upon its part. It was not the duty of the carrier to disregard the consignor's instructions, and close the vent which they directed to be left open. *Texas, etc., R. Co. v. Smissen*, 31 Tex. Civ. App. 549, 551, 73 S. W. 42, affirmed in 97 Tex. 649, no op.

If a consignor of perishable goods is guilty of negligence in instructing the carrier not to ice, and, by reason of obedience thereto, damage results, the consignor, and not the carrier, is responsible to the consignee. *Texas Cent. R. Co. v. Dorsey*, 70 S. W. 575, 30 Tex. Civ. App. 377.

A carrier receiving perishable goods for shipment is entitled to obey the consignor's direction not to ice, and

will not be responsible for damages consequent on such instruction unless through an unreasonable delay in transportation it becomes the carrier's duty to disregard the instruction. *Texas Cent. R. Co. v. Dorsey*, 70 S. W. 575, 30 Tex. Civ. App. 377.

The railway company had the right to observe and obey the statement not to ice, provided they were not guilty of negligence in delaying the transportation; but if there was an unreasonable delay in transporting the car by the railway company, it would become its duty to ice the car if necessary to the preservation of its contents; and if the failure to do this, or the negligent delay, occasioned the loss, this would be the proximate cause of the damages sustained and the railway company should be held responsible and not the shipper. If the railway company was not negligent in these respects, then it should not be held liable. If the shipper was guilty of negligence in giving the instructions not to ice, and by reason thereof the loss occurred, they would be responsible, and not the railroad company. *Texas, etc., R. Co. v. Dorsey*, 30 Tex. Civ. App. 377, 382, 70 S. W. 575. See post, "Icing," V, I, 2.

See charge as to duty of carrier in preservation of perishable property unavoidable delayed, held properly refused as inapplicable under the state of the testimony. *Texas, etc., R. Co. v. Dorsey*, 30 Tex. Civ. App. 377, 70 S. W. 575.

#### H. CHANGE OF DESTINATION.

A carrier is guilty of a conversion of the goods when he forwards them from their point of destination elsewhere on the order of any one but the party to whom they should have been delivered. *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 759.

#### I. SAFE CUSTODY AND PRESERVATION.

See ante, "Proximate and Remote Cause," V, B, 2, c, (2), (c).

3 Tex—35

#### 1. In General.

Safe custody of the property intrusted to him is as much the duty of a common carrier as its conveyance and delivery; and whenever the situation or condition of the goods, from accident or from any cause, becomes such as to require special care or attention, the carrier must put himself in place of the owner, and do for them all that might reasonably be expected of a careful and prudent person, and, if necessary, it would be his duty to incur any reasonable expense in their preservation. When they become exposed to danger of deterioration or destruction from their own inherent infirmity or from any cause, it is his duty to employ at least a reasonable degree of skill and diligence to preserve them; and, if he fail to do so, it will be accounted negligence, and he will be liable for their loss, though the actual proximate cause of it may be one for which, but for such negligence, he would be in no wise responsible. *Missouri Pac. Ry. Co. v. Barnes*, 2 Willson, Civ. Cas. Ct. App. § 577.

A carrier was liable for damage caused by decay in a shipment of fruit, if by exercise of reasonable skill and diligence the decay could have been prevented. *Missouri, etc., R. Co. v. Barnes & Co.*, 2 App. Civ. Cases, § 575.

#### 2. Icing.

See ante, "Duty to Follow Instructions of Shipper," V, G.

In an action for damages to a car of vegetables caused by not keeping them sufficiently iced, evidence by the consignor that all the vegetables were fresh from farm wagons, and accepted by his foreman as being in first-class condition, was not hearsay. *Ft. Worth, etc., R. Co. v. Harlan* (Civ. App.), 62 S. W. 971, reversed in 94 Tex. 599.

In an action against a railroad for damages to a car of vegetables, caused by not keeping them sufficiently iced, evidence that the vegetables were carefully packed, and that the car was well



iced with five hundred pounds of ice when it left the starting point, is not objectionable, as stating a conclusion. *Ft. Worth, etc., R. Co. v. Harlan* (Civ. App.), 62 S. W. 971, reversed in 94 Tex. 599.

Where defendant was sued for injuries to a car of vegetables caused by its neglect to keep them properly iced, evidence that other cars shipped in the same way, just before and just after the injured shipment, arrived in good condition, was irrelevant and inadmissible. *Ft. Worth & D. C. Ry. Co. v. Harlan* (Civ. App.), 62 S. W. 971.

### 3. Opening and Closing Air Vents.

See ante, "Duty to Follow Instructions of Shipper," V, G.

In an action against a carrier for damages to plaintiff's shipment of apples through defendant's negligence in failing to keep open air vents in its car, testimony of defendant's conductor that it was his custom to carefully examine all vents and see whether they were open or closed, was admissible, witness having previously testified, in response to plaintiff's question, that it was his duty to keep the vents open, and having, on redirect examination, stated that it was his custom to perform such duty. *Cane Hill Cold Storage & Orchard Co. v. San Antonio & A. P. Ry. Co.* (Civ. App.), 95 S. W. 751.

### 4. Unloading and Storing.

Question of failure of duty by carrier in unloading freight as one of fact. *Morgan v. Dibble*, 29 Tex. 107, 120.

Carrier must hold goods until they can be delivered to consignee in proper time and manner. *Morgan v. Dibble*, 29 Tex. 107, 119.

Where carrier negligently leaves goods exposed on wharf, he is liable for their loss even though occasioned by immediate act of God. *Morgan v. Dibble*, 29 Tex. 107, 120. See the title SHIPS AND SHIPPING.

**Unloading in Stormy Weather.**—See the title SHIPS AND SHIPPING.

Where a transfer company, a common carrier of goods for hire, received a trunk, and agreed to carry it to the depot, and there deliver it to the owner at 8 o'clock that night, its liability as a common carrier ceased when it placed the trunk on the platform at the usual and customary place for delivering trunks, and its contract performed on its part and the strict rule by which its liability is determined also ceased. The company, however, would have no right to abandon the property because the owner had not come forward to receive it, but it would be required to exercise such degree of care in keeping and protecting the trunk as an ordinarily prudent person would exercise towards such property under the same circumstances; and a failure to exercise such care would be negligence, for which it would be liable for the value of the trunk and contents. *Fort Worth Transfer Co. v. Isaacs* (Civ. App.), 40 S. W. 39, 40.

### Whether Reasonable Care in Protecting Exercised a Question for Jury.

Where defendant carrier agreed to carry plaintiff's trunk to a station, and, in his absence left it on the platform, in the usual place for such deliveries, and it was stolen therefrom, but the evidence whether plaintiff was to be there to receive it was conflicting, the question whether defendant exercised reasonable care in protecting it was for the jury. *Ft. Worth Transfer Co. v. Isaacs* (Tex. Civ. App.), 40 S. W. 39.

**Under Contract with Shipper.**—See ante, "When Done by Carrier," V, E, 2.

## VI. Title, Custody and Control of Goods.

### A. TITLE AND RIGHTS OF CONSIGNOR.

**Stoppage in Transitu.**—See the title STOPPAGE IN TRANSITU. See, also, the title SALES.

### B. TITLE AND RIGHTS OF CONSIGNEE.

The consignee is presumably the

owner of the goods. *Nashville, etc., R. Co. v. Grayson County Nat. Bank*, 100 Tex. 17, 21, 93 S. W. 431, reversing 91 S. W. 1106.

When the consignor and consignee are different persons, and the goods are in possession of the carrier to be delivered to the consignee, *prima facie* the consignee is the owner. But where there is no written contract, and no agreement between the carrier and the consignor further than that the goods shall be shipped to a given point, and the consignor is shown to be the owner before shipment, there is nothing to show a change of ownership. *E. L. & R. R. Co. v. Hall*, 64 Tex. 615, 620.

A consignee has a *prima facie* right in the goods shipped to him, where the consignment contains no directions showing for whose use they were intended; but if his right be controverted it should be left to the jury to determine from the testimony, to whom they do in fact belong, and the judge should not predicate his own assumptions as the foundations of his charge to the jury of what had been proven. *Cobb v. Beall*, 1 Tex. 342, 347.

The general rule is that a delivery by the seller to the carrier is a delivery to the consignee, and that the goods are thereafter at his risk; but this general rule may be changed by a contract that the rights of the parties shall be otherwise. *Fort Produce Co. v. Dis-sen*, 45 Tex. Civ. App. 403, 101 S. W. 477.

Where there was an order by letter, for the purchase of two thousand bushels of "red wheat, new crop, at 65 cents delivered Galveston, f. o. b. — shipment within two days. Delivery at ——" and the seller wrote in reply, "We book sale to you of 2,000 bushels 65 cents Galveston," the reference to Galveston was one of price only, and not as the place of delivery, and upon delivery to the carrier the title passed to the purchaser. *Orthwein's Sons v. Wichita Mill, etc., Co.*,

32 Tex. Civ. App. 600, 75 S. W. 364, affirmed in 97 Tex. 643, no op.

Where whisky was delivered by vendor to a carrier for transportation and delivery to vendees, title passed to vendees subject to vendor's right of stoppage in transitu. *Gulf, etc., R. Co. v. Rotter Bros. (Civ. App.)*, 104 S. W. 402; *Greif & Bro. v. Seligman (Civ. App.)*, 82 S. W. 533.

**Right to Sue for Loss or Injuries.**— See post, "Parties Plaintiff," X, F, 1.

### C. TITLE AND RIGHTS OF CARRIER.

#### 1. Right to Insure.

See the title INSURANCE.

#### 2. Liability of Carrier in Capacity of Warehouseman.

##### a. Construction and Application of Statutes.

Section 4 of act stating carrier's liability as warehouseman (*Pasc. Dig.* art. 455), does not apply where carrier used no diligence to notify consignee of arrival of goods. *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 761.

Rev. St. art. 281, providing that "a carrier's liability for goods attaches from the commencement of the trip or voyage, and continues until the goods are delivered to the consignee at the point of destination," must be construed, with reference to the delivery of the goods, to mean that if the consignee, within a reasonable time, does not demand the goods, the carrier's liability as such will cease, and he becomes a mere warehouseman. *Texas & P. Ry. Co. v. Capps*, 2 Will-son, Civ. Cas. Ct. App. § 35.

##### b. Initiation, Duration and Termination of Capacity.

###### (1) Goods Stored in Depot before Commencement of Transportation.

Under Rev. St. art. 281, making a railroad company liable as warehouseman for goods stored in their warehouses before the commencement of trips, a railroad company is liable only

as warehouseman for goods stored in its warehouse while the owner's agent is waiting for money with which to prepay the freight. *Texas & P. R. Co. v. Morse*, 1 White & W. Civ. Cas. Ct. App. § 411.

Under Rev. St. art. 281, making carriers having depots for storing goods liable as warehousemen at common law for goods stored therein before the voyage begins, a carrier is liable as warehouseman only for goods consigned for shipment which are held in storage awaiting prepayment of the freight; and this, whether the storage be gratuitous or not. *Texas & P. R. Co. v. Morse*, 1 White & W. Civ. Cas. Ct. App. § 411.

**(2) Goods Stored in Depot by Request of Owner.**

A railroad company is not liable as a common carrier for goods burned in its depot, in which they had been left at the request of the consignee. *Texas & P. Ry. Co. v. Wever*, 3 Willson, Civ. Cas. Ct. App. § 60.

**(3) Goods to Be Delivered to Consignee.**

A common carrier is liable as such for goods intrusted to him from the commencement of the trip until the goods are delivered to the consignee, or until they are stored in a warehouse, where they have not been taken by the consignee after diligence had been exercised to notify him. *Texas & P. Ry. Co. v. Schneider*, 1 White & W. Civ. Cas. Ct. App. § 119.

When in such case the consignee, when notified, fails to take the goods, the carrier's liability is that of a warehouseman who is only liable for failure to exercise ordinary care in preserving the goods. *Texas, etc., R. Co. v. Schneider*, 1 App. Civ. Cases, § 118.

Where goods are not demanded by a consignee immediately after their arrival at their destination, the carrier is liable only as a warehouseman. *St. Louis & S. F. R. Co. v. Akers* (Civ. App.), 73 S. W. 848; *Texas, etc.,*

*R. Co. v. Capps*, 2 App. Civ. Cases, §§ 33, 35; *Galveston, etc., R. Co. v. Smith*, 81 Tex. 479, 17 S. W. 133; *St. Louis, etc., R. Co. v. Terrell* (Civ. App.), 72 S. W. 430.

So long as possession remains with the carrier there can be no delivery, but in case of railway transportation the character in which the carrier holds after freight has been safely taken from its cars and deposited on platform or in warehouse may be affected by notice to the consignee of its arrival at its destination. *Missouri Pac. R. Co. v. Haynes & Co.*, 72 Tex. 175, 10 S. W. 398.

"A railroad company does not discharge itself of its duty as a carrier by merely bringing goods to the terminus of its road; it is bound to unload them with due care and put them in a place where they will be reasonably safe and free from injury. Until this is done the duty and responsibility which attach to a corporation as a carrier do not close." *Missouri Pac. R. Co. v. Haynes & Co.*, 72 Tex. 175, 181, 10 S. W. 398.

**(4) Under Texas Statutes.**

**(a) In General.**

Under the statutes in force in this state the liability of the carrier continues until the thing carried is actually delivered to the owner or consignee thereof at such place as the nature of the carriage requires the delivery to be made, or at some other that may be agreed upon, unless due diligence be used to notify the owner that it has arrived at its place of destination. *Missouri Pac. R. Co. v. Haynes & Co.*, 72 Tex. 175, 10 S. W. 398.

The statute (Rev. Stats., art. 282) indicates the duty of the carrier to use diligence to notify the consignee that the cars are at the place where they are to be unloaded. In absence of any effort to give such notice, liability would continue. *Missouri Pac.*

R. Co. v. Haynes & Co., 72 Tex. 175, 10 S. W. 398.

After such notice has been given, or due diligence used to give it, if the thing be not received within a reasonable time the carrier may store it in a safe place, which in some cases and with some classes of property may be the car in which transported, and from the expiration of such reasonable time responsibility as carrier will cease and that of warehouseman begin. Missouri Pac. R. Co. v. Haynes & Co., 72 Tex. 175, 182, 10 S. W. 298.

Under Rev. St., arts. 281, 282, providing that a common carrier's liability continues until delivery, but that, if he uses due diligence to notify the consignee, who does not take the goods, and they have to be stored, the carrier is liable only as a warehouseman, a railroad company remains liable as a common carrier for goods not discharged from its car, though a third person has agreed with the consignee to unload them, and the car is at the place of discharge; there being no agreement by the consignee to receive the goods on the car, and no notice, or diligence to give notice, of the arrival of the car. Missouri Pac. Ry. Co. v. Haynes & Co., 72 Tex. 175, 10 S. W. 398.

The common-law liability of a carrier continues until the goods are delivered to the consignee, unless due diligence has been used by the carrier to notify him of the arrival of his goods, and he has failed to take them away. Houston & T. C. R. W. Co. v. Adams, 49 Tex. 748.

What are the essential facts constituting the diligence required by the statute, must obviously depend in some degree upon the facts and circumstances of each case in which it is to be shown, and upon the custom and usage of business at the place of delivery. Houston, etc., R. Co. v. Adams, 49 Tex. 748, 760.

It was not incumbent upon the carrier to give the consignees a history of the transit of the grain, to inform them in what cars it was originally shipped, nor into what cars it had been transferred in transit. It was sufficient for them to know that their freight had reached the destination stipulated in the bill of lading over appellant's road. And, when this was made known to them, it was their duty to receive it from the company within three days after the reception of such notice. Failing in their duty, the company's liability as a common carrier ceased, and its liability as a warehouseman attached. Galveston, etc., R. Co. v. Hunt (Civ. App.), 32 S. W. 549, 550.

**(b) What Constitutes Delivery.**

Where cotton was shipped to be delivered to compress, the possession remained with the railroad company until the cotton was removed from the cars and placed on platform of compress. Missouri Pac. R. Co. v. Haynes & Co., 72 Tex. 175, 180, 10 S. W. 398.

If, however, there had been an agreement between the parties that appellees would receive the cotton on the cars and unload it themselves when the cars were placed at the destination, under the statute in force in this state appellant would then be liable under the facts. The spirit of this statute under such an agreement would require the carrier to use such diligence as the statute contemplates to notify the consignee that the cars were at the place where they were to be unloaded, and especially would this be necessary when the track leading to and by the compress platform was often occupied with cars not to be unloaded at the compress. Missouri Pac. R. Co. v. Haynes & Co., 72 Tex. 175, 181, 10 S. W. 398.

The fact that appellees may have arrangements with the compress to have that done which was incumbent

on the carrier before there could be a delivery does not alter the situation of the parties nor their rights. If the compress company, as the agent of appellees, had unloaded the cotton and placed it on the platform where appellees desired to have it, and where appellant was bound to place it before it could be relieved from responsibility as carrier, then the delivery would have been complete; but this was not done by either party, and the cotton was in the possession of appellant as carrier when destroyed by fire. *Missouri Pac. R. Co. v. Haynes & Co.*, 72 Tex. 175, 181, 10 S. W. 398.

#### c. Duties and Degree of Care.

##### (1) In General.

A common carrier is liable for all losses of goods intrusted to him except such as are occasioned by the act of God or the public enemy, but a warehouseman is bound only for the exercise of ordinary diligence, or that care which prudent persons usually take of their own property. *Texas & P. R. Co. v. Morse*, 1 White & W. Civ. Cas. Ct. App. § 412. See ante, "General Rule," V, B, 1.

A railroad company which has possession of goods in its warehouse, as a gratuitous bailee, need not employ a watchman to guard the warehouse. *Texas Cent. R. Co. v. Flanary* (Civ. App.), 50 S. W. 726.

A charge requiring a carrier to keep a sufficient watch to preserve goods stored in its depot from loss by fire imposes too great a burden on the carrier, where it was only liable for the exercise of reasonable care and diligence. (*Tex. Civ. App.* 1899) *Texas Cent. R. Co. v. Flanary*, 50 S. W. 726.

The fact that the floor of a railroad warehouse was saturated with oil, and that the company permitted combustible material to be collected there, where there is nothing to show

the cause of the fire that destroyed the warehouse and its contents, does not show negligence so as to authorize a recovery by one whose goods were burned. *Texas Cent. R. Co. v. Flanary* (Civ. App.), 50 S. W. 726.

##### (2) Acts and Omissions Amounting to Negligence.

A carrier which had goods in its freight house as a warehouseman was sufficiently proven to have been negligent by evidence that one of its engines passed by at a high rate of speed, throwing sparks which ignited cotton on the freight platform, from which the fire communicated to the freight house. *Texas & P. Ry. Co. v. Wever*, 3 Willson, Civ. Cas. Ct. App. § 61.

**Damage Caused by Storm.**—Railroad storing uncalled for freight held not liable for damages thereto caused by a storm. *Gulf, etc., R. Co. v. North Texas Grain Co.*, 32 Tex. Civ. App. 93, 74 S. W. 567.

A buyer of certain grain shipped by rail refused to receive it, and the railroad company requested the parties in interest to direct the disposition of the grain, which they refused to do, and, there being no proper storage facilities at the place to which the grain was consigned, the railroad took it to another town, 14 miles away, where it was properly stored. Held, that the railroad company was not liable for damages to the grain caused by an unprecedented storm. *Gulf, C. & S. F. Ry. Co. v. North Texas Grain Co.*, 74 S. W. 567, 32 Tex. Civ. App. 93.

#### d. Extent of Liability.

##### (1) In General.

A railroad company which permits a person to store his wool in a car, merely as a matter of accommodation, without any agreement on his part to ship the wool over such road or to pay any sum as freight or storage, is liable for the loss of the wool by fire

only in case of gross negligence. *Texas Cent. R. Co. v. Flanary* (Civ. App.), 50 S. W. 726.

Where goods are stored in the car of a railroad company without its knowledge or consent, and it, needing the car, stores the goods in its warehouse, as a matter of accommodation to the owner, it is not responsible for the burning thereof, unless it is the result of its gross negligence. *Texas Cent. R. Co. v. Flanary* (Civ. App.), 45 S. W. 214.

### (3) Liability for Personal Injury to Consignee or Agent.

See post, "Warehouseman," VIII, B, 8, c, (4).

### c. Actions.

#### (1) Actions against Carriers.

Objection that defendant was sued as a carrier, whereas the evidence showed his liability, if any, to be that of a warehouseman, is untenable, where answer in confession and avoidance presented issue of liability as a warehouseman. *Texas, etc., R. Co. v. Morse*, 1 App. Civ. Cases, § 411.

In suit for value of a trunk and its contents destroyed by fire while in a railway depot the testimony showed that employees of the railway company in charge of the depot were engaged in saving the property during the fire, in the discharge of their duties. It was proper to refuse an instruction that the railway company would not as a warehouseman be responsible for the negligence of its servants about matters not in line of their duty. *Galveston, etc., R. Co. v. Smith*, 81 Tex. 479, 17 S. W. 133.

The court instructed the jury that if the railway company held the trunk, etc., sued for as warehouseman it would be responsible, and the jury should find for plaintiff if the testimony showed a want of ordinary care for the safety of the goods; also that the burden of proof was upon the

plaintiff. Held, it was error to fail to charge on request that the use of ordinary care if found would require a verdict for the defendant. *Galveston, etc., R. Co. v. Smith*, 81 Tex. 479, 17 S. W. 133.

In an action against a railroad company for burning plaintiff's cotton while lying on defendant's platform, the petition alleged that, through the negligence of defendant, the fire escaped from its engines; but it did not allege a delivery of the cotton to defendant, or that defendant was negligent in not providing a warehouse for the protection of cotton awaiting shipment. The evidence showed that the fire was set by one of defendant's engines about 1 o'clock p. m., and defendant introduced evidence that the engine in question was provided with the best appliances for preventing the escape of fire, and was operated by a competent man, and in a careful manner. Plaintiff testified that when the engine passed he was about to go to defendant's agent to get his bills of lading for the cotton signed; that the agent always signed the bills whenever they were presented, though he did not like to do so until 4 o'clock. Held, that the only question presented by the pleadings and evidence was whether defendant was guilty of negligence in burning the cotton, and it was error to give an instruction based on a hypothetical delivery to defendant for shipment. *Gulf, etc., R. Co. v. Courtney* (Civ. App.), 23 S. W. 226.

**Evidence.**—In an action for the value of cotton destroyed, while on a railroad platform, by fire occasioned by the carelessness of men hired by the company's agent to load it, the burden is on the company to show that the loss was not due to its negligence. *St. Louis S. W. Ry. Co. of Texas v. Martin* (Civ. App.), 35 S. W. 28.

#### (2) Actions by Carrier Respecting Goods.

Where a common carrier delivered a

shipment on a forged order, which was sold to a warehouseman by a party as receiving it, and subsequently sold by warehousemen in ignorance of the fraud, to others, held, the rule of caveat emptor applies and railway company could recover from warehousemen after fully accounting to the consignees. *Gulf, etc., R. Co. v. Taylor & Sons*, 18 Tex. Civ. App. 571, 572, 45 S. W. 749.

#### **D. SEIZURE UNDER LEGAL PROCESS.**

See ante, "Seizure under Legal Process," V, B, 2, c, (6)

#### **E. SAFE CUSTODY AND PRESERVATION.**

See ante, "Safe Custody and Preservation," V, I.

### **VII. Delay in Transportation and Delivery.**

#### **A. GENERAL RULE.**

Carriers must transport within a reasonable time; otherwise they are liable for injury caused freight by delay. *Galveston, etc., R. Co. v. Silegman* (Civ. App.), 23 S. W. 298, 300; *I. & G. N. R. R. Co. v. Server*, 3 App. Civ. Cases, § 441; *San Antonio, etc., R. Co. v. Josey* (Civ. App.), 71 S. W. 606; *International, etc., R. Co. v. Tisdale*, 74 Tex. 8, 17, 11 S. W. 900.

In expediting the shipment the law does not require that it should be transported in as speedy a way as possible. *International, etc., R. Co. v. Young* (Civ. App.), 72 S. W. 68.

A carrier is not bound to use any extraordinary exertions, nor to incur heavy expense, in order to hasten the delivery of goods. *I. & G. M. R. R. Co. v. Server*, 3 App. Civ. Cases, § 441.

A common carrier is bound to reasonable expedition if no particular time is fixed upon. He is not bound to great haste or expedition. *Gerhard v. Neese*, 36 Tex. 635, 637;

*Chicago, etc., R. Co. v. Gillett* (Civ. App.), 99 S. W. 712.

No rule of law makes it the imperative duty of a carrier to furnish immediate transportation after receiving freight for shipment. *Chicago, etc., R. Co. v. Kapp*, 37 Tex. Civ. App. 203, 83 S. W. 233.

If an owner of cotton, during the civil war, forwarded it by a common carrier to the Rio Grande, for the illegal purpose of evading the blockade and revenue laws of the United States, and of exporting the cotton to Mexico, and attempted to hurry the carrier along so as to escape the United States authorities and effect his purpose, the carrier was under no obligation to make dispatch in aid of the owner's objects. *Gerhard's Adm'r v. Neese*, 36 Tex. 635.

**Question for Jury.**—What is reasonable time within which a carrier must transport and deliver goods must be determined upon facts of particular case and is always question of fact. *I. & G. N. R. R. Co. v. Server*, 3 App. Civ. Cases, § 441.

**Proof.**—But what is a reasonable time under the particular facts of the case or what circumstances will excuse the failure to deliver within a reasonable time the carrier would have the right to show in order to relieve itself of liability for this element of damage. *International, etc., R. Co. v. Tisdale*, 74 Tex. 8, 11 S. W. 900.

#### **B. DILIGENCE REQUIRED.**

It is the duty of a carrier to exercise ordinary diligence to transport and deliver with promptness goods and freight delivered to it for transportation. *Houston & T. C. Ry. Co. v. Foster* (Civ. App.), 86 S. W. 44; *Chicago, etc., R. Co. v. Kapp*, 37 Tex. Civ. App. 203, 83 S. W. 233; *Gerhard v. Neese*, 36 Tex. 635; *International, etc., R. Co. v. Tisdale*, 74 Tex. 8, 11 S. W. 900; *I. & G. N. R. R. Co. v. Server*, 3 App. Civ. Cases, § 441; *Chicago, etc.,*

R. Co. v. Gillett (Civ. App.), 99 S. W. 712; St. Louis, etc., R. Co. v. Thompson (Civ. App.), 103 S. W. 684.

The carrier must exercise reasonable diligence to transport and deliver the property to its destination, exercising the care necessary to comply with its contract of shipment; keeping in view the character of the commodity, its likelihood of deterioration and loss in value by reason of delay. International, etc., R. Co. v. Young (Civ. App.), 72 S. W. 68.

A carrier was not liable for delay in the transportation of certain corn, if ordinary care and diligence was used in the transportation and delivery thereof to the consignee. St. Louis Southwestern Ry. Co. v. Thompson (Civ. App.), 103 S. W. 684.

#### C. PERISHABLE GOODS.

A carrier of perishable freight, guilty of negligent delay in the transportation thereof, resulting in a loss of ice necessary to retain the proper temperature to preserve the freight, is liable for the damages attributable to an insufficient quantity of ice. St. Louis, I. M. & S. Ry. Co. v. White (Civ. App.), 103 S. W. 673.

A railroad company chargeable with unreasonable delay in holding a car containing vegetables is liable for the natural consequences thereof, even beyond its own line. San Antonio, etc., R. Co. v. Thompson (Civ. App.), 66 S. W. 792.

A railway agent agreed to have a refrigerator car at B. on May 11th. On May 12th a refrigerator car arrived, and the vegetables left on the 13th; their destination being changed several times after shipment. Plaintiff testified that they were damaged while waiting for the second car, but also that when they arrived at their final destination they had begun to rot; that he changed their destination because he thought he might sell them at another point, and a delay of a

day would not hurt them. Held insufficient to warrant a finding of damage by reason of delay at B. San Antonio & A. P. Ry. Co. v. Thompson (Civ. App.), 66 S. W. 792.

#### D. GOODS RECEIVED IN BAD CONDITION AND MISDIRECTED GOODS.

Plaintiffs brought suit to recover the value of corn shipped by them over defendant's road, and alleged to have been rendered worthless by delay in transportation. Plaintiffs had control of the loading of the car in which the corn was shipped, and they loaded the corn in the car themselves, while it was wet, and in a condition to be damaged by being bulked in the car. Held, that defendant was not responsible for damages occasioned thereby, notwithstanding the fact of a delay in the transportation thereof. Galveston, H. & S. A. Ry. Co. v. Smith, 2 Willson, Civ. Cas. Ct. App. § 138.

Misdirected Goods.—See post, "Decrease in Market Value," VII, H, 2, c.

#### E. EXCUSES FOR DELAY.

##### 1. In Absence of Special Contract.

##### a. General Rule.

Independent of special contract a common carrier is not liable for a delay in delivery of freight where such delay resulted from causes beyond the carrier's control, and the carrier exercised due care for the protection and preservation of the property. International & G. N. Ry. Co. v. Hynes, 3 Tex. Civ. App. 20, 21 S. W. 622; Gulf, etc., R. Co. v. Gatewood, 79 Tex. 89, 95, 14 S. W. 913; Gulf, etc., R. Co. v. Levi, 76 Tex. 337, 13 S. W. 191.

It is immaterial whether such delay be attributed to the act of God or not. If the delay was induced by causes beyond the carrier's control, it is excused, regardless of the agency producing such failure or delay. International, etc., R. Co. v. Hynes, 3 Tex. Civ. App. 20, 21 S. W. 622.



**Carrier Not an Insurer.**—The rule that a carrier is an insurer is inapplicable to an action for damages to a shipment of corn by delay; the corn having been transported and delivered to the consignee. *St. Louis Southwestern Ry. Co. v. Thompson* (Civ. App.), 103 S. W. 684.

"The reasons upon which the extraordinary responsibility of the common carrier for the safety of the goods is founded do not require that the same responsibility should be extended to the time occupied in their transportation. The danger of loss by robbery or embezzlement or theft by collusion and fraud on his part, has no application when the mere time of the carriage is concerned. 'His first duty,' it is said, 'is to carry the goods safely, and the second to deliver them; and it would be very hard to oblige the carrier, in case of any obstruction, to risk the safety of the goods in order to prevent delay. His duty is to deliver the goods within a reasonable time, which is a term implied by the law in the contract to deliver, as *Tindal, C. J.*, puts it when he says, 'the duty to deliver within a reasonable time being merely a term engrafted by legal implication upon the promise or duty to deliver generally.' In this respect, therefore, the common carrier stands upon the same ground with other bailees, and may excuse delay in delivery of the goods by accident or misfortune, although not inevitable or produced by the act of God. All that can be required of him in such an emergency is that he shall exercise due care and diligence to guard against the delay, and that if it occur without his fault or negligence, he shall omit no reasonable efforts to secure the safety of the goods.'" *Hutch. on Carr.*, § 330. See, also, §§ 331-35, 292. *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, 341, 13 S. W. 191. See ante, "Diligence Required," VII, B.

### **Interstate or Domestic Shipment.**

This exemption from liability for damages so occasioned is available to the carrier whether the contract of shipment be interstate or whether it is to be performed wholly within this state. *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 95, 14 S. W. 913.

### **b. Protection of Property Pending Delay.**

"Where the property is actually transported and delivered, but the time of delivery was delayed, such delay, if resulting from causes beyond the control of the carrier, may be excused. If under such circumstances the carrier exercises due care for the protection and preservation of the property, he will not be liable. *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, 13 S. W. 191." *International, etc., R. Co. v. Hynes*, 3 Tex. Civ. App. 20, 21, 21 S. W. 622.

There being testimony tending to show that the delay complained of in the shipment was caused by atmospheric influences, it was error to refuse to charge the jury upon such issue. To render such delay excusable the carrier must have exercised due care to protect the property against injury pending the delay. *International, etc., R. Co. v. Hynes*, 3 Tex. Civ. App. 20, 21 S. W. 622.

### **c. Unusual Rush of Business.**

Where freight is accepted by a carrier without notice to the shipper that its delivery will be delayed, any delay occasioned by unusual rush of business or large accumulation of freight is no defense to an action for delaying the shipment. *Texas & N. O. Ry. Co. v. E. R. & D. C. Kolp, Jr.* (Civ. App.), 88 S. W. 417; *International, etc., R. Co. v. Anderson*, 3 Tex. Civ. App. 8, 11, 21 S. W. 691; *Gulf, etc., R. Co. v. McCorquodale*, 71 Tex. 41, 48, 9 S. W. 80; *Texas, etc., R. Co. v. Felker*, 40 Tex. Civ. App. 604, 90 S. W. 530; *International, etc., R. Co. v. Lewis* (Civ. App.), 23 S. W. 323; *Gulf, etc., R. Co.*

*v. Hume*, 6 Tex. Civ. App. 653, 24 S. W. 915, reversed in 87 Tex. 211.

"A rush of business is no defense for failure to transport freight or cattle with reasonable care, diligence and dispatch." *Gulf, etc., R. Co. v. McCorquodale*, 71 Tex. 41, 9 S. W. 80; *Cross v. McFaden*, 1 Tex. Civ. App. 461, 20 S. W. 846; *International, etc., R. Co. v. Anderson*, 3 Tex. Civ. App. 8, 21 S. W. 691; *International, etc., R. Co. v. Lewis* (Civ. App.), 23 S. W. 323; *Gulf, etc., R. Co. v. Hume*, 6 Tex. Civ. App. 653, 24 S. W. 915, reversed in 87 Tex. 211. Nothing but the act of God or other vis major could excuse the carrier from a compliance with the terms of a contract entered into. The rule announced in *Texas, etc., R. Co. v. Nelson*, 38 Tex. Civ. App. 605, 86 S. W. 616, a case of negligent failure to furnish cars, has no application to such a case. *Texas, etc., R. Co. v. Felker*, 40 Tex. Civ. App. 604, 90 S. W. 530.

"The volume of business offered to or accepted by a common carrier can not avail to relieve it from the performance of a contract already entered into. An excess of business might, under some circumstances, justify a refusal to accept live stock for shipment, but it could not excuse a non-performance of contract obligations." *International, etc., R. Co. v. Anderson*, 3 Tex. Civ. App. 8, 11, 21 S. W. 691.

#### **d. Delay of Owner to Order Goods.**

A railroad company can not escape recovery of damages through its negligent delay in transporting cattle feed for plaintiff by showing that he had unreasonably delayed ordering such feed. *Belcher v. Missouri, etc., R. Co.*, 92 Tex. 593, 598, 50 S. W. 559, reversing 47 S. W. 384.

The fact that a shipper was negligent in delaying the ordering of goods before he delivered them to a carrier for transportation, and had already sustained damages because of his delay, will not prevent him from recov-

ering the damages, arising from the negligence of the carrier in delaying such transportation, which can be shown with reasonable certainty to have resulted therefrom. Judgment (Civ. App. 1898), 47 S. W. 384, 1020, reversed. *Belcher v. Missouri, K. & T. Ry. Co. of Texas*, 50 S. W. 559, 92 Tex. 593.

In such case a charge which informed the jury, in effect, that if the plaintiff failed to use ordinary care to prevent the injury which might arise from the defendant's negligence, he could not recover from the railroad company for any damages sustained by him through its negligence, is error. Such a charge applies strictly the rule of contributory negligence to acts which occurred after the injury had been inflicted, whereas the rule stated is applicable only to those acts which concur in producing the injury. *Belcher v. Missouri, etc., R. Co.*, 92 Tex. 593, 597, 50 S. W. 559, reversing 47 S. W. 384, 1020.

#### **e. Providential Delay, Act of God, Vis Major, etc.**

##### **(1) In General.**

A carrier is not liable for damage to a shipment due to providential delay in transportation. *Missouri, etc., R. Co. v. Barnes & Co.*, 2 App. Civ. Cases, § 575.

Where a railroad company, in transporting a car load of melons and green corn, is delayed by a violent and protracted storm, in consequence of which, when the goods arrived at their destination, they were in a decaying and damaged condition, it is not liable therefor, in the absence of negligence on its part. *Missouri Pac. Ry. Co. v. Barnes*, 2 Willson, Civ. Cas. Ct. App., § 575.

**Floods—Washout on Road, etc.**—A railroad which contracts to ship cattle on a certain day is liable for a failure to do so and can not avoid the liability by showing that there was a washout on its road, caused by an unusual rain,

two days after the time for shipping, and after the time when the cattle would have passed the place of the washout had they been shipped according to contract. *Gulf, C. & S. F. Ry. Co. v. McCorquodale*, 71 Tex. 41, 9 S. W. 80.

**(2) Atmospheric Influence Rendering Telegraph Useless.**

Where delay in delivery of freight was caused by atmospheric conditions, rendering the telegraphic wires unavailable, so that the employees in charge of the train could not receive orders, it was beyond the carrier's control, and excusable. *International & G. N. Ry. Co. v. Hynes*, 3 Tex. Civ. App. 20, 21 S. W. 622.

**(3) Unprecedented Whirlwind.**

Where, after a carrier had received a wagon for shipment, an unprecedented whirlwind blew it from the platform, the carrier was not liable for the consequent delay in shipment. *Gulf, etc., R. Co. v. Compton* (Civ. App.), 38 S. W. 220, 221.

**f. Strikes, Mobs, Lawless and Irresistible Violence.**

Delay beyond the control of the carrier when caused by strikes or mobs, is excused upon his taking due care of the freight. *International, etc., R. Co. v. Hynes*, 3 Tex. Civ. App. 20, 21, 21 S. W. 622; *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, 13 S. W. 191; *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 95, 14 S. W. 913.

A common carrier is not liable for delay in the shipment of goods caused solely by the lawless and irresistible violence of "strikers" and their confederates. (1889) *International & G. N. R. Co. v. Tisdale*, 74 Tex. 8, 11 S. W. 900; (1889) *Missouri Pac. Ry. Co. v. Levi*, 4 App. Civ. Cases, § 9, 14 S. W. 1062; (1890) *Southern Pac. Ry. Co. v. Johnson*, 4 App. Civ. Cases, § 45, 15 S. W. 121; (1890) *Same v. Stell*, Id. 122.

Where goods are actually transported and delivered by a carrier, it is

not liable for loss resulting from mere delay caused by strikes of its employees accompanied by intimidation and violence which could not be prevented or suppressed by the carrier or the civil authorities, the delay being necessarily caused by unforeseen disaster which human prudence could not provide against or by accident not caused by the negligence of the carrier or by thieves or robbers or an uncontrollable mob. *Gulf, Colorado & S. F. Ry. Co. v. Levi*, 76 Tex. 337, 13 S. W. 191.

For failure to carry and deliver, the carrier can not excuse himself by reason of the fact that through human agency not under his control this was prevented, without fault on his part; but if the property be wholly or partially decayed through some inherent quality, without fault on the part of the carrier, this will excuse the failure safely to carry and deliver, for the operation of the laws of nature working destruction or loss furnish the same excuse as do tempest, lightning, or other cause termed an act of God. *Gulf, Colorado & S. F. Ry. Co. v. Levi*, 76 Tex. 337, 13 S. W. 191.

Where delay is caused merely by the refusal of a carrier's employees to perform their duties as such, the carrier is liable therefor, but if the employees suddenly refused to work and are discharged from or abandoned their employment, and their places are promptly supplied by other competent men who are prevented from doing duty by strikers' use of lawless and irresistible violence, the carrier is not responsible for the delay caused solely by such violence, provided it has used reasonable efforts and diligence to suppress the interference. *Missouri Pacific Ry. Co. v. Levi*, 4 Willson, Civ. Cas. Ct. App. § 9, 14 S. W. 1062.

A railroad is not liable for delay in transporting freight caused by strikers interfering with and preventing employees hired to take the place of strikers from doing their duty. I. &

*G. N. R. R. Co. v. Server*, 3 App. Civ. Cases, § 441.

Carriers may show in defense to a suit for failure to deliver freight promptly that they could not deliver it in a shorter time, owing to interference with the operation of the road by strikers and their confederates. *International & G. N. Ry. Co. v. Tisdale*, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545.

A railroad company is liable for delay in transporting freight caused by a strike of its servants, which prevents its trains from running. *Southern Pac. Ry. Co. v. Johnson*, 4 Willson, Civ. Cas. Ct. App., § 441.

A railroad company is not liable for delay in transporting freight caused by a strike of its servants, which prevents its trains from running. *Southern Pac. Ry. Co. v. Johnson*, 4 Willson, Civ. Cas. Ct. App. § 45, 15 S. W. 121.

Under Rev. St. art. 277, which declares that the duties and liabilities of carriers in Texas shall be the same as at common law, except where otherwise provided, a common carrier is not liable for depreciation in the value of goods, resulting solely from inevitable delay in their transportation, caused by a mob of rioters. *Gulf, C. & S. F. Ry. Co. v. Levi*, 76 Tex. 337, 13 S. W. 191, 10 Am. St. Rep. 45, 8 L. R. A. 323, overruling (Sup. 1889), 12 S. W. 677; *Missouri Pac. R. Co. v. Levi*, 4 App. Civ. Cases, § 8, 14 S. W. 1062.

**Exercise of Reasonable Diligence.**—A carrier is liable for injury by delay in transit where the delay is caused by interference of strikers in the movement of trains only when it fails to exercise reasonable diligence to expedite the shipment. Reasonable diligence, under the circumstances, is what the law requires. *Sterling v. St. Louis, etc., R. Co.*, 38 Tex. Civ. App. 451, 86 S. W. 655, affirmed in 101 Tex. 661, no op.

**Evidence.**—In suit against the car-

rier for delay in shipment, evidence that the delay was caused by a strike is admissible. *International, etc., R. Co. v. Tisdale*, 74 Tex. 8, 17, 18, 11 S. W. 900.

Notification to defendant from the superintendent of terminals at the destination of the shipment not to undertake to deliver to the terminals because of a strike of its employees, was admissible on the issue whether the defendant was negligent in detaining the shipment. *Sterling v. St. Louis, etc., R. Co.*, 38 Tex. Civ. App. 451, 86 S. W. 655, affirmed in 101 Tex. 661, no op.

**g. Detention from Refusal to Pay Charges.**

A shipper can not recover from a carrier damages for delay in delivery of goods caused by his refusal to pay the freight charges. *Missouri Pac. R. Co. v. Weisman*, 2 Tex. Civ. App. 86, 87, 88, 21 S. W. 426. See post, "Lien," IX, D.

**2. Under Time Contracts.**

If a carrier has agreed to carry goods to their destination and deliver them within a prescribed time, it will be held to a strict performance of the contract, and no temporary obstruction or even absolute impossibility will be a defense to an action for failure to comply with the engagement. *International & G. N. Ry. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 27 S. W. 680. See *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 95, 14 S. W. 913.

A carrier under a time contract is bound to make it good, notwithstanding an accident or delay by inevitable necessity; because he might have provided against it by his contract. The carrier assumes responsibility as to time; but the rule of liability for injury or loss is at common law. *International, etc., R. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 11, 27 S. W. 680, affirmed in 87 Tex. 311.

A carrier contracting to deliver a shipment of freight at a place desig-

nated within a certain time is liable to the shipper for damages on its own or connecting carrier's lines. *Texas Cent. R. Co. v. Miller* (Civ. App.), 88 S. W. 499.

Where a shipper is chargeable with knowledge of the fact that the carrier's agent has no authority to contract for the delivery of the goods at their destination at a certain date, and the bill of lading contains no evidence of such an undertaking, no recovery can be had for failure to deliver by the date named. *Parks v. Gulf, etc., R. Co.* (Civ. App.), 30 S. W. 708.

#### **What Constitutes a Time Contract.**

—To make a time contract, there must be mutuality of obligation and express stipulation. It has been held, "that the making arrangements to run special fruit trains from fruit growing districts to market, and holding out public notice thereof, and of the time to be made by trains as to their arrival at market, is not regarded in law as creating a special contract between railroad corporations so holding out inducements and the shippers absolutely within the advertised time." *International, etc., R. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 11, 27 S. W. 680, affirmed in 87 Tex. 311.

**Evidence as to Contents of Contract.**—In a damage suit against a railway company for delay in transporting goods, parol evidence is inadmissible as to the contract of shipment, the bill of lading being the best evidence. *St. Louis, etc., R. Co. v. Cates*, 15 Tex. Civ. App. 135, 138, 38 S. W. 648.

**Special Losses.**—Where carrier undertakes to deliver property within a specified time and fails to do so, he is liable for any special reasonable losses resulting from the delay. *G. H. & S. A. R. Co. v. Watson*, 1 App. Civ. Cases, § 813.

### **F. DUTY OF OWNER TO AVERT OR MITIGATE INJURY.**

#### **1. In General.**

A party injured by delay of a car-

rier to make shipment and delivery of goods must not remain supine and inactive, but must make reasonable exertions to avert the loss and prevent the damage to his property, and if he fail to do this, and the injury results by reason of his negligence, he can not recover. *International, etc., R. Co. v. Ritchie* (Civ. App.), 26 S. W. 840, 841; *Houston, etc., R. Co. v. Smith*, 63 Tex. 322, 323.

Where an express company has delayed in delivering samples of cotton, it was the owner's duty to use due care in mitigating injury done him by the express company, and the company would be relieved of liability to the extent of the price received for cotton. *Wells-Fargo Exp. Co. v. Samuels*, 11 Tex. Civ. App. 15, 17, 31 S. W. 305.

#### **2. Contributory Negligence of Owner.**

The fact that a consignee, after discovering the carrier's negligence in failing to transport the goods in a reasonable time, failed to use ordinary care to avoid the injury caused by such negligence, will not preclude him from recovering the damages actually caused to him by such negligence, which he could not, by ordinary diligence, have prevented. Judgment (Civ. App. 1898), 47 S. W. 384, 1020, reversed. *Belcher v. Missouri, K. & T. Ry. Co. of Texas*, 50 S. W. 559, 92 Tex. 593.

In such case the question is for the jury. *Belcher v. Missouri, etc., R. Co.*, 92 Tex. 593, 597, 50 S. W. 559, reversing 47 S. W. 384.

The burden of proof was on the carrier to prove the negligence by which the consignee enhanced the amount of the damage or failed to prevent the injury, as well as the extent to which such damages were enhanced, or to which they might have been lessened by the use of ordinary care on the part of the consignee. Judgment (Civ. App. 1898), 47 S. W. 384, 1020, reversed. *Belcher v. Missouri, K. & T.*

Ry. Co. of Texas, 50 S. W. 559, 92 Tex. 593.

In a suit against a railway for damage through delay in transportation of goods, a charge is not correct to the effect that if plaintiff's injury resulted from his own failure to use ordinary care to avoid injury from defendant's negligence, there can be no recovery. *Belcher v. Missouri, etc., R. Co.*, 92 Tex. 593, 597, 50 S. W. 559, reversing 47 S. W. 384.

### G. DELAY CAUSED BY CONNECTING LINES.

A carrier can not be held liable for delay which was caused by its connecting lines, in the absence of proof of negligence on its own part. But if it wrongfully refused to receive and forward a shipper's goods to their destination when they were tendered to it, thus causing the delay, it would be liable. *Missouri Pac. R. Co. v. Weisman*, 2 Tex. Civ. App. 86, 21 S. W. 426.

### H. DAMAGES.

#### 1. Liability.

Common carrier is liable for damages resulting from delay in transportation and delivery of goods if he fails to transport and deliver goods within a reasonable time. *I. & G. N. R. R. Co. v. Server*, 3 App. Civ. Cases, § 441; *Galveston, etc., R. Co. v. Silegman* (Civ. App.), 23 S. W. 298, 300; *San Antonio, etc., R. Co. v. Josey* (Civ. App.), 71 S. W. 606.

**Special Damages.**—See post, "Special Damages," VII, H, 3.

#### 2. Measure and Elements.

##### a. In General.

For a failure to transport merchandise with reasonable dispatch, the carrier is liable for such damages as are the natural result of such failure, and for such as reasonably might have been expected to be within the contemplation of the parties when the contract of carriage was entered into as a probable result of a breach of it.

*Haberzettle v. Trinity, etc., R. Co.*, 46 Tex. Civ. App. 527, 103 S. W. 219; *International, etc., R. Co. v. Tisdale*, 74 Tex. 8, 17, 11 S. W. 900; *Jones v. George*, 61 Tex. 345, 349; *Pacific Exp. Co. v. Darnell Bros.*, 62 Tex. 639. See example: *Wells, etc., Co. v. Battle*, 5 Tex. Civ. App. 532, 24 S. W. 353.

Where goods are not delivered in a reasonable time by a common carrier, the measure of damages is any reasonable loss and expense occasioned by the delay, together with the value of the goods at the time and place they should have been delivered, less their value at the time and place of actual delivery. *Galveston, H. & S. A. R. Co. v. Douglass*, 1 White & W. Civ. Cas. Ct. App. § 67.

When a common carrier is guilty of unreasonable delay in the performance of his contract, he becomes liable for all the actual and legitimate damages resulting from such unnecessary delay. But he is not liable for hypothetical or chimerical damages nor is he liable for any supposed loss which might have resulted to an immortal or illegal traffic. *Gerhard v. Neese*, 36 Tex. 635, 637.

##### b. Liability as for Conversion.

Mere "delay on the part of the carrier does not constitute a conversion of the goods, no matter how long continued, so as to make him liable for their value; and, so long as the goods remain in specie, however much they may be depreciated in value, the consignee or owner must receive them when tendered, and can recover from the carrier only the damages which he has sustained by the delay." *Gulf, etc., R. Co. v. Everett*, 37 Tex. Civ. App. 167, 83 S. W. 257; *Baumbach v. Gulf, etc., R. Co.*, 4 Tex. Civ. App. 650, 23 S. W. 693. And see *Gulf, etc., R. Co. v. Darby*, 28 Tex. Civ. App. 229, 87 S. W. 129; *Wells, etc., Co. v. Hanson*, 41 Tex. Civ. App. 174, 175, 91 S. W. 321; *Gulf, etc., R. Co. v. Jackson*, 4 App. Civ. Cases, § 47, 15 S. W.

128; *Gulf, etc., R. Co. v. Booton*, 4 App. Civ. Cases, § 67, 15 S. W. 502; *G. H. & S. R. Co. v. Watson*, 1 App. Civ. Cases, § 813; *Texas, etc., R. Co. v. Martin*, 2 App. Civ. Cases, § 342; *St. Louis, etc., R. Co. v. Tyler Coffin Co. (Civ. App.)*, 81 S. W. 826; *Gulf, etc., R. Co. v. Somerville Mercantile Agency (Civ. App.)*, 104 S. W. 1072.

Mere delay in delivery of goods by a carrier is not conversion. *St. Louis Southwestern Ry. Co. of Texas v. Tyler Coffin Co. (Civ. App.)*, 81 S. W. 826.

If a carrier failed to deliver goods within a reasonable time, it does not amount to a conversion per se. *Texas & P. Ry. Co. v. Martin*, 2 Willson, Civ. Cas. Ct. App. § 342.

A carrier's failure to carry and deliver within a reasonable time is a breach of contract and not a conversion so that the owner can not refuse to receive them and recover their value. *G. H. & S. A. Ry. Co. v. Watson*, 1 White & W. Civ. Cas. Ct. App., § 815.

A carrier's delay in delivering goods is not a conversion thereof, no matter how long continued, so as to make it liable for their value, and the consignee should receive them when tendered and sue for damages resulting from the delay in delivery. *Gulf, C. & S. F. Ry. Co. v. Somerville Mercantile Agency (Civ. App.)*, 104 S. W. 1072.

A consignee is not bound to receive goods tendered by carrier, which have become useless to him, by reason of delay in transportation, but can recover their value. *G. C. & F. S. R. Co. v. Maetze*, 2 App. Civ. Cases, § 631.

Mere delay by the carrier in delivering a shipment does not amount to a conversion; and if the property is, meantime, destroyed by act of God, such as the great storm at Galveston on September 7, 1900, the carrier is not liable. *Gulf, etc., R. Co. v. Darby*, 28 Tex. Civ. App. 229, 67 S. W. 129.

Where an express company lost plaintiff's trunk and failed to deliver the same on demand within a reason-

able time, but later found the same and offered a delivery, there was no conversion, and it was only liable for the damage occasioned by the delay. *Wells, Fargo & Co. v. Hanson*, 41 Tex. Civ. App. 174, 91 S. W. 321; *Baumbach v. Gulf, etc., R. Co.*, 4 Tex. Civ. App. 650, 23 S. W. 693.

Where a railway company received a carload of wheat for transportation, and, owing to delay in carriage and delivery at the point of destination, it was still in possession of the company, when a large part of it was destroyed by an unusual storm, the company is not liable for conversion of the wheat so destroyed. *Gulf, C. & S. F. Ry. Co. v. Darby*, 67 S. W. 129, 28 Tex. Civ. App. 229.

Where a railroad company received a carload of wheat for transportation, and while in the company's possession a large portion of it was destroyed by a storm, and the company recovered a portion of the wheat and retained it an unreasonable time, the company is liable for conversion of the wheat so recovered and retained. *Gulf, C. & S. F. Ry. Co. v. Darby*, 67 S. W. 129, 28 Tex. Civ. App. 229.

Plaintiff had a carload of lumber on one of defendant's cars which, by agreement, was to be delivered at a point on its track about a mile distant, where defendant was building a house. The lumber was not delivered there until about a month and a half later, when plaintiff refused to receive it, having in the meantime purchased lumber to supply his needs. He sued for the value of the lumber. It is well settled that mere delay, however unreasonable, on the part of the carrier in delivery of the goods, does not amount to a conversion; the consignee must receive it when tendered, so long as it retains its identity and is not rendered wholly valueless. He should have accepted it and held defendant liable for the actual damages which he had sustained. *Baumbach v. Gulf, etc.,*

R. Co., 4 Tex. Civ. App. 650, 23 S. W. 693.

Where, by reason of the delay of a carrier in delivering a part of a machine shipped, such part had become useless to the owner, and he was compelled to replace it with another, he is not bound to receive such part when tendered to him, but is entitled to recover its value of the carrier at the time and place it should have been delivered, with interest. *Gulf, C. & S. F. Ry. Co. v. Maetze*, 2 Willson, Civ. Cas. Ct. App. § 637.

Plaintiff shipped to himself over defendant's road a cotton press, in several pieces, one of which (a sill) was delayed in its delivery over a month, in consequence of which plaintiff purchased another sill. Held, that plaintiff was not bound to receive the sill when tendered to him, as by reason of the delay it had become useless to him, he having been compelled to replace it with another, and detached, as it was, from the press, it was valueless. *Gulf, C. & S. F. Ry. Co. v. Maetze*, 2 Willson, Civ. Cas. Ct. App. § 637.

Where a consignor, having heard nothing from the goods shipped, asked the carrier what had become of the goods, and was told that he did not know, there was no demand, so as to render the carrier guilty of conversion. *St. Louis Southwestern Ry. Co. of Texas v. Tyler Coffin Co.* (Civ. App.), 81 S. W. 826.

**As to Effect of Demand.**—See post, "Tender of Freight and Demand for Goods," VIII, A, 5, d.

In an action against a carrier for the conversion of certain goods, in which no demand on the carrier for the goods and refusal on its part were shown, and in which it appeared that defendant still had the goods in its possession, a tender of them was a defense to the action. *St. Louis Southwestern Ry. Co. of Texas v. Tyler Coffin Co.* (Civ. App.), 81 S. W. 826.

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**Loss after Plaintiff's Refusal to Accept Shipment.**—In an action for damages from delay in the transportation of fruit trees, by reason of which they were rendered worthless, plaintiff can not recover for any loss occasioned by his refusal to receive the trees when tendered by the carrier on their arrival. *St. Louis S. W. Ry. Co. v. Cates*, 38 S. W. 648, 15 Tex. Civ. App. 135.

In an action for damages from delay in the transportation of fruit trees, etc., it was error to refuse to charge that if the trees, when they arrived, and were tendered to plaintiff, were but partially damaged, he could recover only for such portion as were damaged. *St. Louis S. W. Ry. Co. v. Cates*, 38 S. W. 648, 15 Tex. Civ. App. 135.

#### c. Decrease in Market Value.

In an action against a carrier of goods for failure to deliver the same within a reasonable time, the measure of damages is the difference in value of the merchandise at the time and place it ought to have been delivered and at the time of its delivery. (Tex. Civ. App. 1905) *Chicago, R. I. & P. Ry. Co. v. C. C. Mill Elevator & Light Co.* (Civ. App.), 87 S. W. 753; *I. & G. N. R. Co. v. Philips*, 63 Tex. 590, 594; *Habertzette v. Trinity*, etc., R. Co., 46 Tex. Civ. App. 527, 103 S. W. 219; *Houston*, etc., R. Co. *v. Hogg*, 2 Posey 544; *Missouri Pac. R. Co. v. White*, 3 App. Civ. Cases, § 160; *Gulf*, etc., R. Co. *v. McCarty*, 82 Tex. 608, 18 S. W. 716; *Houston*, etc., R. Co. *v. Foster* (Civ. App.), 86 S. W. 44; *San Antonio*, etc., R. Co. *v. Josey* (Civ. App.), 71 S. W. 606; *Inman & Co. v. St. Louis*, etc., R. Co., 14 Tex. Civ. App. 39, 53, 37 S. W. 37, affirmed in 93 Tex. 643, no op.; *Gulf*, etc., R. Co. *v. Pettit*, 3 Tex. Civ. App. 588, 589, 22 S. W. 761; *Gulf*, etc., R. Co. *v. McCorquodale*, 71 Tex. 41, 47, 9 S. W. 80; *Gulf*, etc., R. Co. *v. Pickens* (Civ. App.), 58 S. W. 156, 157; *G. H. & S. A. R. Co. v. Watson*, 1 App. Civ.



Cases, § 813; Texas, etc., *R. Co. v. Nicholson*, 61 Tex. 491; Missouri, etc., *R. Co. v. Webb & Co.*, 20 Tex. Civ. App. 431, 440, 49 S. W. 526; Missouri Pac. R. Co. *v. Fagan*, 72 Tex. 127, 9 S. W. 749; Missouri Pac. R. Co. *v. Breeding*, 4 App. Civ. Cases, § 154, 16 S. W. 184; *Garlington v. Ft. Worth, etc., R. Co.*, 34 Tex. Civ. App. 274, 78 S. W. 368.

Hutchinson on Carriers, § 771, thus states the rule: "If the goods are intended for sale in the market at destination, and the carrier unreasonably and negligently delay their transportation, it is now universally agreed, whatever doubts may have been at one time entertained upon the subject, that the general rule by which the damages are to be computed, if goods of the particular kind have fallen in market value during the delay, or if they have depreciated in quality because of the delay, is the difference between the market value when the goods should have arrived and the value at the time of their delivery, the carrier being liable to the extent of the depreciation, with interest from the time when they should have been delivered." Missouri, etc., *R. Co. v. Webb & Co.*, 20 Tex. Civ. App. 431, 440, 49 S. W. 526.

Such damage is deemed to have been within the contemplation of the parties at the time the contract was made. Gulf, etc., *R. Co. v. McCorquodale*, 71 Tex. 41, 47, 9 S. W. 80; Gulf, etc., *R. Co. v. Pickens* (Civ. App.), 58 S. W. 156, 157.

This rule has also been applied in cases where the carrier simply delays the receipt of the property but does not refuse to receive. *Inman & Co. v. St. Louis, etc., R. Co.*, 14 Tex. Civ. App. 39, 53, 37 S. W. 37, affirmed in 93 Tex. 643, no op., citing *Houston, etc., R. Co. v. Smith*, 63 Tex. 322; Gulf, etc., *R. Co. v. Hume*, 87 Tex. 211, and Texas, etc., *R. Co. v. Nicholson*, 61 Tex. 491.

If there is other deterioration due to the delay of the carrier that must also be taken into consideration. The principle which allows the difference in market value between the two periods of time as a measure of damages of course finds its almost universal application in the case of common carriers, as they do the principal, if not the entire, transportation of the country. But it does not proceed from the extraordinary care required of them by the common law, or any other stringent rules applied to them, but is equally binding upon any party who undertakes to do for another a specific thing within a specified time. Texas, etc., *R. Co. v. Nicholson*, 61 Tex. 491, 497.

Where a carrier, with knowledge that a shipper has contracted to sell his property at a given price, to be delivered at a certain time, accepts it for transportation, and negligently delays same, the measure of damages is whatever the shipper has lost by reason of the failure to deliver in time. *Houston, etc., R. Co. v. Hogg*, 2 Posey 544, 547.

The rule that the measure of damages in the case of a carrier of goods is the difference between the value of the goods at the point of shipment and that at the point of destination applies only in case the goods are never delivered at all, and not to a case where there is merely a delay in transporting them. *Texas Pac. Ry. Co. v. Nicholson*, 61 Tex. 491.

In an action against a carrier for unreasonable delay in delivering potatoes, on proof that the potatoes were such as were called for by the contract, and in good condition when shipped, and of negligent delay of the carrier, resulting in damage to them, the shipper was entitled to recover the difference in the market value of the potatoes in the condition in which they would have arrived but for the delay, and that in which they did arrive.

*Garlington v. Ft. Worth & D. C. Ry. Co.*, 78 S. W. 368, 34 Tex. Civ. App. 274.

And on the issue of such market value the price at which the potatoes were actually sold was receivable. *Garlington v. Ft. Worth, etc., R. Co.*, 34 Tex. Civ. App. 274, 78 S. W. 368.

The measure of damages for delay in the shipment of watermelons is the difference between the market value of the melons when they actually arrived at their destination and what their market value would have been, had they been delivered with diligence, regardless of the fact that they were afterwards shipped to another market. *Houston & T. C. Ry. Co. v. Foster* (Civ. App.), 86 S. W. 44.

**Misdirected Goods.**—The railroad company is responsible in damages for depreciation in value of goods between the date of misdirection and date of its coming into hands of rightful consignee. *Vincent v. Rather*, 31 Tex. 77, 86. See post, "Misdirected Goods," VIII., B, 9, b.

When a carrier receives shipment not properly marked, it is liable for delay in delivery. *G. C. & F. S. R. Co. v. Maetze*, 2 App. Civ. Cases, § 631.

**Delay at Original after Change in Destination.**—Where a railway agent at the point to which vegetables were consigned agrees to send the car containing them as soon as it arrives to another point, and thereby their destination is changed to the latter, the measure of damages for delay in holding the car at the original destination is the difference in values at the changed destination. *San Antonio & A. P. Ry. Co. v. Thompson* (Civ. App.), 66 S. W. 792.

**Samples of Cotton.**—In an action against an express company for failure to deliver samples of cotton, damages would be measured by fall in price of cotton represented by samples. *Wells-Fargo Exp. Co. v. Samuels*, 11 Tex. Civ. App. 15, 17, 31 S. W. 305.

Where cotton samples are shipped from an interior market to the market at Galveston, delay in delivering such samples will render carrier liable for decline in price of cotton. *Wells-Fargo Exp. Co. v. Samuels*, 11 Tex. Civ. App. 15, 17, 31 S. W. 305.

#### d. Loss of Profits on Sales.

In an action against a carrier for delay of goods, losses or profits on sales were too remote to furnish basis for recovery. *G. H. & S. A. Ry. Co. v. Douglass*, 1 White & W. Civ. Cas. Ct. App., § 67.

#### e. Goods Intended for Use of Owner.

Measure of damages for delay in transporting and delivering goods which are not intended for the market is ordinarily the rental value of the goods during the delay, with legal interest from the time the goods should have been delivered. *Brown v. Adams*, 3 Willson, Civ. Cas. Ct. App. § 391. And see, to the same effect, *G. H. & L. A. R. Co. v. Jessee*, 2 App. Civ. Cases, § 403; *G. C. & S. F. R. Co. v. Maetze*, 2 App. Civ. Cases, § 631; *Gulf, etc., R. Co. v. Compton* (Civ. App.), 38 S. W. 220, 221.

Mr. Hutchinson in his work on Carriers, § 776, lays down the rule thus: "Where the goods are not intended for sale in the market of destination, but are intended to serve some specific purpose of the owner, the rule that the carrier will be liable for depreciation in the market value during his negligent delay will, of course, not be applicable; and in the absence of special circumstances which may make the carrier liable for some special loss or for the expense to which the owner may be put by his negligent delay, he could be held liable only for the inconvenience to which the owner had been put by being deprived of the use of his property during the time of the delay; which must be determined as a question of fact by the jury, by ascertaining from the evidence the value of

its use, the criterion of which would be, in most cases, its rental value during the delay; or, in case of an absolute refusal to transport according to contract, for such time as would be requisite to obtain the article by another conveyance or from some other source." *Texas, etc., R. Co. v. Hassell*, 23 Tex. Civ. App. 681, 683, 58 S. W. 54.

In an action against a carrier for delay in the delivery of goods, where the goods are not intended for sale in the market of destination but are intended for some use by the owner, there being no special circumstance such as would make the carrier liable for special loss, the carrier can be held liable only for that inconvenience to which the owner has been put by the deprivation of the property pending the delay. *Gulf, Colorado & S. F. Ry. Co. v. Maetze*, 2 Willson, Civ. Cas. Ct. App., § 631.

Where goods shipped are not intended for sale in the market of destination, but are intended to serve some specific purpose of the owner, in the absence of special circumstances which may make the carrier liable for some special loss or for the expense which the owner may be put to by the carrier's negligent delay, the carrier can be held liable only for the inconvenience to which the owner has been put by being deprived of the use of his property during the time of the delay, which must be determined as a question of fact by the jury, by ascertaining from the evidence the value of its use, the criterion of which would be its rental value during the delay. *Galveston, H. & S. A. Ry. Co. v. Jessee*, 2 Willson, Civ. Cas. Ct. App., § 404.

Where goods are intended for the owner's personal use the measure of damage for delay in delivery, in the absence of special circumstances, is value of the use of such property during the delay, and the carrier is not liable for depreciation in market value by reason of such delay. *St. Louis,*

*etc., R. Co. v. Hindsman*, 1 App. Civ. Cases, §§ 204, 206.

Plaintiff shipped on defendant's railroad a cotton press in several pieces, which was delivered, except one piece, a sill, of which plaintiff immediately notified defendant, and plaintiff sent for and received another sill after a delay of over a month. Held, that the plaintiff's measure of damages was the reasonable cost of replacing the delayed sill, and the fair rental value of the press during the delay caused in the operation thereof by the failure to deliver the sill promptly, together with legal interest on such damages. *Gulf, C. & S. F. Ry. Co. v. Maetze*, 2 Willson, Civ. Cas. Ct. App. § 631.

A contractor shipping doors, windows, and blinds by rail, to be used in the construction of a building, can not recover of the railroad company wages paid by him to his employees while they were doing nothing, because of delay in delivery, where the company at the time of shipment did not know that such a delay would probably result in such damages. *Ligon v. Missouri Pac. Ry. Co.*, 3 Willson, Civ. Cas. Ct. App. § 1.

In a suit against a carrier for delay in shipment, loss of profits can not be allowed as damages, unless data of estimation are so definite and certain that they can be ascertained by calculation and carrier had notice that such damages would ensue from the delay. *G. H. & S. A. R. Co. v. Jessee*, 2 App. Civ. Cases, § 403.

Plaintiff's petition alleged, in substance, that he shipped his photographing outfit on defendant's road, at San Antonio, to be transported to Stafford Junction, a distance of 150 miles. The shipment was made September 1st, and it was plaintiff's desire to have his outfit at Brackett, 10 miles from Stafford Junction, ready for business, on September 3d. There were troops stationed at or near Brackett, and the time selected by plaintiff to open his

business there, was pay day of the troops, which continued about six days. His outfit did not reach Stafford Junction until September 6th, and some tent poles, of the value of \$25, did not reach there at all. In consequence of this delay and loss, he was prevented from opening his business at Brackett until September 16th, when pay day had expired. He claimed as damages the value of the articles lost and \$600 loss of profits. Held, on general demurrer, that the facts alleged showed a good cause of action, but that a special exception to the petition, that the damages claimed were too remote, should have been sustained as to the damages claimed for loss and profits. *Galveston, H. & S. A. Ry. Co. v. Jessee*, 2 Willson, Civ. Cas. Ct. App., §§ 403, 404.

In an action by the shipper against the carrier for delay in shipping a piece of machinery necessary to the operation of plaintiff's sawmill, the jury may, in estimating damages, consider the loss of time, the expense of idle servants, contracts which the shipper had to fill, and profits arising from the operation of the mill. *Pacific Exp. Co. v. Darnell* (Sup.), 6 S. W. 765.

In such case multiplying the amount of loss per day by the number of days, Sunday excepted, will give amount plaintiff's are entitled to recover. *Pacific Exp. Co. v. Darnell* (Sup.), 6 S. W. 765.

A carrier, by failure to transport and deliver freight within a reasonable time, is not liable for the profits which the owner would have made had the property been delivered within a reasonable time. *Bowden v. San Antonio & A. P. Ry. Co.* (Civ. App.), 25 S. W. 987.

A pop-corn wagon was delivered to a carrier for transportation, with information that it was wanted at its destination on a certain day, for a special occasion. Held, that the measure of damages for failure to transport it in

time for the day mentioned was the loss of the profits which would have been made on that day, but, as to other days, the measure of damages would be the fair rental value of the wagon. *Gulf, C. & S. F. Ry. Co. v. Compton* (Tex. Civ. App.), 38 S. W. 220.

Claim was made for a carrier's delay in shipping to M. a new invention for renovating feathers, which had no established rental value. Evidence showed that the machine was moved from town to town as the supply of feathers to be cleaned became exhausted, and that at M. the supply of feathers and the profits were greater than at other places, due to working up the supply during such delay. There was testimony as to the rental value of the machine, together with horses and wagons. Held, that the measure of damages was the fair rental value of the machine, to be determined from its character, capacity, and running expenses, and, in the absence of specific instructions how to arrive at such value, it was error to refuse charges that no recovery could be had for any special benefit from use of the machine at M., and to find the rental value of the machine alone, without teams, wagons, and hands to operate it. *Texas & P. Ry. Co. v. Hassell*, 58 S. W. 54, 23 Tex. Civ. App. 681.

The measure of damages does not include the profit consignee might have realized from its operation during the time delayed, nor rental value together with teams, wagons and hands to operate it. *Texas, etc., Ry. Co. v. Hassell*, 23 Tex. Civ. App. 681, 58 S. W. 54.

In such suit the fact that the profits in operating the machine, which was portable, would have been greater at destination than at other points is not an element of damages where carrier had no knowledge of such fact. *Texas, etc., Ry. Co. v. Hassell*, 23 Tex. Civ. App. 681, 58 S. W. 54.

**Household Goods.**—The measure of

damages for delay in the delivery of goods consisting of household necessities intrusted to a carrier for shipment is the reasonable value of the use of the property to the owner during the time of the delay. *Missouri, K. & T. Ry. Co. of Texas v. Clifton* (Civ. App.), 80 S. W. 386.

The measure of damages for failure to transport and deliver household goods and wearing apparel is the value of the use of the goods to the owner during the delay. *Brown v. Adams*, 3 Willson, Civ. Cas. Ct. App. § 391.

**Goods Having No Rental Value.**—Where goods can not be said to have rental value, the measure of damages for delay in delivering such goods would be the value of the use of goods to the owner during the delay, excluding from estimate remote, speculative and uncertain damages restricting estimate to natural, direct, certain and proximate injury sustained. *Brown v. Adams*, 3 App. Civ. Cases, § 390.

#### **f. Expenses Occasioned by Delay.**

##### **(1) In General.**

Where, through the unreasonable delay of a carrier in delivering goods, they deteriorate in value, the owner may recover, in an action for damages, any reasonable expense occasioned by the delay. *San Antonio & A. P. Ry. Co. v. Josey* (Civ. App.), 71 S. W. 606.

##### **(2) Expenses of Telegraphing and Telephoning to Trace Shipment.**

Expense by the consignee of fuel oil in telegraphing and telephoning to trace the shipments were natural results of the carrier's delay in transporting the oil, for which the consignee could recover. *Haberzettle v. Trinity & B. V. Ry. Co.*, 46 Tex. Civ. App. 527, 103 S. W. 219.

##### **(3) Demurrage.**

Where, owing to unreasonable delay by a railroad in forwarding a car load of grain, the consignee refused to accept it, so that the consignor was compelled to leave it in the car, and the

railroad company demanded and received demurrage, the consignor was entitled to recover the demurrage in an action for the damages occasioned by the delay. *Texas & N. O. Ry. Co. v. E. R. & D. C. Kolp, Jr.* (Civ. App.), 88 S. W. 417.

##### **(4) Interest Paid by Consignee.**

The fact that a consignee of goods was paying interest on a debt which he depended on the goods to satisfy is not an element of damages in an action against the carrier for a delay in delivering them. *Houston & T. C. Ry. Co. v. Jackson*, 62 Tex. 209.

##### **g. Interest.**

In an action against a carrier to recover for delay in transporting plaintiff's freight, in the absence of fraud, delinquency, or injustice on the part of the carrier, plaintiff can not recover interest as a part of his damage. *Texas & P. Ry. Co. v. Wright*, 2 Willson, Civ. Cas. Ct. App. § 339.

Where a common carrier delays in carrying produce, interest on its value after the time when it should have been delivered may be recovered. *Houston & T. C. Ry. Co. v. Jackson*, 62 Tex. 209. See *Brown v. Adams*, 3 App. Civ. Cases, §§ 390, 391.

##### **h. Physical Suffering and Mental Anguish.**

Damages for mental and physical suffering because of the delay by a carrier in delivering household goods and wearing apparel can not be recovered. *Brown v. Adams*, 3 Willson, Civ. Cas. Ct. App. § 391.

In an action against a carrier for delay in transporting plaintiff's museum, for a certain exhibition, plaintiff can not recover for mental anguish experienced because of the delay. *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 21 S. W. 411.

There was testimony before the court in this case from which it might be implied that Miller was the agent of the company to receive the package

for shipment. He was notified of the fact that the package contained medicine for Mrs. Black, who was sick, and that it was important that it should be sent on the next train. This was notice to the company rendering it liable for the injury occasioned by its neglect in forwarding the package with reasonable dispatch. *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 363, 27 S. W. 830.

A package containing medicine for plaintiff's wife was not promptly delivered by the express company. Physical and mental suffering of the wife caused by the delay were proper bases for recovery. *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 363, 27 S. W. 830, citing *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598; *Gulf, etc., Tel. Co. v. Richardson*, 79 Tex. 649, 15 S. W. 689; *Western Union Tel. Co. v. Hoffman*, 80 Tex. 420, 15 S. W. 1048; *Hale v. Bonner*, 82 Tex. 33, 17 S. W. 605.

In an action against an express company for failure to deliver promptly medicines shipped for the use of plaintiff's sick wife, damages for sympathetic mental sufferings of the husband on account of the pain of his wife are too remote. *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 363, 27 S. W. 830.

### 3. Special Damages.

#### a. General Rule.

Plaintiff in an action against a carrier for delay in delivering goods can not recover special damages not within contemplation of the parties at execution of contract of shipment. *Ligon v. Missouri Pac. R. Co.*, 3 App. Civ. Cases, § 1.

#### b. Under Texas Statute.

Special damages may be allowed against a railroad in this state although it is by law deprived of the privilege of declining to receive the shipment, of limiting its liability, or of charging extra compensation for the extra lia-

bility, because: (1) by the very nature of its business it invites the passage over its line, at the rates fixed by the commission, of the usual commerce of the country, some of which it must know will be tendered to it with notice of such special conditions, and such invitation and tender constitute a contract with reference to such conditions; (2) it must be assumed that the rates fixed by the commission include extra compensation for this class of risks as one of the ordinary and fixed charges of operation, and that therefore the shippers generally have paid for this measure of indemnity; and (3) the carrier has the opportunity to make immediate preparation to guard against the breach. *Missouri, etc., R. Co. v. Belcher*, 89 Tex. 428, 430, 35 S. W. 6.

Where special circumstances under which contract of shipment was made were not communicated to carrier, the measure of damages for the breach of contract is the amount of injury which would generally arise from such breach. *Pacific Exp. Co. v. Darnell Bros.*, 62 Tex. 639, 641.

#### c. Notice or Knowledge of Necessity for Haste.

##### (1) Necessity for and Sufficiency of Notice.

In the absence of notice to the carrier of special damages to be incurred by failure to ship goods promptly, the measure of damages is the difference between the market price at destination at time of delivery and when they should have been delivered. *Missouri, K. & T. Ry. Co. of Texas v. Webb*, 49 S. W. 526, 20 Tex. Civ. App. 431. See, to the same effect, *Pacific Exp. Co. v. Darnell Bros.*, 62 Tex. 639; *Missouri, etc., R. Co. v. Webb & Co.*, 20 Tex. Civ. App. 431, 442, 49 S. W. 526.

In order to impose on the carrier who makes unreasonable and negligent delay to transport and deliver a shipment a further liability than for damages arising naturally and directly,

that is, in the ordinary course of things, from a breach of contract, such unusual or extraordinary damages must have been brought within the contemplation of the parties as the probable result of a breach at the time of contracting. Generally, notice then given of any special circumstances which would show that the damages to be anticipated from a breach would be enhanced has been held sufficient for this effect. *Missouri, etc., R. Co. v. Webb & Co.*, 20 Tex. Civ. App. 431, 441, 49 S. W. 526.

In an action against a railroad for failure to deliver goods shipped, special damages can not be recovered unless facts rendering such damages were within knowledge of railroad at the time of entering into the contract of shipment. *Ligon v. Missouri Pac. R. Co.*, 3 App. Civ. Cases, § 1.

A carrier having no knowledge of any special purpose in sending property by him is liable for an unreasonable delay only for the difference in value of the property when it was delivered and when it ought to have been delivered. *Galveston, H. & S. A. Ry. Co. v. Watson*, 1 White & W. Civ. Cas. Ct. App., § 814.

Unless a carrier has been notified of the urgent necessity for prompt carriage, he will be liable, in case of his negligent delay, only for the usual and ordinary damages. *Pacific Exp. Co. v. Darnell*, 62 Tex. 639.

Plaintiff shipped a photographic outfit to a certain place by defendant's railroad, for a particular purpose. It did not appear that defendant at any time had notice of the particular purpose of its shipment, or of the particular necessity or advantage to plaintiff of their delivery at the place of destination at a certain date, or that plaintiff would suffer any special damage by delay. Held, that the measure of damages for failure to transport and deliver the goods within a reasonable time was the rental value of the goods during the delay, they not be-

ing goods intended for market, and that loss of profits claimed, of an uncertain kind, were not allowable. *Galveston, H. & S. A. Ry. Co. v. Jesse, 2 Willson*, Civ. Cas. Ct. App. § 405.

For delay in cases of an ordinary shipment of goods to a merchant of the kind in which he deals, where there is no fact shown which would put the carrier on contemplation or knowledge of the fact that the goods are designed for a special purpose and for a definite use, other than is inferred from the character of the shipment, the measure of damages is the difference in the value of the goods at the time they should have arrived and the time they did arrive. *Gulf, C. & S. F. Ry. Co. v. Pettit*, 3 Tex. Civ. App. 588, 22 S. W. 761.

It is error in such case to allow rents for delayed machinery. *Gulf, etc., R. Co. v. Pettit*, 3 Tex. Civ. App. 588, 589, 22 S. W. 761.

"There may be shipments of goods of such character that the carrier would be liable for the value of the rent or use of the property during the time of a delay, although it was not informed of any special object or purpose in the shipment." *Gulf, etc., R. Co. v. Pettit*, 3 Tex. Civ. App. 588, 590, 22 S. W. 761.

In order to charge a carrier with such special damages for delay in transportation as the rental value of machinery intended for immediate use, special notice of the intention must be given at the time of shipment, and not afterwards. *Gulf, C. & S. F. Ry. Co. v. Gilbert*, 4 Tex. Civ. App. 366, 23 S. W. 320, reversing (1893) 4 Tex. Civ. App. 366, 22 S. W. 760; *Gulf, etc., R. Co. v. Pettit*, 3 Tex. Civ. App. 588, 589, 22 S. W. 761.

**Wages Paid Employee.**—In action against a railroad for damages for failure (delay) to deliver materials shipped to be used in construction of building, shipper can not recover wages which he had to pay employees while waiting for material. *Ligon v.*

Missouri Pac. R. Co., 3 App. Civ. Cases, § 1.

**Order Book of Nurseryman.**—Failure of an express company to deliver, within a reasonable time, the order book of a nurseryman, containing the names of his customers, does not render the company liable for losses resulting through his inability to fill their orders, unless the company had notice that it was necessary for him to have the book to enable him to deliver the trees. *Wells, Fargo & Co. v. Battle*, 5 Tex. Civ. App. 532, 24 S. W. 353.

Though, at the time of the shipment of the book, the express company may have had no notice of the importance of its early delivery, yet if it received such notice at the point of destination, and negligently failed to deliver it within a reasonable time thereafter, it is liable for special damages resulting from inability to fill orders. *Wells, Fargo & Co. v. Battle*, 5 Tex. Civ. App. 532, 24 S. W. 353.

**Oil for Fuel.**—For a delay in delivering fuel oil, a carrier was not liable for damages resulting to plaintiff through being compelled to shut down an ice plant, for expenses paid employees while the plant was idle, for loss of profits, and for loss sustained by not having ice to save meat, etc., in cold storage, where the carrier did not know when the contract was made that such results might follow delayed delivery of the oil, that the shipment was made to the "Home Ice Factory," and it was fuel not putting the carrier on notice. *Haberzettle v. Trinity & B. V. Ry. Co.*, 103 S. W. 219, 46 Tex. Civ. App. 527.

**Machinery for Specific Purpose.**—In a suit against a carrier for delay in shipment of engine to be used in ginning cotton for that season, when it did not appear defendant was notified of such purpose and no special damages were alleged or proved, permitting recovery for rental value was

error. *Gulf, etc., R. Co. v. Gilbert*, 4 Tex. Civ. App. 366, 369, 370, 22 S. W. 760, 23 S. W. 320.

**Notice to Agent.**—Notice to express company's agent receiving package for shipment, that it contained medicine for sick person, is notice to company of importance of its prompt delivery. *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 363, 366, 27 S. W. 830.

**Notice to Train Master.**—Notice of special conditions rendering immediate shipment necessary to a train master is not notice to the railway company upon a matter under control of the station agent, it not appearing that the train master had any control over the station agent in the matter of making contracts for shipment, or that it was his duty to communicate to such agent information with reference thereto. *Missouri, etc., R. Co. v. Belcher*, 89 Tex. 428, 35 S. W. 6; *S. C.*, 88 Tex. 549, 32 S. W. 518; *Missouri, etc., R. Co. v. Faulkner*, 88 Tex. 649, 32 S. W. 883, reversing 31 S. W. 543.

**Knowledge of Character of Freight.**—A shipper is entitled to recover the civil damages of a carrier for delay, where it had knowledge of the character of the freight, so as to charge it with notice of necessity for quick delivery. *St. Louis, etc., R. Co. v. Cates*, 15 Tex. Civ. App. 135, 139, 140, 38 S. W. 648.

## (2) Effect of Notice.

### (a) In General.

Where a common carrier undertakes to deliver property shipped within a certain time, with notice of the purpose for which shipped, it is liable, on a breach, for any special losses which might reasonably have been anticipated by the parties as a probable result of a delay. *Galveston, H. & S. A. Ry. Co. v. Watson*, 1 White & W. Civ. Cas. Ct. App. § 814.

Where a carrier has knowledge of the special purpose for which property is intended it is chargeable with special damages from delay in ship-



ment which was reasonably within contemplation of parties. *Gulf, etc., R. Co. v. Gilbert*, 4 Tex. Civ. App. 366, 368, 22 S. W. 760, 23 S. W. 320; *Gulf, etc., R. Co. v. Pettit*, 3 Tex. Civ. App. 588, 589, 22 S. W. 761.

Where a carrier accepts property with knowledge that the consignor has sold it under a contract to deliver it at a certain time, and by the carrier's negligence the transportation is delayed until the time for delivery has passed, thus causing the consignor to lose said sale, the measure of damages is the difference between the price at which the property was contracted to be sold and its market value when delivered. *Houston & T. C. R. Co. v. Hogg*, 2 Posey Unrep. Cas. 544.

A carrier which has notice of the special purpose to which the consignee intends to put machinery shipped over its line may be charged with any special damage resulting from delay in the transportation, which, in the nature of things, was reasonably within the contemplation of the parties at the time of shipment; and where the delayed goods are gin machinery, and the carrier has been notified that they are to be put in immediate operation on arrival, the proper measure of damages is the rental value of the machinery during the time it has been delayed. *Gulf, C. & S. F. Ry. Co. v. Gilbert*, 4 Tex. Civ. App. 366, 22 S. W. 760.

A railroad company is liable for special damages for delay in transportation of food for cattle if, at the time of the execution of the contract of shipment, the carrier was aware that such special damages would arise from the delay, though the carrier is required to receive goods for shipment at the rate fixed by the railroad commission, and can not limit its liability by special contract. *Missouri, K. & T. Ry. Co. of Texas v. Belcher*, 89 Tex. 428, 35 S. W. 6.

Where a carrier was notified of pur-

pose of shipping a museum, on failure to transport it to its destination, shipper may recover the value of the use of it at such destination during the period of the fair intended to be exhibited at, and such value could not be more properly determined than by ascertaining what the probable net profits would have been. *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 527, 21 S. W. 411.

**(b) Notice Subsequent to Delivery to Carrier.**

Subsequent knowledge of facts rendering special damages probable, would not, in absence of fraud or gross negligence on part of railroad, render it responsible beyond general measure in ordinary cases of delay in delivery of goods by carrier. *Ligon v. Missouri Pac. R. Co.*, 3 App. Civ. Cases, § 1.

In *Gulf, etc., R. Co. v. Gilbert*, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320, it was held: "In order to make the carrier liable for the damages that result by reason of the special circumstances known to it, those circumstances, and the knowledge resulting therefrom, must be made known to the carrier at the time the contract of shipment is entered into; this upon the principle that the carrier, by reason of the additional risk and the increased liability, may enter into suitable stipulations looking to its protection." *Wells, etc., Co. v. Battle*, 5 Tex. Civ. App. 532, 534, 24 S. W. 353.

Unless such notice was given the carrier at the time it entered into the contract, so that it could know the risks it was taking, and the full consequences that would follow a breach of its contract to deliver promptly, special damages for such injuries can not be recovered. *Missouri, etc., R. Co. v. Belcher*, 89 Tex. 428, 35 S. W. 6. It would have a right, according to this decision, to charge more, or insert other provisions in its contract concerning such special conditions, in

order to cover the risks of having to pay such special damages. *St. Louis, etc., R. Co. v. May* (Civ. App.), 44 S. W. 408.

Where a carrier was not notified, until after the contract of shipment had been entered into that the goods were desired for a special purpose, which necessitated their prompt delivery, the carrier was not liable for special damage caused by the failure to deliver promptly. *Chicago, R. I. & P. Ry. Co. v. C. C. Mill Elevator & Light Co.* (Civ. App.), 87 S. W. 753, citing *Missouri, etc., R. Co. v. Belcher*, 89 Tex. 428, 35 S. W. 6.

Notice to the carrier, after the date of the contract, that special damage would arise from a delay in the shipment, in time for him to have prevented the delay, does not render him liable for such damages. *Missouri, K. & T. Ry. Co. of Texas v. Belcher*, 89 Tex. 428, 35 S. W. 6; *Belcher v. Missouri, etc., R. Co.*, 92 Tex. 593, 50 S. W. 559, reversing 47 S. W. 384, 1020; *Bourland v. Choctaw, etc., R. Co.*, 99 Tex. 407, 90 S. W. 483, reversing 90 S. W. 483; *Gulf, etc., R. Co. v. Gilbert*, 4 Tex. Civ. App. 366, 370, 22 S. W. 760, 23 S. W. 320; *Pacific Exp. Co. v. Redman* (Civ. App.), 60 S. W. 677.

It can not be assumed by the courts that the parties, in making such a contract, contemplated that defendant would be liable for such damages on subsequent notice, or that the railroad commission in fixing rates made any allowance for such a risk; for no such liability has ever been fixed upon the carrier by any adjudicated case so far as the court have been able to ascertain. *Missouri, etc., R. Co. v. Belcher*, 89 Tex. 428, 35 S. W. 6.

Carrier's liability for delay in transportation of machinery shipped for specific purpose which was not disclosed to carrier would not be affected by subsequent notice by shipper, as to purpose of shipment. *Gulf, etc., R. Co. v. Gilbert*, 4 Tex. Civ. App. 366, 370, 371, 22 S. W. 760, 23 S. W. 320.

Plaintiff sued for damages for pain and retarded recovery for failure of an express company to promptly deliver medicine purchased by her. The medicine was ordered by plaintiff's relative, for whom she had worked, which fact was known to defendant's agent at the shipping point. The package was directed to such relative, and, though defendant's agent was informed that it contained medicine, he was not informed that it was for plaintiff. Held, that though defendants, subsequent to the date of shipment, were notified of plaintiff's interest therein and the probable consequence of their failure to deliver, they were not responsible for special damages to plaintiff for their failure to thereafter promptly deliver the medicine. *Pacific Exp. Co. v. Redman* (Civ. App.), 60 S. W. 677.

**Feed for Cattle.**—A carrier is not liable for special damages for delay in transporting and delivering cattle feed, where at the time of executing the shipping contract the carrier was unaware that the consignee intended to use the same immediately to feed a herd of cattle, and that special damages would arise from delay. (Civ. App. 1905), *Choctaw, O. & G. Ry. Co. v. Bourland*, 87 S. W. 173, reversed *Bourland v. Choctaw, O. & G. Ry. Co.* (1906), 90 S. W. 483, 3 L. R. A. (N. S.), 1111, 99 Tex. 407.

A carrier is not liable for injury to stock by reason of delay in transportation of feed, unless the carrier, at the time of making the contract of shipment, has notice that the shipper has immediate need of the feed for his stock. *Rehearing* (Civ. App. 1898), 47 S. W. 384, denied. (Civ. App. 1898), *Belcher v. Missouri, K. & T. Ry. Co. of Texas*, 47 S. W. 1020, reversed, (1899), 50 S. W. 559, 92 Tex. 593.

Where cattle feed had been shipped and carried to its point of destination, and the consignee, after its arrival, applied to the carrier's agent and

stated to him that he was out of feed, and that his failure to get it would mean a great loss to him, because he had no other feed for his cattle, and delivery was not made, solely through the fault of the agent, the consignee was entitled to recover special damages, although notice of the peculiar facts was not given before or at the time of the making of the contract of carriage. *Judgment, Choctaw, O. & G. Ry. Co. v. Bourland* (Civ. App. 1905), 87 S. W. 173, reversed. *Bourland v. Choctaw, O. & G. Ry. Co.*, 90 S. W. 483, 3 L. R. A. (N. S.), 1111, 99 Tex. 407.

In order that a shipper of hulls may recover damages to cattle which he was feeding, caused by delay in the transportation of the hulls, he must show that the carrier was notified of the special circumstances from which such damages would probably flow in case of delay. *Daube & Kapp v. Chicago, R. I. & T. Ry. Co.*, 86 S. W. 797, 39 Tex. Civ. App. 24.

**Fruit Trees.**—In an action for damages, caused by delay in the transportation of fruit trees sold under contract for delivery by a certain day, special damages can not be recovered unless the necessity for such delivery was brought to the knowledge of defendant at the time of the shipment, or from the character of the freight defendant was charged with such knowledge. *St. Louis S. W. Ry. Co. v. Cates* (Tex. Civ. App.), 38 S. W. 648, 15 Tex. Civ. App. 135.

**(c) Notice to Station Agent at Destination.**

Notice to a station agent of special damages that may result from delayed shipment of car from distant station is not notice to the company. *Missouri, etc., R. Co. v. Belcher*, 88 Tex. 549, 551, 32 S. W. 518.

One station agent is not required to transmit to another notice received by former as to special damage likely

to result from delay in shipping a car from the latter's station; therefore, such notice to the former is not notice to the latter or to the company. *Missouri, etc., R. Co. v. Belcher*, 88 Tex. 549, 551, 32 S. W. 518.

**(3) Proof of Notice.**

Plaintiff sued to recover damages for pain and retarded recovery by reason of failure of defendant express companies to promptly deliver medicine purchased by her. The medicine was ordered by a relative of plaintiff, for whom she had worked, which facts were known to defendants' agent at the shipping point; but the package was directed to such relative, and, though defendants' agent was informed that the package contained medicine, he was not informed that it was for plaintiff. Held, that the evidence was insufficient to show notice to defendants of plaintiff's connection with and interest in the shipment, so as to warrant a finding of special damages in her favor. *Pacific Exp. Co. v. Redman* (Civ. App.), 60 S. W. 677.

*Pacific Exp. Co. v. Darnell Bros.*, 62 Tex. 639, was a case where suit was instituted to recover special damages for a delay of thirteen days in a shipment of certain mill machinery, and it was held that: "To authorize a recovery for the loss of profits, as damages, occasioned by suspension of their milling operations, it was essential for the appellees not only to prove that such suspension was caused or rather continued by the failure to promptly forward the cylinder, but also that such facts had been communicated to appellant as would have reasonably indicated the result which would or might have been expected to flow from a delay in forwarding the same. Such elements of damage would not necessarily result from such delay. Nor are they such as might be reasonably supposed to have entered into the contemplation of the

respective parties, at the time the contract was made, as the probable result of its breach." *Missouri, etc., R. Co. v. Webb & Co.*, 20 Tex. Civ. App. 431, 442, 49 S. W. 526.

#### d. Mitigation of Damage.

In an action for damages against an express company, for negligently delaying for a period of fourteen days the shipment of a piece of machinery necessary for the operation for plaintiffs' mill, the facts that the same piece of machinery was delayed for four months at the place where it had been sent for repairs, does not preclude the plaintiffs' right of recovery. *Pacific Exp. Co. v. Darnell* (Sup.), 6 S. W. 765.

#### 4. Proof of Damages.

**Necessity—Physician's Bill.**—In an action against an express company for failure to deliver medicines promptly, the physician's bill can not be recovered, in the absence of testimony as to how much of the bill was for the increased and prolonged sickness caused by the delay. *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 363, 27 S. W. 830.

**Mode—Rental Value.**—In an action against a common carrier for failure to deliver goods within a reasonable time to the consignee thereof, the rental value of the property delayed should be estimated with reference to the circumstances of the case; and, if there is a market rental value, such value would control, but, if there was no market, the value may be ascertained by proof of such elements or facts affecting the question as may exist, and by the opinions of witnesses properly informed on the subject. *Gulf, C. & S. F. Ry. Co. v. Maetze*, 2 Willson, Civ. Cas. Ct. App. § 636.

**Profits.**—In an action against a carrier for delay in delivering goods, whereby they did not arrive until after pay day of the troops at a certain place, evidence as to the amount of

profits plaintiff had realized in his business during previous pay days at such place was too remote. *Galveston, H. & S. A. Ry. Co. v. Jessee*, 2 Willson, Civ. Cas. Ct. App. § 407.

#### I. ACTIONS.

##### 1. Actions for Damages.

###### a. Nature and Form.

A railroad company may be sued in tort for delay in shipping goods. *San Antonio, etc., R. Co. v. Graves* (Civ. App.), 49 S. W. 1103.

###### b. Venue.

A railroad company in partnership with another company may be sued with the latter for delay in transportation, in a county in which the latter operates its road, though the former does not operate a road in such county, nor have an agent there. *San Antonio, etc., R. Co. v. Graves* (Civ. App.), 49 S. W. 1103.

###### c. Parties.

One with whom a carrier of goods has made a contract of shipment may sue in his own name for damage caused by delay in the shipment, even though he does not own all of the goods. *Galveston, H. & S. A. Ry. Co. v. Barnett* (Civ. App.), 26 S. W. 782.

###### d. Petition or Complaint.

###### (1) In General.

A petition which states facts showing delay by the carrier in the delivery of a machine, and asks for judgment for its rental value, during that time, is good on general demurrer as a claim for rent. *Gulf, C. & S. F. Ry. Co. v. Pettit*, 3 Tex. Civ. App. 588, 22 S. W. 761.

Plaintiff's petition alleged, in substance, that he shipped his photographing "outfit" on defendant's road at San Antonio, to be transported to Stafford Junction, a distance of 150 miles. The shipment was made September 1st, and it was plaintiff's desire to have his "outfit" at Brackett, 10 miles from Stafford Junction, ready for business

on September 3d. There were troops stationed at or near Brackett, and the time selected by plaintiff to open his business there was the "pay day" of the troops, which continued about six days. His outfit did not reach Stafford Junction until September 6th, and some tent poles of the value of \$25 did not reach there at all. In consequence of this delay and loss, he was prevented from opening his business at Brackett until September 16th, when "pay day" had expired. He claimed as damages the value of the articles lost, and \$600 loss of profits. Held, on a general demurrer, that the facts alleged showed a good cause of action. *Galveston, H. & S. A. Ry. Co. v. Jessee*, 2 Willson, Civ. Cas. Ct. App. § 403.

A complaint against a carrier for delay in delivering a shipment of rice alleging the difference between its value as delivered and as it should have been delivered, and payment for such difference as damages, is sufficient, though such damages be special damages, because of the rice being wet when delivered to the carrier. *Texas, etc., R. Co. v. Bigham* (Civ. App.), 67 S. W. 522.

**Allegation of Damage to Each Article.**—A petition against a carrier to recover damages for delay in delivering goods need not allege the damage done to each article; it being sufficient to itemize the articles alleging the value of each, and the aggregate value of the whole. *Brown v. Adams*, 3 Willson, Civ. Cas. Ct. App. § 390.

**(2) Allegation of Special Damage.**

In an action against a carrier for delay in shipment of goods, facts which would authorize the award of special actual damages must be alleged in the petition in order to entitle the complainant to recover such damages. *Gulf, etc., R. Co. v. Cole*, 4 App. Civ. Cases, § 97, 16 S. W. 176.

The petition must aver that the carrier had notice of the intended use

of the property at the time of making the contract of shipment, to be held liable for special damages. *Wells, etc., Co. v. Battle*, 5 Tex. Civ. App. 532, 534, 24 S. W. 353; *Pacific Exp. Co. v. Darnell Bros.*, 62 Tex. 639; *Gulf, etc., R. Co. v. Gilbert*, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320.

In a suit against a carrier for the loss of sale of goods transported by reason of its unnecessary delay, such damages being special, must be specially pleaded. *International, etc., R. Co. v. Hatchell*, 22 Tex. Civ. App. 498, 500, 55 S. W. 186.

Shipper must allege carrier had notice of necessity of promptly forwarding goods to authorize recovery for loss of profits. *Pacific Exp. Co. v. Darnell Bros.*, 62 Tex. 639, 641.

Where, in an action against a carrier for delay in delivering certain threshing machinery, plaintiffs claimed special damages, in that they lost the benefit of contracts with certain individuals in the neighborhood of the place to which the machinery was shipped for the threshing of 30,000 bushels of grain, a complaint failing to allege the names of the persons with whom it was claimed plaintiffs had such contracts was objectionable. *Missouri, K. & T. Ry. Co. of Texas v. Sproles & Vines* (Civ. App.), 92 S. W. 40.

A complaint against a carrier for delay in the transportation of certain threshing machinery alleged that plaintiffs used 22 head of horses and 20 men at an expense of not less than \$40 per day; that said men and teams were forwarded to the destination of the machinery, so as to be there on the arrival of the machinery, and that because of the delay, plaintiffs incurred an expense of maintaining such employees and teams during four and a half days at \$40 a day, and that defendant, at the time of the shipment, knew that if there was a delay plaintiffs would be damaged in the manner and form alleged. Held, that the com-

plaint was not objectionable for failure to allege that defendant was notified of the advance shipment of plaintiffs' men and teams, or that expense or injury would result from such delay and the amount thereof. *Missouri, K. & T. Ry. Co. of Texas v. Sproles & Vines* (Civ. App.), 92 S. W. 40.

**Mode Raising Objection.**—Where, in an action against a carrier for delay in delivering freight, the petition did not allege defendant's knowledge, when it received the goods for transportation, of the specific facts pleaded from which plaintiff's damages accrued, the objection should be made by special exception to the petition, and a ruling of the trial court invoked upon it, so as to have afforded plaintiff an opportunity to amend his petition if the exception was sustained; and where defendant failed to make the objection in that manner and form, he could not thereafter raise it by a special charge, raising the question of the sufficiency of plaintiff's petition to support the damages proved or by exception to the general charge, after all the evidence was adduced upon the trial, or upon a motion for new trial after the verdict was returned. *Wabash R. Co. v. Newton, etc., Co.* (Civ. App.), 110 S. W. 992, 993.

**Amendment Alleging Notice.**—In an action against an express company for negligently delaying the shipment of a piece of machinery, an amendment to the petition alleging that defendant's agent had notice that the operation of the shipper's mill would be suspended until the machinery should be returned does not state a new cause of action. *Pacific Exp. Co. v. Darnell* (Sup.), 6 S. W. 765.

Such an amendment merely perfects the cause of action already definitely stated. *Pacific Exp. Co. v. Darnell* (Sup.), 6 S. W. 765.

#### **e. Issues, Allegata and Probata.**

##### **(1) In General.**

Evidence of knowledge on the part

of the carrier of the necessity of prompt delivery, and that the consignor's business would be suspended by any delay, is inadmissible, in the absence of any averments to that effect. *Pacific Exp. Co. v. Darnell*, 62 Tex. 639.

Where it is alleged that the delay was caused by the negligence of the railroad company, without stating what the negligence was, evidence of the bad condition of the track where the delay occurred was admissible to show such negligence. *St. Louis, A. & T. Ry. Co. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. 1008.

In an action against a carrier for delay in transportation, evidence of a strike that caused the delay was not admissible under the general denial. *St. Louis, etc., R. Co. v. Pumphrey* (Civ. App.), 42 S. W. 246.

Averment in a petition in an action against an express company for delay in delivering samples of cotton that the samples were consigned to plaintiff's agent at a named point and that plaintiff was damaged in a certain sum by reason of such delay, may admit proof of such damages by reason of a fall in the market price of cotton. *Wells-Fargo Exp. Co. v. Samuels*, 11 Tex. Civ. App. 15, 16, 31 S. W. 305.

Where, in an action against a carrier for delay in delivering freight shipped over its line, the answer did not contain a general denial, and the special denial did not extend to plaintiff's allegations of damages, it was only necessary for plaintiff to prove such allegations as were placed in issue by the special denial. *Wabash R. Co. v. Newton, etc., Co.* (Civ. App.), 110 S. W. 992, 993.

##### **(2) Pleading and Proof of Customs of Trade.**

Objects of shipment of samples of cotton from an interior market to a market at Galveston is too well known to need either averment or proof in an action against an express company

for damages for delay in delivering cotton samples so shipped. *Wells-Fargo Exp. Co. v. Samuels*, 11 Tex. Civ. App. 15, 16, 17, 31 S. W. 305.

"It is a matter of common information that samples are so shipped to make sales in the market to which the shipment is made, and not for sale of samples themselves. It would not be unreasonable to say that the parties contemplated such object by the shipment, and that a breach of the carrier's contract would involve liability for decline in the price of cotton—the bales of cotton represented by the samples. *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491." *Wells-Fargo Exp. Co. v. Samuels*, 11 Tex. Civ. App. 15, 16, 31 S. W. 305.

#### f. Evidence.

##### (1) Presumptions and Burden of Proof.

In an action against a carrier for injury by delay in transit, the burden is on the plaintiff to establish by a preponderance of the evidence facts entitling him to recover. *Sterling v. St. Louis, etc., R. Co.*, 38 Tex. Civ. App. 451, 86 S. W. 655, affirmed in 101 Tex. 661, no op. See *Wells, etc., Co. v. Battle*, 5 Tex. Civ. App. 532, 534, 24 S. W. 353.

As a carrier must use ordinary care to avoid unreasonable delay in the transportation of goods, proof of an unusual delay shows negligence *prima facie* calling on the carrier to excuse the delay and thereby disprove negligence to avoid liability for a loss sustained in consequence of the delay. *Chicago, R. I. & P. Ry. Co. v. Gillett* (Civ. App.), 99 S. W. 712.

**Contributory Negligence of Owner.**—See ante, "Contributory Negligence of Owner," VII, F, 2.

##### (2) Admissibility.

Evidence as to the customary length of time consumed by freight trains in running between the points on defendant's line over which the shipment was made was admissible to show unnec-

essary delay. *Texas, etc., R. Co. v. Crowley* (Civ. App.), 86 S. W. 342.

Where carrier's witness testified to delays at different points than those specified in the complaint, it could not object to plaintiff's testimony as to such delays as not within the issues. *San Antonio, etc., R. Co. v. Griffith* (Civ. App.), 70 S. W. 438.

In an action against an express company for failure to deliver samples of cotton, testimony offered to show that plaintiff actually received more for his cotton than it was actually worth in market at the place of delivery, should be admitted. *Wells-Fargo Exp. Co. v. Samuels*, 11 Tex. Civ. App. 15, 17, 31 S. W. 305.

In an action against an express company for failure to deliver cotton samples, the exclusion of testimony offered by defendant to prove that cotton in bales was inferior to that in samples, is error. *Wells-Fargo Exp. Co. v. Samuels*, 11 Tex. Civ. App. 15, 17, 31 S. W. 305.

Where, in an action against a carrier for delay in delivering threshing machinery, plaintiffs alleged that they had contracted to thresh about 30,000 bushels of grain in the vicinity of the place to which the machinery was shipped; that they threshed 10,000 bushels, but lost the threshing of the remainder, evidence that when the machinery arrived there were two other machines on the ground, and that if plaintiffs' machinery had arrived in time, they would have threshed all the wheat that their competitors threshed, was inadmissible. *Missouri, K. & T. Ry. Co. of Texas v. Sproles & Vines* (Civ. App.), 92 S. W. 40.

In an action for failure of an express company to promptly deliver a shipment, evidence that the drivers to whom the goods were delivered agreed at the time that they should go on a certain train, that the shipper had made shipments before with the drivers, and that their contracts had been car-

ried out, is admissible as showing the agency of the drivers to receive goods and contract for their shipment. *Pacific Express Co. v. Needham* (Civ. App.), 94 S. W. 1070.

Such evidence was admissible as *res gestæ*. *Pacific Exp. Co. v. Needham* (Civ. App.), 94 S. W. 1070, affirmed in 101 Tex. 652, no op.

**Train by Which Shipment Forwarded.**—The carrier has the right to show if it can that the shipment in question was shipped on the first freight train on its road after it had been received, and that the transportation began as soon as the road was clear and open to the train. *Chicago, etc., R. Co. v. Kapp*, 37 Tex. Civ. App. 203, 83 S. W. 233.

**Market Price.**—Where a commission merchant testified that his order for a carload of potatoes at 60 cents per bushel f. o. b. at B.; he, the shipper, was also entitled to show that he had contracted to sell potatoes to the commission company at 60 cents per bushel f. o. b. cars at B., the point of shipment—not that such contract price was recoverable, the defendant carrier having no notice of the contract, but as bearing on the market price. *Garlington v. Ft. Worth, etc., R. Co.*, 34 Tex. Civ. App. 274, 78 S. W. 368.

It being shown that the agents of the railway company were informed at the time of receiving the shipment that it was for immediate sale at their destination, it was relevant to show the state of the market at the destination when it should have been delivered, and the lower price when actually delivered. *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834.

**Statement of Plaintiff as to Amount of Loss.**—It is reversible error, where plaintiff has recovered from a carrier \$478 for loss on a shipment of poultry through delay, fall in market, etc., to exclude evidence of his statement, on his return from the trip, that he had

lost about \$75 on his venture. *Texas, etc., R. Co. v. Fisher*, 15 Tex. Civ. App. 63, 38 S. W. 392.

**Statements and Declarations of Agents, Conductors, etc.**—Where it in no way appeared that the delay, concerning which the statements of a conductor were offered as admissions of negligence, was one to the fault of such conductor, or that the schedule of the delayed train was in any manner under his control, or that he had authority to speak for the railway company in such matter, the statements were not admissible. *St. Louis, etc., R. Co. v. Carlisle*, 34 Tex. Civ. App. 268, 78 S. W. 553, affirmed, no op.; *Cooper Grocer Co. v. Britton*, 7 Tex. Ct. Rep. 408; *Standefor v. Aultman, etc., Machinery Co.*, 34 Tex. Civ. App. 160, 78 S. W. 552.

The declarations of the railway conductor as to the time when his train is due at a station on his route, made while he is running the train, is competent evidence. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749.

In a suit against a carrier for delay in shipment, a conversation between its agent and the shipper is admissible to show defendant's negligence for delay in delivery under the contract in bill of lading. *Houston, etc., R. Co. v. Houx & Co.*, 15 Tex. Civ. App. 502, 40 S. W. 327.

**Expert and Opinion Evidence.**—A witness who has had 10 years' experience in inspecting cotton seed is qualified as an expert to testify to the extent of the deterioration in value of seed through delay in transportation and subjection to dampness. *San Antonio, etc., R. Co. v. Josey* (Civ. App.), 71 S. W. 606.

**Facts Otherwise Abundantly Established.**—In an action for injury to trees by delay in their transportation by an express company, error in admitting evidence as to the good reputation of the nurseryman from whom plaintiff received the goods is not re-



versible, where the sound condition of the trees when received by the express company was otherwise abundantly established. *Pacific Exp. Co. v. Needham* (Civ. App.), 94 S. W. 1070, 1071, affirmed in 101 Tex. 652, no op.

**Parol Evidence as to Contract.**—See ante, "Under Time Contracts," VII, E, 2. See the title CARRIERS, ante, p. 304.

### (3) Weight and Sufficiency.

Under Rev. St., art. 2266, providing that, when any action is founded on an open account, the party's affidavit, or that of his agent or attorney, will be sufficient evidence of the claim, an action by a shipper for damages resulting from a delay in transportation of goods is not an open account, within the meaning of the statute. *Galveston, H. & S. A. Ry. Co. v. Gildea*, 2 Willson, Civ. Cas. Ct. App. § 271.

Evidence held sufficient to show a negligent delay on the part of a carrier in transporting and delivering watermelons at their destination. *Houston & T. C. Ry. Co. v. Foster* (Civ. App.), 86 S. W. 44.

Evidence, in an action for delay by a carrier in transporting a sawmill, that it had a capacity of 20,000 feet per day, that sawmills are usually rented for a fourth of their output, and that the average value of the product of a sawmill, at the mill, is \$6 per 1,000 feet, authorizes a finding that the rental value of the mill is \$10 per day. *St. Louis Southwestern Ry. Co. of Texas v. Burke*, 91 S. W. 812, 41 Tex. Civ. App. 273.

**Proof of Notice of Circumstances Rendering Carrier Liable for Special Damages.**—See ante, "Notice or Knowledge of Necessity for Haste," VII, H, 3, c.

### g. Questions for Jury.

Where there is conflict in evidence in an action against an express company for delay in delivering samples of cotton as to whether samples were delivered to the company for ship-

ment, the issue should be submitted to the jury. *Wells-Fargo Exp. Co. v. Samuels*, 11 Tex. Civ. App. 15, 17, 31 S. W. 305.

Where there is evidence, in an action against a railroad for damages from the explosion of a car of explosives, that the company allowed the car to be delayed, the question of negligence is for the jury. *Ft. Worth, etc., R. Co. v. Beauchamp*, 95 Tex. 496, 68 S. W. 502.

It is for the jury to say whether under all of the circumstances a railway company was negligent in failing to at once forward a shipment after its receipt. *Chicago, etc., R. Co. v. Kapp*, 37 Tex. Civ. App. 203, 83 S. W. 233.

Where a commission merchant testified that his order for a carload of potatoes at 60 cents per bushel f. o. b. at B. was based on the market price at D., and that upon their arrival at D. in a damaged condition he sold them at the best prices obtainable, stating the prices, and that for those not injured he got the same price he was then getting for potatoes, this was sufficient evidence of market value at D. to take the case to the jury, although the witness also testified that he "could not give definite figures as to the market value of such potatoes at D., had they reached there on time." *Garlington v. Ft. Worth, etc., R. Co.*, 34 Tex. Civ. App. 274, 78 S. W. 368.

### Inconvenience and Damage Where Goods Intended for Use of Owner.

In an action against a carrier for delay in the delivery of goods not intended for sale 'n the market of destination, where the measure of damages is the owner's inconvenience owing to the deprivation of the property, the question of inconvenience and damage therefrom is for the jury. *Gulf, Colorado & S. F. Ry. Co. v. Maetze*, 2 Willson, Civ. Cas. Ct. App. § 631.

**Amount of Recovery.**—Where, in an action against a carrier for damage to a shipment of corn by delay, plaintiff's testimony that the corn was injured to the amount of \$442 was the only direct evidence of the extent of the damage, defendant was nevertheless entitled to have the amount plaintiff should recover determined by the jury, and it was therefore error to charge that if the jury found for plaintiff they should allow \$442. *St. Louis, etc., R. Co. v. Thompson* (Civ. App.), 103 S. W. 684.

**Directing Verdict.**—In an action against an express company for failure to promptly deliver medicine shipped to plaintiff's agent, held not error to refuse to direct a verdict for defendant. *Pacific Exp. Co. v. Redman* (Civ. App.), 60 S. W. 677.

**What Is a Reasonable Time.**—See ante, "General Rule," VII, H, 3, a.

#### **h. Instructions.**

In a suit against a railway for damage through delay in transportation of goods, plaintiff is entitled to a charge submitting the question of negligence where the evidence justifies such submission. *Belcher v. Missouri, etc., R. Co.*, 92 Tex. 593, 597, 50 S. W. 559, reversing 47 S. W. 384.

An instruction that if defendant was negligent in not transporting the goods on the day they were received, and that, but for such negligence, the delay in transportation would not have occurred, the jury should find for plaintiff, if they found the other issues in his favor, was improperly refused. Judgment (Civ. App. 1898), 47 S. W. 384, 1020, reversed. *Belcher v. Missouri, K. & T. Ry. Co. of Texas*, 50 S. W. 559, 92 Tex. 593.

In an action against a carrier for damages caused by its delay in transporting goods which were delivered to it on Saturday, an instruction that the jury should determine whether the defendant was negligent in failing to transport the car within a reasonable

time, when qualified by the statement that defendant was under no obligation to run its train on Sunday, and was not chargeable with negligence in failing to do so, if it ran no freight train over its line on that day, was erroneous, since it might have led the jury to believe that defendant was not required to transport the goods until Monday, whereas it was plaintiff's right to have the court instruct the jury upon the very facts proved, and to direct their minds to the very circumstances on which he relied. Judgment (Civ. App. 1898), 47 S. W. 384, 1020, reversed. *Belcher v. Missouri, K. & T. Ry. Co. of Texas*, 50 S. W. 559, 92 Tex. 593.

An instruction in a case where freight was delivered to a carrier at 2 p. m. Saturday, and was not shipped till 6 p. m. Monday, there being no train Sunday, that in considering the question of negligence of the carrier in failing to transport the freight within a reasonable time it "was under no obligation to run its train on Sunday, and can not be charged with negligence in failing to transport \* \* \* on Sunday, if it ran no freight train over the line that day," was not open to the objections that it is on the weight of evidence, that it presents a hypothetical issue, and not a real question of fact, or that it singles out and lays undue stress on an issue not in the case. Rehearing (Civ. App. 1898) 47 S. W. 384, denied. (Civ. App. 1898), *Belcher v. Missouri, K. & T. Ry. Co. of Texas*, 47 S. W. 1020, reversed (1899), 50 S. W. 559, 92 Tex. 592.

The court having charged on the subject of negligence of the carrier in failing to transport in a reasonable time in a case where the freight was received at 2 p. m. Saturday, and not shipped till 6 p. m. Monday, there was no necessity in giving an instruction to find for the shipper if the carrier was negligent in not getting the car

out on Saturday. Rehearing (Civ. App. 1898) 47 S. W. 384, denied. (Civ. App. 1898) *Belcher v. Missouri, K. & T. R. Co. of Texas*, 47 S. W. 1020, reversed (1899) 50 S. W. 559, 92 Tex. 593.

In an action by the consignee of cattle feed for special damages, the court instructed that the special damages might be recovered if defendant's agent at the point of destination of the feed was advised by plaintiff, "before or at the time of the arrival of said feed" at said station, that it was necessary for it to be promptly delivered, or damage would result. The evidence showed that the feed was ready for delivery when such notice was given, and that the failure to deliver was solely because of the agent's fault. Held, that the instruction referring to notice before the arrival of the feed could have caused no misunderstanding or injury to defendant. Judgment, *Choctaw, O. & G. Ry. Co. v. Bourland* (Civ. App. 1905), 87 S. W. 173, reversed. *Bourland v. Choctaw, O. & G. Ry. Co.*, 99 Tex. 407, 90 S. W. 483, 3 L. R. A. (N. S.), 1111.

In an action against a carrier for delay in delivering freight consigned to a station which had not been opened for business at the time the freight was shipped, an instruction that, in determining whether there was delay in the transportation of the freight, the jury should estimate the entire time consumed for transportation, without reference to when the station was in fact opened, unless they believed that plaintiffs knew or should have known that the station was not open when the shipment was made, in which event they should exclude from their estimate as much time as elapsed between the date of the shipment and the time when the station was actually opened, was sufficiently favorable to defendant. *Texas & N. O. Ry. Co. v. E. R. & D. C. Kolp, Jr.* (Civ. App.), 88 S. W. 417.

In an action against a carrier for delay in transporting a threshing outfit, an instruction that the measure of plaintiffs' damages was the expense, if any, incurred by plaintiffs in maintaining their employees and teams during the delay, if any, and the reasonable value for the time lost, if any, during said delay "and the loss, if any, they sustained by reason of being deprived of the threshing of any of the crops of wheat, which they had contracted for," was objectionable, as authorizing double damages for the same injury. *Missouri, K. & T. Ry. Co. of Texas v. Sproles & Vines* (Civ. App.), 92 S. W. 40.

In an action against a carrier for delay in transporting a threshing outfit, an instruction on the subject of the carrier's notice of the fact that the delay would probably result in the special damages alleged, authorizing the jury to charge defendant with constructive notice, was erroneous. *Missouri, K. & T. Ry. Co. of Texas v. Sproles & Vines* (Civ. App.), 92 S. W. 40.

Where in a suit against a carrier for delay in transporting a machine appellant asked the court to charge that the measure of damages was the cash rental value of the machine during the time of delay, he can not complain of its refusal to give a charge conflicting with that proposition, to wit: that no recovery could be had of the rental value because defendant was not shown to have had notice that the machine was to be used at once. *Texas, etc., R. Co. v. Hassell*, 23 Tex. Civ. App. 681, 683, 58 S. W. 54.

Where, in an action against a carrier for delay in the shipment of corn, the evidence as to the time when defendant received the corn was conflicting, it was improper for the court to assume in its charge that the corn was received by the carrier on a particular day. *St. Louis, etc., R. Co. v. Thompson* (Civ. App.), 103 S. W. 684.

**Curative Instructions.**—In an action for the delay of an express company in the transmission of goods, any error in admitting a conversation with the drivers of the company, who received the goods, going to prove their agency, and a contract with them, is cured by an instruction that plaintiff could only recover if he had a contract with the office agents. *Pacific Exp. Co. v. Needham* (Civ. App.), 94 S. W. 1070, 1071, affirmed in 101 Tex. 652, no op.

#### i. Directing Verdict.

See ante, "Questions for Jury," VII, 1, 1, g.

#### 2. Actions for Breach of Contract.

**Evidence.**—In an action against a railroad company for damages for failure to ship cattle as agreed, it was claimed in defense that the company was crowded with business, and could not furnish cars sooner. Held, that it was not error to permit plaintiff to show that empty cars stood at the shipping point during the time of delay, and that the cattle were finally shipped in a part of the same cars. *Gulf, C. & S. F. Ry. Co. v. McCorquodale*, 71 Tex. 41, 9 S. W. 80.

### VIII. Delivery by Carrier.

#### A. DUTY AND NECESSITY FOR DELIVERY.

##### 1. In General.

A carrier is bound, without demand, to deliver goods or do that which is tantamount, before discharged from responsibility. *Morgan v. Dibble*, 29 Tex. 107, 117.

The carrier is under the same contract, obligation, or duty to deliver the goods safely that he is to carry them safely. *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 749, 759.

The relation of consignee and carrier begins when the goods are received to be carried, and ends only when they are delivered or stored at the

point of delivery under such circumstances as to constitute the liability of the carrier that of a warehouseman only. And so as a rule, the contract of the carrier is not performed until he has delivered the freight to the consignee. *Fielder v. Missouri, etc., R. Co.*, 92 Tex. 176, 179, 46 S. W. 633, affirming 42 S. W. 362.

The liability of a common carrier continues from the commencement of the trip until the goods are delivered to the owner or consignee at the point of destination or at some other that may be agreed upon, unless due diligence be used to notify the owner that they have arrived at place of destination. *Missouri Pac. R. Co. v. Haynes & Co.*, 72 Tex. 175, 10 S. W. 398.

##### 2. Partially Injured Goods.

An action will lie against a carrier for nondelivery, although the goods are partially injured, and that by the act of God. Such defense, if the goods had been tendered or delivered, would only go in mitigation of damages. *Houston & T. C. Ry. Co. v. Harn*, 44 Tex. 628.

##### 3. Effect of Usage.

The carrier is under the same contract, obligation, or duty to deliver the goods safely that he is to carry them safely. The law fixes these duties upon the carrier, and he can not relieve himself from them by proving his usage. *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 758.

##### 4. Regulations Respecting Delivery.

###### a. Delivery on Platform.

A railroad company has the right to require persons hauling freight from its depot to receive the same on the platform from its servant and not to enter the warehouse for the purpose of checking off the freight and also to require that persons doing business with the company shall transact the same over the counter and not behind it, and such regulations are reason-

able. *Donovan v. T. & P. Ry. Co.*, 64 Tex. 519.

**b. Production and Surrender of Bill of Lading and Receipt for Goods.**

A carrier has the right to require the production of the bill of lading before delivering the goods. (Civ. App.), *Nashville, C. & St. L. Ry. Co. v. Grayson County Nat. Bank*, 91 S. W. 1106, judgment reversed 93 S. W. 431, 100 Tex. 17; *Dwyer v. Gulf, etc., R. Co.*, 69 Tex. 707, 7 S. W. 504.

The carrier would clearly have this right provided he had any good reason to doubt the consignee's right to receive the goods. *Nashville, etc., R. Co. v. Grayson County Nat. Bank*, 100 Tex. 17, 21, 93 S. W. 431, reversing 91 S. W. 1106.

As, in general, a bill of lading is assignable by the consignee and sometimes by the consignor, so as to render the carrier liable to make delivery to the assignee, it seems no unreasonable regulation to require the production of the bill of lading as a condition of delivery. *Dwyer v. Gulf, etc., R. Co.*, 69 Tex. 707, 709, 7 S. W. 504.

When a carrier delivers goods he has the right to demand of the party receiving them some written evidence that he has done so, and if the party refuses to give a receipt it will be a good defense to the action for the goods. *Dwyer v. Gulf, etc., R. Co.*, 69 Tex. 707, 709, 7 S. W. 504.

These requirements are obviously just and reasonable and in strict accord with the habits and customs of business men everywhere, and the refusal to perform such reasonable requests should be a sufficient excuse for the carrier to refuse to deliver the goods, as experience demonstrates, that such precautions are necessary to avoid disputes, law suits and losses, and the performing of such requirements could, in no event, entail loss or inconvenience on the consignor or owner of the goods. *Dwyer v. Gulf,*

*etc., R. Co.*, 69 Tex. 707, 709, 7 S. W. 504.

A railroad company is not liable for damages for failure to deliver goods to an unidentified consignee, where he fails to produce the bill of lading, though he may offer security. *Gulf, C. & S. F. R. Co. v. Freeman*, 4 Willson, Civ. Cas. Ct. App. § 246, 16 S. W. 109.

A carrier may deliver the goods to the consignee without requiring the production of the bill of lading, unless it contains a stipulation to the contrary. Judgment (Civ. App.), 91 S. W. 1106, reversed. *Nashville, C. & St. L. Ry. Co. v. Grayson County Nat. Bank*, 93 S. W. 431, 100 Tex. 17.

While it has been held that if the parties to a bill of lading stipulate that the goods shall not be delivered without its production, the carrier is not excused for a delivery to the consignee when the bill was not presented; yet the law is that in the absence of such a stipulation, the carrier may deliver without requiring its production. *Nashville, etc., R. Co. v. Grayson County Nat. Bank*, 100 Tex. 17, 21, 93 S. W. 431, reversing 91 S. W. 1106.

A carrier is liable to a bona fide holder of a bill of lading where, without production of such bill, it delivers the goods to one not entitled thereto. (Civ. App.) *Nashville, C. & St. L. Ry. Co. v. Grayson County Nat. Bank*, 91 S. W. 1106, judgment reversed 100 Tex. 17, 93 S. W. 431.

The carrier must bear the risk of delivering the goods to the person entitled to them under the bill of lading and its indorsements; and where the bill directs delivery to the vendor's order, or his assigns, the carrier is notified that he must not deliver to the consignee without the bill properly indorsed by the consignor, and if he delivers otherwise he will be liable. *Grayson County Nat. Bank v. Nash-*

ville, C. & St. L. Ry. (Civ. App.), 79 S. W. 1094.

Where a carrier permitted goods consigned to shipper's orders to be taken away by a purchaser after arrival at destination without complying with carrier's instructions in producing a bill of lading, it is liable for their value regardless of whether its possession was that of a carrier or warehouseman. *St. Louis, etc., R. Co. v. Hall, etc., Mach. Co.*, 23 Tex. Civ. App. 211, 214, 215, 56 S. W. 140, affirmed in 93 Tex. 694, no op.

**Surrender of Bill of Lading.**—A railroad company has no right to demand surrender of bills of lading as a condition of delivery of the goods which they represent to a consignee who tenders charges and produces the bill of lading for inspection, but refuses to surrender the same. *First Nat. Bank v. San Antonio, etc., R. Co.*, 97 Tex. 201, 214, 77 S. W. 410, affirming in part and reversing in part 72 S. W. 1033; *Dwyer v. Gulf, etc., R. Co.*, 69 Tex. 707, 7 S. W. 504, but see *Gulf, etc., R. Co. v. Freeman*, 4 App. Civ. Cases, § 246, 16 S. W. 109.

Where bills of lading were pledged to secure advances made to the purchaser of the goods, and on the bankruptcy of the purchaser a part of the property covered by the bills of lading was in possession of a carrier, its refusal to deliver the property to the pledgee of the bills of lading, except on surrender thereof, was a conversion of the property. Judgment (Civ. App.) 72 S. W. 1033, modified. *First Nat. Bank v. San Antonio & A. P. R. Co.*, 77 S. W. 410, 97 Tex. 201.

Since the station agent had no right to demand such surrender, this was a conversion of the property. *First Nat. Bank v. San Antonio, etc., R. Co.*, 97 Tex. 201, 214, 77 S. W. 410, affirming in part and reversing in part 72 S. W. 1033, and following *Dwyer v. Gulf, etc., R. Co.*, 69 Tex. 707, 7 S. W. 504.

It is claimed that after possession

of the goods has been delivered to the owner or consignor the bill of lading becomes the property of the carrier, and the carrier is entitled to possession of it. Upon like reason, as is claimed, the maker of a note upon payment is entitled to the possession as against the payee. The instances are not analagous, for after the note is paid it is entirely useless to the payee, and this may be the reason of the universal custom of surrendering the note instead of executing a receipt for its payment; but, as before suggested, the bill of lading may be of use to the consignor or owner of the goods after a delivery has been made. It must be conceded that the bill of lading was at one time the property of the owner of the goods, and it is not perceived how the delivery of them could destroy his right in this property without his consent. If the right to the bill of lading, which is both a receipt and a contract in writing, passed to the carrier upon the delivery of the goods, there would be no need to invoke the law of custom; but if it did not, it follows that the owner could not be deprived of it without his consent. And it is unreasonable that a custom should require the surrender of a valuable right in order to obtain possession of property, that the law without condition or qualification requires should be delivered. A usage or custom contrary to the command of a statute is void. *Dwyer v. Gulf, etc., R. Co.*, 69 Tex. 707, 7 S. W. 504.

**Refusal to Surrender Bill of Lading as Excusing Failure to Comply with § 4258a, Rev. Stat., Respecting Delivery on Production of Bill of Lading and Tender of Freight Charges.**—See the title CARRIERS, ante, p. 304.

#### c. Identification of Consignee or Proof of Ownership.

See ante, "Production and Surrender of Bill of Lading and Receipt for Goods," VIII, A, 4, b.

A carrier is only required to deliver

to the consignees or some who shows right to receive the property. *Houston, etc., R. Co. v. Adams*, 49 Tex. 748; *Gulf, etc., R. Co. v. Freeman*, 4 App. Civ. Cases, § 246, 16 S. W. 109; *Gulf, etc., R. Co. v. Fowler*, 12 Tex. Civ. App. 683, 688, 34 S. W. 661, affirmed in 93 Tex. 661, 684, no op.

A carrier is not bound to accept the statement of a consignee that he is the owner, as true. It was its duty to exercise caution in delivering the property, being liable, in all events, for delivery to those entitled to receive it. It is not its duty to obtain and furnish the consignee the evidence of his right to receive the shipment, but is his to furnish same to carrier. *Gulf, etc., R. Co. v. Fowler*, 12 Tex. Civ. App. 683, 34 S. W. 661, affirmed in 93 Tex. 661, 684, no op.

The carrier can act upon the bill of lading or way bill as showing who was entitled to receive the property until furnished with some better evidence showing a right in some one else. The bare statement by a stranger to the bill of lading or way bill that his right of possession is superior to that of the consignee is to be accepted as true at the peril of the carrier, and in the exercise of the care that rests upon it, it would be the extreme of the want of diligence for it to give more credence to such an assertion than to the written evidence concerning the shipment in its possession, showing that some one else is the consignee and is entitled to possession. *Gulf, etc., R. Co. v. Fowler*, 12 Tex. Civ. App. 683, 688, 34 S. W. 661, affirmed in 93 Tex. 661, 684, no op.

Evidence that defendant road received shipment billed to X. at S., shipped it to S., where plaintiff demanded it without producing evidence of ownership; that after ascertaining plaintiff's ownership, defendant offered to deliver, but plaintiff refused to accept and defendant sold it at auction, was insufficient to show defendant's

conversion of horse. *Gulf, etc., R. Co. v. Fowler*, 12 Tex. Civ. App. 683, 688, 689, 34 S. W. 661, affirmed in 93 Tex. 661, 684, no op.

## **5. Liability for Failure or Refusal to Deliver.**

### **a. In General.**

Independent of statute, a person has a right of action against a railway that unnecessarily refused to deliver goods after tender of the freight due as shown by the bill of lading, and nominal damages might be recovered without proof of actual damages; but that contracting under the statute they would be held liable, in case of failure to comply with its terms, in a sum to be ascertained as provided by it, as if the statute had been made a part of the contract. *Houston, etc., R. Co. v. Harry & Bros.*, 63 Tex. 256. See the title CARRIERS, ante, p. 304.

In an action against an express company for refusal to deliver a coop of chickens on a certain date, a verdict for defendant was unwarranted; it appearing that its driver, on being requested by plaintiff's wife to carry the coop through a side gate, only 10 feet away, instead of through the front gate, indignantly threw the coop back into the wagon, without looking to see where the side gate was, saying that he would not carry it anywhere, and that defendant's agent, on being informed of the driver's conduct, ratified the same. *Gary v. Wells, Fargo & Co.'s Express* (Civ. App.), 40 S. W. 845.

It does not avail a railroad company which has converted goods of a vendee that vendee had not paid therefor. *Gulf, C. & S. F. Ry. Co. v. Rotter Bros.* (Civ. App.), 104 S. W. 402.

**Liability for Delay in Delivery.**—See ante, "Delay in Transportation and Delivery," VII.

### **b. Stoppage in Transitu.**

A carrier may, in suit by consignee for nondelivery, defend by showing consignor's stopping in transitu, but

such right must be existent at time it is exercised. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 202, 17 S. W. 608. See the title STOPPAGE IN TRANSITU.

#### c. Right to Detain Goods for Charges.

##### (1) In General.

See post, "Lien," IX, D.

##### (2) Charges Accruing from Misdirection.

In a suit against a railroad company for refusal to deliver goods, it was error to refuse to instruct that if the goods were shipped over another line by plaintiff's agent, who misdirected them, and they were afterwards shipped to their proper destination partly over defendant's line, defendant had the right to hold the goods for the charges, and plaintiff could not recover; it appearing that the value of the goods was less than the freight charges so accruing. *Texas & P. Ry. Co. v. Klepper*, 69 S. W. 426, 29 Tex. Civ. App. 590.

The carrier was not liable in damages for refusal to deliver to plaintiff upon his tender of what would have been the proper amount of freight charges but for such mistake. *Texas, etc., R. Co. v. Klepper*, 29 Tex. Civ. App. 590, 69 S. W. 426.

#### d. Tender of Freight and Demand for Goods.

See ante, "Liability as for Conversion," VII, H, 2, b.

**Demand of Delivery.**—Demand for delivery of goods by carrier is not a condition precedent to right to sue for nondelivery and conversion. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 201, 202, 17 S. W. 608.

In a suit against a railway company as carrier for nondelivery and conversion of goods, a demand is not material, as it is the duty of the carrier to deliver the goods to the owner, and it is responsible for failure to so deliver them. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608.

In an action against a carrier for goods received, the fact, found by the court, that plaintiff made a demand for the goods, on the testimony of a witness who failed to show of whom he made the demand, or that it was made in behalf of plaintiff, is unsupported by evidence, but was a harmless error, since a demand was unnecessary in a suit for conversion. *Missouri Pac. Ry. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608.

A conversion by the carriers is sometimes shown by a delivery made to a wrong person. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 201, 17 S. W. 608; *Roberts v. Yarboro*, 41 Tex. 449; *Houston, etc., R. Co. v. Adams*, 49 Tex. 748. If this should appear, no demand would be necessary, because the evidence of the conversion would be complete without it. A conversion may also be shown by a demand made by the proper person and a refusal by the carrier, without lawful excuse. *Gulf, etc., R. Co. v. Humphries*, 4 Tex. Civ. App. 333, 336, 23 S. W. 556.

**Tender of Charges.**—In an action against a forwarding merchant, by the assignee of a bill of lading, for refusal to deliver the goods, a peremptory refusal on the part of defendant dispenses with the necessity of making a formal tender of charges thereon before bringing suit. *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

A shipper can not recover for the detention of goods by a railroad company because of his refusal to pay charges when the goods are tendered to him. *Missouri Pac. R. Co. v. Weisman*, 2 Tex. Civ. App. 86, 21 S. W. 420.

## B. MODE AND SUFFICIENCY.

### 1. In General.

A carrier must deliver the goods intrusted to it in a proper manner. *Trice v. Miller*, 3 App. Civ. Cases, § 440; *Gulf, etc., R. Co. v. Clark*, 2 App. Civ. Cases, § 512.



**Carrier by Water.**—See the title SHIPS AND SHIPPING.

**Delivery in Stormy Weather.**—See the title SHIPS AND SHIPPING.

## 2. Acts Which Constitute a Delivery.

### a. In General.

Notification to a consignee by a carrier of the arrival of goods constitutes delivery. *Gulf, C. & S. F. Ry. Co. v. Somerville Mercantile Agency*, (Civ. App.), 104 S. W. 1072.

Where a railroad company receives and issues bills of lading for uncompressed cotton, and, under due authority, sends it to a compress leased and operated by the assignee of the bills, and his servants, not being informed that he had become the owner by assignment, redelivered it to the original consignee, believing him the owner, the company is not liable to the assignee for failure to deliver the cotton. *Missouri, K. & T. Ry. Co. v. McFadden*, 89 Tex. 138, 33 S. W. 853.

There can be no question, under the facts, that if a proper tender of the chickens had been made to the wife of owner, and she had refused to accept them, carrier could not be held liable. But the facts do not show that she failed to receive them, but, on the other hand, made a most reasonable request of the driver, which gave him offense, and he refused to deliver the chickens at all. *Gary v. Wells, etc., Exp. Co.* (Civ. App.), 40 S. W. 845.

### b. Notice to Consignee.

See ante, "Liability of Carrier in Capacity of Warehouseman," VI, C, 2.

It is incumbent on a carrier to give notice to consignee of the arrival of goods. *Morgan v. Dibble*, 29 Tex. 107, 117, 118.

On the arrival of goods at a delivery point, carrier must give such notice to the consignee as will inform him with reasonable certainty that the carrier is ready to deliver, and of the place of delivery, and said notice must

be given in business hours. *Texas, etc., R. Co. v. Schneider*, 1 App. Civ. Cases, § 118.

### 3. Time.

A carrier must deliver goods intrusted to it at a reasonable time. *Gulf, etc., R. Co. v. Clark*, 2 App. Civ. Cases, § 512; *Trice v. Miller*, 3 App. Civ. Cases, § 440.

The carrier must tender the goods within a reasonable time and within reasonable hours. *Houston, etc., R. Co. v. Trammell*, 28 Tex. Civ. App. 312, 315, 68 S. W. 716, affirmed in 95 Tex. 680, no op.; *Missouri Pac. R. Co. v. Haynes & Co.*, 72 Tex. 175, 10 S. W. 398; *Morgan v. Dibble*, 29 Tex. 107, 119; *Texas, etc., R. Co. v. Schneider*, 1 App. Civ. Cases, §§ 118, 120, 121.

Carrier must tender goods to consignee within business hours, that consignee may receive and store his goods safely. *Morgan v. Dibble*, 29 Tex. 107, 119; *Texas, etc., R. Co. v. Schneider*, 1 App. Civ. Cases, § 118.

Where a contract for shipment does not specify any particular time for delivery, it must be made in a reasonable time. *Gulf, etc., R. Co. v. Baugh* (Civ. App.), 42 S. W. 245.

### 4. Place.

A carrier must deliver goods intrusted to it at a proper place. *Trice v. Miller*, 3 App. Civ. Cases, § 440; *Gulf, etc., R. Co. v. Clark*, 2 App. Civ. Cases, § 512; *Texas, etc., R. Co. v. Schneider*, 1 App. Civ. Cases, § 118.

**Delivery Must Be Made at Point of Destination.**—*Gulf, etc., R. Co. v. Baugh* (Civ. App.), 42 S. W. 245.

A consignee of goods is entitled to receive them at the place where the carrier undertook to deliver them, and is under no obligation to receive them elsewhere. *Gulf, C. & S. F. Ry. Co. v. Clark*, 2 Willson, Civ. Cas. Ct. App. § 513; *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 759.

The consignee is under no obliga-

tion to seek or demand his goods elsewhere. *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 759.

Where a carrier contracted to carry goods to a particular place his responsibility does not cease until a due delivery has been made or tendered at such place. *Texas & P. Ry. Co. v. Martin*, 2 Willson, Civ. Cas. Ct. App. § 342.

#### **5. Duty to Furnish Facilities for Removing Goods.**

If a railway company failed to furnish a consignee facilities for removing his lumber from the place where it unloaded it as far as it owned and controlled the land, his remedy would be against the company, and not against a lessee of the land where the lumber was unloaded. *Calcasieu Lumber Co. v. Harris*, 77 Tex. 18, 13 S. W. 453.

#### **6. Goods Shipped Collect on Delivery.**

In an action against a carrier for failure to deliver 100 bales of cotton called for by a bill of lading, with draft drawn on plaintiff, which he paid, defendant pleaded that such amount called for by the bill of lading was a mistake, that only 50 bales had been received on it, and that plaintiff had knowledge of the mistake. Held, that it was error for the court to refuse to charge that if the plaintiff would have known of the mistake before paying the draft, had he exercised ordinary care, and he failed to do so, that would amount to actual knowledge on his part. *Missouri, K. & T. Ry. Co. v. Levine* (Civ. App.), 93 S. W. 1095.

The rule is that "actual notice exists when knowledge is actually brought home to the party to be affected by it, or when he might by the use of reasonable diligence have informed himself of the existence of certain facts." If Levine had any information which was sufficient to have put a prudent man upon inquiry, it will be regarded as notice, if it was of such a character that he might have ascertained the

facts by the use of proper diligence. Whether Levine had such information, and, if so, he used the proper diligence to ascertain the facts, was a question for the jury to determine from the evidence. *Missouri, etc., R. Co. v. Levine* (Civ. App.), 93 S. W. 1095, 1096; *Sickles v. White*, 66 Tex. 178, 17 S. W. 543.

#### **7. Open and Closed Shipments.**

See the title CARRIERS. ante, p. 304.

#### **8. To Whom Delivery May Be Made.**

##### **a. In General.**

A carrier must deliver goods entrusted to it to the right person being liable in all events, for delivery to those entitled to receive it. *Gulf, etc., R. Co. v. Clark*, 2 App. Civ. Cases, § 512; *Trice v. Miller*, 3 App. Civ. Cases, § 440; *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 202, 17 S. W. 608; *Gulf, etc., R. Co. v. Fowler*, 12 Tex. Civ. App. 683, 34 S. W. 661, affirmed in 93 Tex. 661, 684, no op.; *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 759.

Common carriers deliver property at their peril and must take care that it is delivered to proper person. *Trice v. Miller*, 3 App. Civ. Cases, § 440.

**Express Companies.**—Great care must be exercised by express companies to deliver goods to the right person. *Wells, etc., Co. v. Windham*, 1 Tex. Civ. App. 267, 268, 269, 21 S. W. 402.

##### **b. Consignee or Agent of Consignor.**

The consignor has a right to select his agent or consignee to whom delivery must be made. *Houston, etc., R. Co. v. Hogg*, 2 Posey 544, 549.

"Where the carrier receives the goods under a contract, either express, or implied from the marks on the goods, to deliver them to a person named, without any reservation of power of disposal by the consignor, then the delivery to such person completes the contract and relieves the carrier from further liability. This rests on the assumption which the car-

rier is authorized to entertain that the title to the goods passes to the consignee on delivery to the carrier. But if the carrier has notice that the consignee is not the owner, nor entitled to receive the goods, delivery to him will constitute conversion." (6 Cyc. 468.) *Nashville, etc., R. Co. v. Grayson County Nat. Bank*, 100 Tex. 17, 22, 93 S. W. 431, reversing 91 S. W. 1106.

It is laid down as elementary law, that the consignee is presumably the owner of the goods. He is entitled to demand a delivery of them subject only to the right of stoppage in transitu, and therefore the carrier may safely deliver to him, provided always the latter has no notice of a limitation upon the right in favor of an adverse claimant. *Nashville, etc., R. Co. v. Grayson County Nat. Bank*, 100 Tex. 17, 21, 93 S. W. 431, reversing 91 S. W. 1106.

Where goods have been transferred from one carrier to another, the last carrier is bound to deliver the goods to the holder of the bill of lading issued by the first carrier. *Grayson County Nat. Bank v. Nashville, etc., R. Co.* (Civ. App.), 79 S. W. 1094.

**Production of Bill of Lading Essential.**—See the title CARRIERS, ante, p. 304.

#### c. Agent of Consignee.

##### (1) In General.

Where a carrier delivers goods in good order to the person authorized by the consignee to receive the same, he is, by such delivery, relieved from all liability therefor. *St. Louis S. W. Ry. Co. v. Crawford* (Civ. App.), 35 S. W. 748.

No action lies against a carrier for value of goods alleged to have been lost, where it is shown that they reached destination and were delivered to draymen duly authorized by plaintiff to receive them. *St. Louis, etc., R. Co. v. Crawford* (Civ. App.), 35 S. W. 748.

In an action against a carrier for loss of goods in transit, a requested charge that if the goods were delivered

by defendant to plaintiff's drayman, defendant was not liable for such as may have been so delivered, should have been given. *Gulf, etc., Ry. v. Lewine* (Civ. App.), 29 S. W. 835.

##### (2) Written Order to Deliver to Agent.

A written authority from consignee to a third person to collect goods shipped him by express should not be so uncertain as to give just grounds for doubting the scope of the authorization; as great care must be taken by express agents to deliver goods to the proper person, and heavy liabilities may result from wrong delivery. *Wells, etc., Co. v. Windham*, 1 Tex. Civ. App. 267, 268, 269, 21 S. W. 402.

An order for consignee to railroad agent who was also the express company agent as follows: "Railroad Agent: Dear Sir—Please deliver to the bearer any freight I may have in your possession and oblige;" is not a sufficient demand on the express company to make it the agent's duty to deliver express, freight, or make the company liable for damages resulting from his failure to do so; for from the order given the agent could not know that the bearer was authorized to receive such freight. *Wells, etc., Co. v. Windham*, 1 Tex. Civ. App. 267, 268, 269, 21 S. W. 402.

Young trees were consigned by an express company to a person at a certain station, in care of the railroad agent, who was agent also of the express company. The freight and express received at the station were kept in the same room. After the trees had been there several weeks, the consignee sent an order, addressed to the "R. R. Agent," directing the latter to deliver to bearer "any freight" there might be for the consignee. The agent reported that there was nothing for him. Held, that the demand was not sufficient to charge the express company with liability for the agent's failure to deliver. *Wells, Fargo & Co.*

*v. Windham*, 1 Tex. Civ. App. 267, 21 S. W. 402.

The arrival of the trees was advertised on December 20, and it was seen by the consignee, who on January 3 following sent the order described in the preceding paragraph; to which the agent replied that there was nothing for Windham. The order not being such as to direct the agent's attention to the trees, the failure to deliver them resulted from the fault of the appellee, and the judgment in his favor for damages is here reversed, and rendered for the appellant. *Wells, etc., Co. v. Windham*, 1 Tex. Civ. App. 267, 21 S. W. 402.

**(3) Agent of Carrier on Order of Consignee.**

Where consignor directs delivery to railroad agent at point of delivery, he makes him his own agent and delivery to such agent is delivery to consignor's agent. *Houston, etc., R. Co. v. Hogg*, 2 Posey 544, 549.

A railroad agent, who is also agent for an express company, owes no duty to a consignee as a railroad agent to receive goods expressed to consignee in care of such railroad agent. *Wells, etc., Co. v. Windham*, 1 Tex. Civ. App. 267, 268, 269, 21 S. W. 402.

**(4) Warehouseman.**

When freight transported by a common carrier to a seaport town is placed in a warehouse for delivery to the consignee, and control thereof is assumed by the consignee, the delivery is complete; but if he so negligently places and leaves it that the consignee or his agent in attempting and with reasonable care to remove the same, is injured by reason of the negligent manner in which it was left by the carrier, the latter is responsible in damages, provided no negligence of the consignee or his agent contributed to such injury. *Mallory & Co. v. Smith*, 76 Tex. 262, 13 S. W. 199. See the title **WAREHOUSES AND WAREHOUSEMEN**.

**d. Assignee of Bill of Lading.**

See the title **CARRIERS**, ante, p. 304.

**9. Misdelivery.**

**a. In General.**

A carrier is liable, in all events, for a proper and correct delivery of the property to those who are entitled to receive it, and a mistake in this respect, although arising out of an abundance of caution, will not shield it from liability to the true owners. *Gulf, etc., R. Co. v. Fowler*, 12 Tex. Civ. App. 683, 688, 34 S. W. 661, affirmed in 93 Tex. 661, 684, no op., following *Houston, etc., R. Co. v. Adams*, 49 Tex. 748. See, to the same effect, *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 201, 17 S. W. 608; *Roberts v. Yarboro*, 41 Tex. 449; *Gulf, etc., R. Co. v. Humphries*, 4 Tex. Civ. App. 333, 336, 23 S. W. 556.

"Common carriers deliver property at their peril, and must take care that it is delivered to the right person; for if the delivery be to the wrong person, either by an innocent mistake, or through fraud of third persons, as upon a forged order, they will be responsible, and the wrongful delivery will be treated as a conversion." *Houston, etc., R. W. Co. v. Adams*, 49 Tex. 748, 759.

It is the duty of the carrier in discharge of his undertaking to deliver the goods to the consignee or his assigns. He must at his peril deliver the goods to the true owner. He must suffer the consequences of a mistake, however honestly made. If he deliver, however innocently, the property to the wrong person, such misdellivery becomes a conversion. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 201, 17 S. W. 608.

A railroad is bound as a common carrier to deliver goods to the real consignee, to whom they in fact belong, and the delivery of them to any one else is a violation of the contract, which entitles the owner to an action

for their value. *Houston & T. C. R. W. Co. v. Adams*, 49 Tex. 748.

A carrier is guilty of a conversion of the goods by delivering them to the wrong person, though he acted in good faith and with due caution. *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 759.

It is true that it is not as customary for other carriers, as it is for express companies, to oblige themselves to look up the owner and consignee, and deliver the goods to him at his residence or place of business. But all classes of common carriers are responsible, and equally responsible, for a loss of the goods by delivery to the wrong person. *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 758.

If a carrier delivers property to wrong person, either by innocent mistake or through fraud of third persons, the carrier is liable for property. *Trice v. Miller*, 3 App. Civ. Cases, § 440.

The misdelivery by defendants of the goods, by their return to the consignor, was therefore a conversion of the property. A demand is unnecessary to justify a suit for conversion. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 202, 17 S. W. 608.

By wrongful delivery the carrier becomes at once liable to the shipper for its value and is not relieved by its subsequent destruction by an "act of God." *Missouri, etc., R. Co. v. Seley*, 31 Tex. Civ. App. 158, 72 S. W. 89, affirmed in 97 Tex. 641, no op.

Where a railway company delivered a consignment of wheat to another than the consignee, subject to the consignor's order, such erroneous delivery constituted a technical conversion, rendering the railroad company immediately liable for the price of the wheat; so that it was not relieved by its subsequent destruction in the hands of such third person by an unprecedented storm. *Missouri, K. & T. Ry. Co. of Texas v. Seley*, 72 S. W. 89, 31 Tex. Civ. App. 158.

Through the mistake of a forwarding agent, goods belonging to Russell Adams, and marked "R. Adams, Brenham, Tex.," were shipped, January 19, 1871, to Bremond, Tex., and on January 23d, on request of a letter signed "R. Adams," were forwarded to Burton, and March 16th delivered to Robert Adams, who showed no receipt or bill of lading, and who receipted for them as "R. Adams." In an action by the owner, brought February 6, 1873, held, that the railway company was liable as for a conversion of the goods. *Houston & T. C. Ry. Co. v. Adams*, 49 Tex. 748, 30 Am. Rep. 116.

Where the carrier delivered goods to a person of the same name as the one to whom the goods were sent, because of such person's having, by false and fraudulent devices, impersonated the consignee, the carrier is not liable, unless he failed to act in good faith and with due diligence. *Pacific Exp. Co. v. Hertzberg*, 42 S. W. 795, 17 Tex. Civ. App. 100.

An imposter, through an order in the name of a reputable merchant in another city, procured a shipment of goods by express to the merchant. He then appeared at the place of delivery, introduced himself as bearing the same name as the merchant, and, the merchant having informed the agent that he had not ordered the goods, and did not expect any packages, the agent delivered the goods to the imposter, without requiring the bill of lading or personal identification, and without attempting to communicate with the shipper as to the identity of the consignee. Held, that the delivery was negligent. *Pacific Exp. Co. v. Hertzberg*, 42 S. W. 795, 17 Tex. Civ. App. 100.

In this case the only identification of such person was by letters and telegrams in his possession and addressed in name of consignee. *Pacific Exp. Co. v. Herzberg*, 17 Tex. Civ. App. 100, 104, 105, 42 S. W. 795.

A common carrier, who negligently delivers goods to one impersonating the true consignee, is liable therefor. *Pacific Exp. Co. v. Critzer* (Civ. App.), 42 S. W. 1017, following *Pacific Exp. Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 42 S. W. 795.

When the carrier delivers to the person to whom the goods were sent, although by false and fraudulent devices that person personates another, to whom the consignor believed he was sending the goods, the carrier, if acting in good faith and with due diligence, is not liable. The failure to act in good faith or with due diligence constitutes negligence, and negligence is a question of fact for the jury to determine. *Pacific Exp. Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 105, 42 S. W. 795.

Where a director of a corporation to which goods have been consigned got possession of the unindorsed bill of lading, and induced the carrier to deliver the goods to him without authority, which he converted to his own use, the carrier was liable for misdelivery. *Cane Belt R. Co. v. Peden Iron & Steel Co.*, 101 S. W. 528, 45 Tex. Civ. App. 630.

Bills of lading for cotton recited that it was received for delivery to the order of plaintiff. The shipper was a buyer of cotton, who paid therefor by drafts on plaintiff, secured by the bills of lading. The cotton was delivered to another, who guaranteed to hold the carrier harmless, and, without paying, plaintiff applied the cotton to a claim against the third person. The delivery was not made in accordance with custom, but in reliance on the guaranty. Held, that the carrier was liable to plaintiff for the loss of the cotton. *Texas & G. Ry. Co. v. First Nat. Bank*, 112 S. W. 589, 47 Tex. Civ. App. 283.

**Evidence.**—In an action against a carrier for failure to deliver 93 bales of cotton in accordance with a bill of

lading reciting the receipt of the cotton for shipment and delivery to the order of plaintiff, evidence held to sustain a finding that the 93 bales were delivered to a third person, authorizing a judgment against the carrier therefor. *Texas & G. Ry. Co. v. First Nat. Bank*, 112 S. W. 589, 47 Tex. Civ. App. 283.

Evidence that a witness, on learning that goods shipped to him over defendant's railway had reached their destination, went with his wagons to haul the same, and found them in a car on a switch about two miles distant, and that he had been informed that the car remained at the point of destination a day and a night, is sufficient to support a finding that the goods remained at the point of destination only 24 hours, and were thereafter removed by the railroad company to the place where they were delivered to a third party. *St. Louis S. W. Ry. Co. of Texas v. Hall & Brown Woodworking Mach. Co.*, 56 S. W. 140, 23 Tex. Civ. App. 211.

#### b. Misdirected Goods.

##### (1) Goods Misdirected by Carrier.

Railroad company is liable for loss of goods misdirected by it; or delivered by mistake. *Vincent v. Rather*, 31 Tex. 77, 86. See ante, "Decrease in Market Value," VII, H, 2, c.

The act of an agent of a railway company in billing a shipment of property to a place other than that stated in the contract of shipment, held the proximate cause of the shipper's losing the benefit of the market. *Gulf, etc., R. Co. v. Harris* (Civ. App.), 72 S. W. 71.

A common carrier is not responsible for loss of misdirected goods after rightful consignee assumes control. If a common carrier make a mistake in the delivery of goods, although it should happen from their negligence, he is not responsible for their safety after they have been found and taken into the possession and control of the

owner, his agent or factor. *Vincent v. Rather*, 31 Tex. 77, 86.

**(2) Goods Misdirected by Owner or Shipper.**

Goods shipped by the owner to himself were marked with the name, but not with the place of their destination, when received by the carrier. Held, that, if it was the owner's fault that the goods were not properly marked, the carrier can not be heard to complain thereof, because it received the freight in that condition, and thereby waived any defect in the manner in which it was marked or directed. *Gulf, C. & S. F. Ry. Co. v. Maetze*, 2 Willson, Civ. Cas. Ct. App. § 635.

**c. Action against Person to Whom Goods Wrongfully Delivered.**

A railroad company which delivered property intrusted to it as a common carrier upon a forged order can recover its value after fully accounting to the consignees, from warehousemen to whom it was delivered by the fraudulent recipient for a valuable consideration, and by whom it was sold without knowledge of the fraud to other parties, the maxim of caveat emptor being applicable to such sale. *Gulf, etc., R. Co. v. Taylor & Sons*, 18 Tex. Civ. App. 571, 45 S. W. 749.

A suit by consignor at instance and for benefit of carrier and judgment for value of the goods wrongfully converted by consignee after arrival at destination, does not affect consignor's right of recovery against carrier for its misdelivery. *St. Louis, etc., Ry. v. Hall, etc., Mach. Co.*, 23 Tex. Civ. App. 211, 214, 215, 56 S. W. 140, affirmed in 93 Tex. 694, no op.

**d. Damage for Misdelivery.**

See post, "Misdelivery," XI, B, 2, c.

**10. Waiver of Objections.**

Where a carrier tenders freight at an unreasonable time or improper place or in an improper manner, the consignee, by accepting the goods, waives all objections which he might have urged against the acceptance un-

der ordinary circumstances. *Gulf, Colorado & S. F. R. Co. v. Clark*, 2 Willson, Civ. Cas. Ct. App. § 512.

A shipper can not be held bound by, or be supposed to have consented to, the improper shipment or delivery of his goods by the carrier, merely by following them to the point to which they have been improperly forwarded, or by demanding them from the party to whom they were wrongfully delivered. *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 759.

**C. EFFECT OF DELIVERY.**

A railroad's liability as a common carrier for goods shipped over its lines ceased with the delivery of goods at the destination. *Texas, etc., Ry. v. Wever*, 3 App. Civ. Cases, § 60.

When the consignee receives the property, the carrier's responsibility ceases. *Houston, etc., R. Co. v. Hogg*, 2 Posey 544, 549.

Where goods are consigned in care of the railroad agent at the point of destination, the agent holds the property as agent of the consignee, not as agent of the company, and when such agent receives the property the carrier's liability ceases. *Houston & T. C. R. Co. v. Hogg*, 2 Posey Unrep. Cas. 544.

**D. DELIVERY IMPOSSIBLE FROM DEFAULT OF SHIPPER OR CONSIGNEE.**

**1. In General.**

A common carrier's duties and responsibilities cease when he arrives at the point of destination and can find no consignee or other agent to receive the goods for the owner or consignor, and is unable to make a delivery not from any fault of his but from the default of the shipper in not having some person there to receive his property. Though he might be bound to hold or store the goods for the benefit of the owner, yet he would not be held liable as a common carrier but as a simple bailee and bound only to or-

dinary care and diligence; and he would be entitled to extra compensation as a bailee. If while holding the goods as such bailee, the federal authorities seize the same without any fault of his he could not be held responsible for any loss which might occur to the owner. *House v. Soder*, 36 Tex. 629, reaffirmed in *Gerhard v. Neese*, 36 Tex. 635.

## 2. Refusal of Consignee to Accept Delivery.

See ante, "Liability as for Conversion, VII, H, 2, b.

**Notice to Shipper and Liability of Carrier.**—In an action against a carrier for damages for delay in notifying the shipper of the consignee's refusal to accept the goods, plaintiff was not entitled to recover in the absence of proof of the date of the consignee's refusal, since the carrier was not required to notify the shipper until it was notified, or by the exercise of ordinary diligence could have known of such refusal. *Missouri, K. & T. Ry. Co. of Texas v. Jenkins*, 80 S. W. 428, 35 Tex. Civ. App. 429.

The carrier, if liable at all, would be liable only as warehouseman, if it exercised reasonable diligence in notifying the shipper of the consignee's failure to receive the cotton. *Missouri, etc., R. Co. v. Jenkins*, 35 Tex. Civ. App. 429, 80 S. W. 428.

**Sale of Goods.**—A general state statute providing for the sale of rejected freight by the carrier after the expiration of six months was applicable to a shipment from a point without to a point within such state. *St. Louis Southwestern Ry. Co. v. Arkansas & T. Grain Co.*, 95 S. W. 656, 42 Tex. Civ. App. 125.

A sale of goods by a carrier, on the refusal of the consignee to accept them, is unauthorized, where the sale is for much less than the market value and is made without notice of sale, and immediate sale is unnecessary to protect the carrier in its freight

charges, and it is liable for the fair market value at the time of sale. *Missouri, K. & T. Ry. Co. of Texas v. Groce* (Civ. App.), 106 S. W. 720.

The right of a carrier to sell goods on the refusal of the consignee to accept them can only be exercised after notice to the consignor, and such notice of sale as will reasonably assure a sale at the reasonable market value. *Missouri, K. & T. Ry. Co. of Texas v. Groce* (Civ. App.), 106 S. W. 720.

Where carriers on the refusal of the consignee to accept a carload of potatoes, sold them without any attempt at compliance with Rev. St. 1895, arts. 328, 331, authorizing carriers to sell perishable property remaining after its arrival until in danger of depreciation at public auction after giving five days' notice, this was a conversion of the property. *Carter & Corey v. International & G. N. Ry. Co.* (Civ. App.), 93 S. W. 681.

Where, after rejection of certain corn by the consignee, the carrier sold it without complying with a state statute regulating such sales, and there was no evidence that the corn was perishable other than that it was moldy and in a damaged condition, it was no defense to the carrier's liability that the statute was inapplicable to perishable freight. *St. Louis Southwestern Ry. Co. v. Arkansas & T. Grain Co.*, 95 S. W. 656, 42 Tex. Civ. App. 125.

A state statute regulating the sale of rejected freight by a carrier, and requiring that such sale be made only after the expiration of six months, on notice specified, superseded the common law in respect to the manner of selling such freight by a carrier, so that a sale in violation of the statute was illegal. *St. Louis Southwestern Ry. Co. v. Arkansas & T. Grain Co.*, 95 S. W. 656, 42 Tex. Civ. App. 125; *Gulf, etc., R. Co. v. North Texas Grain Co.*, 32 Tex. Civ. App. 93, 74 S. W. 567.

The consignee of a carload of onions



having refused to accept the same because of its damaged condition, the carrier, after a delay of eight days, shipped the property to another place to be sold for freight charges. After such shipment, but before sale, the consignee demanded the property, offering to pay the charges, which the carrier refused. Held, a conversion of the property, the sale not being such as is provided for by Rev. Stat. 1895, arts. 328, 329. *Missouri, etc., R. Co. v. Rines & Co.*, 37 Tex. Civ. App. 618, 84 S. W. 1092.

The onions were in legal effect converted by the carrier, certainly by a sale thereof not in accordance with Rev. Stat. 1895, arts. 328 and 329 (Texas, etc., *R. Co. v. Klepper*, 29 Tex. Civ. App. 590, 69 S. W. 426; *Gulf, etc., R. Co. v. North Texas Grain Co.*, 32 Tex. Civ. App. 93, 74 S. W. 567), if not by the unauthorized removal from Ft. Worth to Dallas. *Missouri, etc., R. Co. v. Rines & Co.*, 37 Tex. Civ. App. 618, 84 S. W. 1092.

**Damages.**—Where the consignee of cotton refused to accept the same on the ground that it was of inferior grade, the carrier was liable for delay, in notifying the shipper of such refusal in case the cotton was of inferior grade, only for the decline in the market price for the time intervening between the date on which by the exercise of ordinary care it could have learned of the consignee's refusal and notified the shipper and the date on which the cotton was actually sold after notice was given. *Missouri, K. & T. Ry. Co. of Texas v. Jenkins*, 80 S. W. 428, 35 Tex. Civ. App. 429.

**Actions—Evidence.**—Where, in an action against a carrier for conversion of corn by a sale after rejection by the consignee, the issue was sharply drawn as to whether the corn was No. 2 mixed corn when loaded at the point of shipment, evidence that the corn was part of another carload, the balance of which witness sold as No. 2

corn to dealers at the point of shipment, and that no complaint had ever been made by any of the purchasers of the same was not irrelevant. *St. Louis Southwestern Ry. Co. v. Arkansas & T. Grain Co.*, 95 S. W. 656, 42 Tex. Civ. App. 125.

Nor was such evidence objectionable as hearsay. *St. Louis, etc., Ry. Co. v. Arkansas, etc., Co.*, 42 Tex. Civ. App. 125, 95 S. W. 656 (see 101 Tex. 655, no op.).

**Instructions.**—Where, in an action against a carrier for damages for negligence in failing to promptly notify the shipper of the consignee's refusal to accept the goods, there was neither allegation nor proof that the carrier failed to transport the goods within a reasonable time or give the consignee notice of arrival, an instruction that it was the duty of the carrier to carry out the contract and ship the goods to the destination in a reasonable time, and to give notice to the consignee as agreed on, was error. *Missouri, K. & T. Ry. Co. of Texas v. Jenkins*, 80 S. W. 428, 35 Tex. Civ. App. 429.

Where goods were refused by the consignee, and were afterwards received by the shipper and sold, an instruction that, if the carrier delivered the goods to the consignee without his surrender of the bill of lading or other order from the consignors to deliver, the consignors were entitled to recover, held error. *Missouri, K. & T. Ry. Co. of Texas v. Jenkins*, 80 S. W. 428, 35 Tex. Civ. App. 429.

### 3. Duty of Carrier to Unload, Store and Protect.

See ante, "Unloading and Storing." V, I, 4.

## IX. Freight and Charges.

### A. FREIGHT.

#### 1. Rate or Amount of Charge.

##### a. In General.

Mr. Hutchinson, in his work on

Carriers, 2d ed., § 447, in discussing the amount of compensation to be allowed the common carrier for the transportation of goods in cases where the rate has not been fixed by statute, by established usage, nor by agreement of the parties, says that, "The carrier will be entitled to demand and receive a reasonable compensation." And that, "Further than that his charges shall be reasonable, the common law seems to have put no restriction upon the carrier in respect to his demand for compensation." *Abilene Cotton Oil Co. v. Texas, etc., R. Co.*, 38 Tex. Civ. App. 366, 369, 85 S. W. 1023, affirmed in 101 Tex. 627, no op.

Where goods are properly tendered to a common carrier for shipment, the common law requires it to receive them, and if no special contract is made for compensation, it has the right to charge its reasonable and customary rates for like services. *Missouri, etc., R. Co. v. Stoner*, 5 Tex. Civ. App. 50, 53, 23 S. W. 1020.

The mere fact that a less freight rate is allowed to one class of shippers for special reasons applicable only to them, than to other shippers of same general character of goods is not proof that the higher rate is unreasonable. *Missouri, etc., R. Co. v. Trinity County Lumber Co.*, 1 Tex. Civ. App. 553, 557, 21 S. W. 290 (see 85 Tex. 405).

**Measure or Weight as Standards.**—A railroad company may lawfully rate cotton either by measurement or weight, but can not charge according to both standards on the same lot of freight. *Central R. Co. v. Hearne*, 32 Tex. 546, 547.

**Value as Basis of Charge.**—The value of the thing to be carried may be taken in consideration by the carrier in fixing compensation for the carriage. *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 308, 309, 12 S. W. 815.

**Stipulation as to Value as Basis of Charge and Measure of Damages.**—See the title CARRIERS, ante, p. 304.

**Under Charter Provisions.**—See the title CARRIERS, ante, p. 304.

#### b. Special Contracts.

##### (1) Requisites and Validity.

###### (a) In General.

A contract whereby a salt company agrees to ship 66 per cent. of its output over a certain railroad, which in return agrees to ship at as low a rate as may be offered by any other road, is not void as against public policy. *Texas & P. Ry. Co. v. Texas Short Line Ry. Co.*, 80 S. W. 567, 35 Tex. Civ. App. 387.

**Meeting of Minds—Mistake as to Rates.**—A shipper of fruit can not recover the difference between the price at which defendant railroad company's agent agreed to ship a carload and the regular price, which plaintiff was subsequently compelled by the connecting line to pay, when it appears that, though the shipper informed the agent of the character of the fruit shipped, the latter misunderstood him, and quoted the rate under a mistake as to the character of the shipment. *Gulf, C. & S. F. Ry. Co. v. Dawson* (Civ. App.), 24 S. W. 566.

**Consideration.**—A carrier's contract to transport freight at certain rates is not void, as being an agreement to do what it was legally required to do by the railroad commission act, and hence without consideration. *Thompson v. San Antonio & A. P. Ry. Co.*, 11 Tex. Civ. App. 145, 32 S. W. 427.

###### (b) Charging Less than Maximum Rate.

See, also, the title CARRIERS, ante, p. 304.

The railroad commission act, even when rates have been fixed, does not enjoin a railroad from charging a less rate than the commission has named, provided it makes no discrimination;

hence, even in cases where the commission has fixed rates for a railway company, it can not be said that it is powerless to make contracts for transportation. *Thompson v. San Antonio, etc., R. Co.*, 11 Tex. Civ. App. 145, 147, 148, 32 S. W. 427.

It was not the intention of the state railroad commission act to abolish the right of railroad companies to make contracts for freight. A lawful contract may be made for less rates than those prescribed by the commission. *Thompson v. San Antonio, etc., R. Co.*, 11 Tex. Civ. App. 145, 147, 148, 32 S. W. 427.

A contract by a carrier to carry goods at less than the maximum rates fixed by the commissioners is valid where there is no discrimination. *Wells, Fargo Exp. Co. v. Williams* (Civ. App.), 71 S. W. 314; *Thompson v. San Antonio, etc., R. Co.*, 11 Tex. Civ. App. 145, 32 S. W. 427.

### (2) Construction, Operation and Effect.

**Rate Payable.**—Stipulation in contract of shipment to pay "at the rate of tariff," does not make the shipper liable to pay more than the rate agreed on, no tariff having been legally established. *Gulf, C. & S. F. Ry. Co. v. Leatherwood*, 69 S. W. 119, 29 Tex. Civ. App. 507.

**Conclusiveness of Weights Stated in Bill of Lading.**—Where, under a written contract, a carrier was to accept and ship freight according to the shipper's scale of weights, with a proviso that the carrier could from time to time inspect the books of the shipper to verify the weights, and that the shipper would pay all undercharges found due, the carrier was not precluded from going behind bills of lading and freight bills signed by it and showing that the weights furnished by the defendant were incorrect, and recover shortage, though the carrier's agent knew of the shortage at the time the shipments were made. *Belton Oil*

*Co. v. Gulf, C. & S. F. Ry. Co.*, 92 S. W. 411, 41 Tex. Civ. App. 374.

"The purpose of the stipulation referred to was to reserve the right for a reasonable time to correct errors in weights, and that such right was not destroyed by making out bills according to the weights furnished by the defendant and receiving payment therefor from the defendant. The stipulation that the plaintiff would accept the scale of weights of the defendant on all consignments in carload lots, and that inspections might be made by its auditor, or other duly accredited representative, and that same might be made from time to time, negatived the idea that it was intended that the inspection should be made at the very time the several shipments were tendered, and not after they had been made and freight charges paid according to the weights furnished by the defendant." *Belton Oil Co. v. Gulf, etc., R. Co.*, 41 Tex. Civ. App. 374, 92 S. W. 411.

**Contract for Through Rate.**—A carrier contracting with shipper for a through rate of freight is liable to him for any charge over and above that rate. *Galveston, etc., R. Co. v. Short* (Civ. App.), 25 S. W. 142, 143.

**Damage Resulting from Quotation of Less than Published Tariff.**—A railway company is liable for damages caused by its agent quoting to a shipper a freight rate less than the regular published tariff, for an interstate shipment, whereby he was led to make contracts to sell the article transported at a price based on the rate named, though the carrier could not contract to transport at such rate nor the shipper enforce such contract. *Texas, etc., R. Co. v. Mugg*, 98 Tex. 352, 83 S. W. 800.

### (3) Merger of Prior Verbal in Written Contract.

In a suit against a carrier for overcharge, a plaintiff who proved the written contract of shipment was

signed by mistake can recover on the verbal contract made before written contract was signed. *Galveston, etc., R. Co. v. House*, 4 Tex. Civ. App. 263, 268, 23 S. W. 332.

In a suit against a carrier for freight overcharges, plaintiff claimed that the shipment was under an oral contract fixing the rate at \$186.87 per car and that a written contract stipulating a rate of 56¼ cents per hundred, was signed by mistake or fraud. Held, that if the jury found the facts in favor of plaintiff, he was entitled to recover the difference between what he was compelled to pay and the amount defendant was entitled to at \$186.87 a car while if the jury found that the written contract controlled, plaintiff could then only recover for overcharges in weights and charges for feeding and watering but in no event, could he recover for both. *Galveston, Harrisburg & S. A. Ry. Co. v. House*, 4 Tex. Civ. App. 263, 23 S. W. 332.

A shipper having agreed with the agent upon a rate of freight, and being busy until after dark, loading, thereafter went to the depot, and being assured by the agent that the contract was all right, signed it without reading it, put it in his pocket, ran and boarded the train, which left immediately, and did not discover the overcharge until he reached Chicago. Held, admissible evidence of mistake or fraud. *Galveston, etc., R. Co. v. House*, 4 Tex. Civ. App. 263, 23 S. W. 332.

### c. Published Tariffs.

See the title **INTERSTATE COMMERCE**.

A carrier in dealing with shippers is required to conform its charges for transportation to the rates fixed in its published tariff and can not lawfully depart therefrom. *Missouri, etc., R. Co. v. Trinity County Lumber Co.*, 1 Tex. Civ. App. 553, 557, 21 S. W. 290.

**Persons to Whom Published Rates Applicable.**—A railroad's published rate for the carriage of salt applies as

well to other carriers as to producers and owners of salt. *Texas & P. Ry. Co. v. Texas Short Line Ry. Co.*, 80 S. W. 567, 35 Tex. Civ. App. 387.

## 2. Right to and Payment of Freight.

### a. Delivery of Goods at Destination.

#### (1) Part Performance.

The contract for the conveyance of merchandise is in its nature an entire contract; and unless it be completely performed by the delivery of the goods at the place of destination, the carrier can not, in general, claim freight. The cases in which a partial payment may be claimed are exceptions founded upon principles of equity and justice as applicable to particular circumstances. *Adams & Co. v. Haught*, 14 Tex. 243.

If the owner of the goods, either by his waiver or default, is the cause of their not being transported to the place of destination, full freight may be recovered. *Adams & Co. v. Haught*, 14 Tex. 243.

Defendant railroad charged \$1.70 per hundred on freight from San Francisco to El Paso, and \$2 on freight to the city of Mexico; its line connecting at El Paso, which was about halfway, with the Mexican Central. On through freights its division with the Mexican Central gave it only 96 cents for carrying to El Paso. Plaintiff shipped goods from San Francisco to the city of Mexico, his receipt therefor providing that, if shippers, consignees, or their agents should remove their goods from the warehouse at El Paso, the shipment would be treated as an El Paso proper shipment, and full El Paso proper rates collected. Held, that plaintiff could not demand and receive the goods at El Paso without paying full local rates to that point. *Southern Pac. Ry. Co. v. Haas (Sup.)*, 17 S. W. 600.

Held, herein, that even if there was any discrimination in the rates against El Paso in favor of the city of Mexico and points along the Mexican Central,

it would not be subject to consideration under a state law, the shipment being from a point without the state, and the shipper could not receive goods at El Paso without paying full local rates to that point. *Southern Pac. R. Co. v. Haas* (Sup.), 17 S. W. 600.

A joint through-rate freight tariff, issued and posted by defendant and other railroad companies, showed that on goods of a certain class consigned from San Francisco to the city of Mexico, via El Paso, Tex., the charges were \$2 per 100 pounds, and the proportional rate to the latter place was 96 cents per 100 pounds, while the local rate from San Francisco to El Paso was \$1.70 per 100 pounds on the same class. Held that, where such goods were consigned from San Francisco to the city of Mexico over defendant's road, and sequestered by the owner at El Paso, the former was entitled to receive as charges only 96 cents per 100 pounds. *Southern Pac. Ry. Co. v. Haas* (Civ. App.), 21 S. W. 1021.

A clause in a joint through-rate freight tariff from San Francisco to the city of Mexico via El Paso provided that, in the event of freight being removed from the warehouse at El Paso by shippers by any process, it will be treated as an El Paso proper shipment, and full El Paso proper rates collected. Held that, if the owner of goods shipped from San Francisco to Mexico and sequestered at El Paso had notice, or by the exercise of reasonable care could have known, of such tariff before the goods were shipped, he and the carrier would be presumed, where the shipping receipt is silent as to charges to El Paso, to have contracted with reference to such tariff, and defendant would be entitled to collect the local rate, unless the same was an unjust discrimination. *Southern Pac. Ry. Co. v. Haas* (Civ. App.), 21 S. W. 1021.

It was held, further that where in an

action by the owner against the carrier to sequester such goods at El Paso, there is sufficient evidence showing that the effect of the local rate is to unjustly discriminate against El Paso merchants to put the burden on defendant to show that such discrimination did not in fact exist or to show dissimilar conditions or facts and circumstances that would authorize the discrimination and it offers no evidence to such effect, a finding that the local rate is an unjust discrimination will not be disturbed. *Southern Pac. R. Co. v. Haas* (Civ. App.), 21 S. W. 1021 (see 85 Tex. 401).

**Freight Pro Rata Itineris.**—See the title SHIPS AND SHIPPING.

#### (2) Where Consignee Can Not Be Found.

The freight money becomes due when upon the arrival of the goods at the place of consignment the carrier can find no consignee there. *House v. Soder*, 36 Tex. 629.

Freighter contracting during a rebellion to carry goods from one point in Texas to another, and there deliver them to agent of consignor, may recover freight money, if upon arrival at destination he is unable to find consignee and in consequence goods are confiscated by federal authorities. *House v. Soder*, 36 Tex. 633, 634; *Gerhard v. Neese*, 36 Tex. 635, 636.

#### b. Demand.

A carrier's claim for his freight is not barred by delay in making demand after delivery within the period of limitation. The shipper's obligation to pay the freight when due did not impose upon the company the duty to make demand at that time. As to the consignee it was still due. After delivery no due date was fixed, so that the due date was not changed. The railway might demand it as soon after delivery as it pleased or, generally speaking, at any time thereafter within the period of limitation. Of course there might not be facts attending a

delay in enforcing the right which might defeat it. But the few days after final default, as in this case, is certainly insufficient. *McFarland v. Parr & Co.*, 34 Tex. Civ. App. 292, 295, 79 S. W. 76.

**c. Bond to Secure Freight.**

To secure dispatch in the loading of export cotton on their ships appellees executed to appellant, an agent of railways, a bond to secure him in the payment of freights for all cotton delivered at their ships' sides and loaded. Cotton was transported to various consignees in Galveston, and shipped on appellees' vessels and the freights due the railways paid thereafter, on demand by appellees. This was not always true of cotton consigned to D. & Co., a firm from which the appellant had not exacted prepayment of freights, a fact of which appellees were advised. The bill of one cargo of D. & Co. cotton shipped on their vessels was returned by appellees to railways indorsed that D. & Co. paid their own freight bills. Subsequently two cargoes of D. & Co. cotton were shipped on appellees' vessels, the freight bills of which were presented to D. & Co. and by them held up on questions of weights. Finally the appellant, as agent of the railways, withdrew the bills from D. & Co., who a few days later failed. The suit is against appellees on the bond, and the only issue submitted to the jury was that of estoppel in pais raised by the answer, and the verdict and judgment was for defendants, appellees here. On the whole case this court holds that under the bond the railways waived but the one right to hold the cotton for freight; that the bond covered all cotton received by the appellees for shipment; that estoppel does not apply, and that under the bond appellees were liable. *McFarland v. Parr & Co.*, 34 Tex. Civ. App. 292, 79 S. W. 76.

**d. Facts Relieving from Liability.**

Where the freight rate charged in a

bill of lading is illegal, the carrier may recover reasonable remuneration for its transportation services. *Missouri, etc., R. Co. v. Trinity County Lumber Co.*, 1 Tex. Civ. App. 557, 21 S. W. 290.

**Fact that shipper intended to evade blockade and revenue laws** after the freight reached the point of destination is no defense to an action on a contract for the carriage of freight from one point to another in Texas during the rebellion. *House v. Soder*, 36 Tex. 629, 633; *Gerhard v. Neese*, 36 Tex. 635, 637.

In 1863, so far as the supreme court is apprised, there was no law or public policy of the United States, and no proclamation of the President of the United States, prohibiting the hauling of cotton from one portion of Texas to another, nor interdicting one citizen of the state from contracting to do such hauling for another and it is immaterial that the destination of the cotton was the port of Brownsville, on the Rio Grande. *House v. Soder*, 36 Tex. 629.

**e. Fraudulent Misclassification by Consignor or Agent.**

Where a freight rate was obtained by a misrepresentation of the consignee's agent as to the class to which the freight belonged, it constituted in law a fraud and the carrier was entitled to recover the rate under a correct classification. *Missouri, Kansas & T. Ry. Co. v. Trinity County Lumber Co.*, 1 Tex. Civ. App. 553, 21 S. W. 290.

So held in case of classification of narrow gauge cars for use on steam railroad instead of on logging tramway. *Missouri, etc., R. Co. v. Trinity County Lumber Co.*, 1 Tex. Civ. App. 553, 556, 21 S. W. 290 (see 85 Tex. 405).

**f. Action by Carrier for Freight.**

**Jurisdiction.**—In a suit by a carrier to recover freight charges, where the petition also seeks to recover the possession of the property for the trans-

portation of which the charges are due, and which was wrongfully taken from it, the value of the property to which the right of possession is asserted, and not the amount of the freight charges, determines the jurisdiction of the trial court. *Texas, etc., R. Co. v. Rucker*, 38 Tex. Civ. App. 591, 88 S. W. 815.

**Form of Action.**—The defendants contracted with the plaintiff that the latter should proceed to the town of M., with his wagons and teams, and should thence transport, at a stipulated rate per hundred pounds, to the town of S., certain goods and merchandise, for which they furnished him an order to their forwarding merchants. The plaintiff proceeded to M. with his wagons and teams, but the shipping merchant furnished him no goods for the defendants, and informed him that the defendants had no goods there, but offered him other goods for transportation at current rates to intermediate points between M. and S. Plaintiff refused to receive other freight than the goods he had contracted with defendants to haul, and after returning empty brought this suit against defendants, claiming judgment for the amount of freight money his wagons could have earned at the stipulated rate, if the goods had been furnished. Held, that the suit was not properly brought; the plaintiff's remedy was not the present suit for the enforcement of the contract, but an action for breach of the contract and for the damages consequent thereto by reason of the failure to furnish the freight. *Heilbronner v. Hancock*, 33 Tex. 714, 715.

**Set-Off of Damages to Shipment.**—The goods were wet and greatly injured when delivered to the consignee but appeared to have been wet when received by the carrier. The carrier had given a clear bill of lading on receipt of the goods and was therefore prima facie responsible for the damages. The damage was estimated by

the parties to be \$300 but subsequent examination showed it to be much more. It was held that this damage then ascertained and acknowledged would have been a good set-off against the freight. *Austin v. Talk*, 20 Tex. 164.

**Amount of Recovery Where Hirer Fails to Furnish Freight.**—A carrier of freight by wagon, who agreed to go to a certain point, and thence transport goods at an agreed rate, but to whom the goods were not delivered, and who then found other freight, which he hauled part of the distance, must abate his demand under the contract pro tanto. *Heilbronner v. Hancock*, 33 Tex. 714.

In such case plaintiff had right of action for breach of contract and was bound to accept freight offered him and abate pro tanto his demand against defendants. This by analogy to the maritime law of affreightment. *Heilbronner v. Hancock*, 33 Tex. 714, 719.

It was undoubtedly the duty of the carrier to have taken any other freights which were offered him to haul between the intermediate points, and to have credited the hirer with whatever he might have received for hauling such freight; and whether he was or was not, in contemplation of law, a common carrier, makes no kind of difference. Carrying freight was in the line of his business, and he owed it in good faith to the hirer to make what he could out of the trip within the line of his business, and without extraordinary trouble. *Heilbronner v. Hancock*, 33 Tex. 714, 719.

### 3. Discrimination.

See the title CARRIERS, ante, p. 304.

### 4. Overcharge.

#### a. Stipulations Respecting Excessive Charges.

A clause of a contract of carriage that the carrier shall not be liable for damages on account of any demand for a greater freight rate than men-

tioned in the contract, but shall only be liable to pay the amount of excess freight charges which may be demanded, has no application where the excessive freight rate is demanded, but not paid, and suit is brought, not to recover the amount of excess, but for damages for refusal to deliver the property and illegally detaining the same. *Southern Kansas Ry. Co. of Texas v. J. W. Burgess Co.* (Civ. App.), 90 S. W. 189.

**b. Liability for Overcharge.**

Where a rate given by a carrier was not accepted at the time, it is not liable to the shipper for an overcharge on goods shipped afterwards, for which the carrier charged a higher rate allowed by law at the time of shipment. *Dillingham v. Labatt* (Civ. App.), 30 S. W. 370.

**Mistake.**—A carrier is not liable for an all ged overcharge on a shipment of fruit where the shipper and the freight agent misunderstood each other, the shipper claiming a special rate was made on grapes and melons, and the agent making a bill of lading for all melons, which bill was accepted by the shipper. *Gulf, etc., R. Co. v. Dawson* (Civ. Co.), 24 S. W. 566.

A railway company is not liable in an action for overcharges where the rate given by it to the shipper was due to his own mistake in giving the name of "Hancock," instead of "Ft. Hancock," which was at a much greater distance from the point of shipment. *Dillingham v. Labatt* (Civ. App.), 30 S. W. 370.

**Overcharge Exacted by Connecting Carrier.**—Railroad company held not liable for an overcharge for freight exacted by a connecting carrier, in the absence of any showing that it ever received any part of such overcharge. *Chicago, etc., R. Co. v. Henderson* (Civ. App.), 73 S. W. 36.

In an action against a railroad company to recover an alleged overcharge of freight, it appeared that defendant

had contracted to transport the goods for a certain sum, but that, when the goods arrived at their point of destination, the connecting carrier refused to deliver them, except on the payment of additional freight, but there was no showing that defendant received any part of the sum so collected. Held, that a judgment against defendant for the overcharge exacted by the connecting carrier was unauthorized. *Chicago, R. I. & T. Ry. Co. v. Henderson* (Civ. App.), 73 S. W. 36.

**Where Contract to Carry at Less than Maximum Rate.**—The statute does not prohibit a carrier from charging less than the maximum rates fixed by the commission, where no discrimination appears; and where the carrier, after agreeing to carry at a reduced rate, collects the full rate, the difference may be recovered by the shipper. *Wells, Fargo Exp. Co. v. Williams* (Civ. App.), 71 S. W. 314. See, also, *Thompson v. San Antonio, etc., R. Co.*, 11 Tex. Civ. App. 145, 147, 32 S. W. 427.

**c. Estoppel to Deny Distance.**

In an action to recover back alleged freight charges, when the railroad company has always charged for a certain number of miles as the correct distance between two points, it is estopped to deny that such is true distance. *I. & G. N. R. R. v. Pichard*, 1 App. Civ. Cases, § 427.

**d. Actions for Overcharge.**

**(1) Right of Action.**

The statutory remedy for overcharge in freight approved by art. 4258, Rev. Stat., is not exclusive, but cumulative, and an action for recovery of the overcharges may still be maintained. *Murray & Bro. v. Gulf, etc., R. Co.*, 63 Tex. 407.

**(2) Jurisdiction.**

By Rev. St. 1895, art. 3258, the common law is in force, save as altered or repealed by statute. Interstate Commerce Act, §§ 1, 2 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St.



1901, pp. 3154, 3155]), declares that all charges by carriers shall be reasonable, and makes unreasonable charges unlawful. By section 8 (24 Stat. 382 [U. S. Comp. St. 1901, p. 3159]) any one injured by a violation of the act is given the right to damages. Section 9 gives jurisdiction to the federal courts of actions brought under section 8, and section 22 (24 Stat. 387 [U. S. Comp. St. 1901, p. 3170]) provides that nothing in the statute shall in any way abridge remedies existing at common law, but that the provisions of the statute are in addition thereto. Held, that a shipper, in a case of interstate carriage, may in a state court, under the common law, be accorded relief from unreasonable freight rates exacted from him, notwithstanding such unreasonable rates have been filed and promulgated by the carrier under the provisions of the interstate commerce act. (Civ. App. 1905) *Abilene Cotton Oil Co. v. Texas & P. Ry. Co.*, 38 Tex. Civ. App. 366, 85 S. W. 1052, reversed in *Texas & P. R. Co. v. Abilene Cotton Oil Co.* (1907) 27 S. Ct. 350, 204 U. S. 426, 51 L. Ed. 553. See the title INTERSTATE COMMERCE.

### (3) Parties.

Plaintiff sued in justice's court to recover overcharge of freight, and amended in county court alleging that he owned goods shipped with others. Held, since contract was with plaintiff, he being both the consignor and consignee, he had the right to sue, where amendment changed neither cause of action nor character in which plaintiff sued. *Galveston, etc., R. Co. v. House*, 4 Tex. Civ. App. 263, 266, 23 S. W. 332.

### (4) Evidence.

**Admissibility.**—In a suit against a railway company for overcharging on certain freight, by rating cotton as "measurement freight" instead of "weight freight" (the company's charges being limited per foot as well as per hundred pounds), it was error

to admit the evidence of merchants and shippers to prove that, by custom, cotton was "weight freight" and not "measurement freight." The company might lawfully rate cotton either by measurement or weight, but could not charge according to both standards on the same lot of freight. *Central R. Co. v. Hearne*, 32 Tex. 546, 547.

A letter from one of the railroad commissioners is not proper evidence to show the commission rates on goods shipped by a common carrier in an action against the carrier for overcharges. *Wells, Fargo Exp. Co. v. Williams* (Civ. App.), 71 S. W. 314.

Where a shipper and carrier have agreed on a rate to be charged, admission of a letter from the carrier's general freight agent to the shipper, written in accordance with the agreement, and quoting such rates, is not error. *Gulf, C. & S. F. Ry. Co. v. Leatherwood*, 69 S. W. 119, 29 Tex. Civ. App. 507.

**Weight and Sufficiency.**—In an action to recover excess freight charges, evidence that a certain rate, higher than that contracted for by the carrier, which higher rate was demanded by the agent at the final destination, was in the printed tariff furnished him, which tariff was on file in the office of the general freight agent, does not show that it was established and published as required by the interstate commerce act. *Gulf, C. & S. F. Ry. Co. v. Leatherwood*, 69 S. W. 119, 29 Tex. Civ. App. 507.

In an action against a railroad company for exacting greater compensation than that fixed by the Railroad Commission, in which the issue was as to whether a shipment from another state had lost its character as interstate commerce, the middleman who received the goods at the point of transshipment within the state testified that he had bought them from the consignor on December 24th. A letter from the consignor read: "We

confirm sale to you on the 24th inst." The middleman referred to this letter as confirming the sale. Held, that a finding that on December 26th the middleman was informed of the interstate character of the shipment, "but at the time of making the contract" he did not know from whence the goods were to come, was sustained by the evidence. Judgment (Civ. App. 1903) 73 S. W. 429, 32 Tex. Civ. App. 1, affirmed. (1904) *Gulf, C. & S. F. Ry. Co. v. State*, 78 S. W. 495, 97 Tex. 274, affirmed (1907) 27 S. Ct. 360, 204 U. S. 403, 51 L. Ed. 540.

Evidence held not to show that a higher freight rate than contracted for was established and published as required by the interstate commerce act. *Gulf, etc., R. Co. v. Leatherwood*, 29 Tex. Civ. App. 507, 69 S. W. 119, affirmed in 97 Tex. 634, no op.

#### (5) Questions for Jury.

During a freight war between two railroads, one of them made special contracts with several shippers for shipments of cotton at certain rates, which were to continue whether rates went up or down. They went up, and another shipper, being obliged to pay the increased rate on cotton, brought an action to recover the excess above the rates fixed in the contracts. Held, that an instruction that, if plaintiff was charged a higher rate than others, he could recover, was erroneous, as it should have been submitted to the jury to determine, on all the facts, whether the charge was unreasonable or more than was exacted of the public generally. *Houston & T. C. Ry. Co. v. Rust*, 58 Tex. 98.

#### (6) Charge of Court.

In a suit for freight overcharges, the court instructed that if defendant agreed to furnish stable cars at a specified rate and did furnish them and nothing was said before shipment to change the verbal contract made between the shipper and defendant's

agent, plaintiff was entitled to recover the difference between the contract price and the freight charged. Held, that the charge was correct in view of other evidence that the written contract fixing a higher rate was signed by mistake. *Galveston, Harrisonburg & S. A. Ry. Co. v. House*, 4 Tex. Civ. App. 263, 23 S. W. 332.

### B. DEMURRAGE.

#### 1. Liability of Consignee.

In ordinary cases, the railway which delivers a car to be unloaded by consignee, may charge reasonable demurrage fixed by regulation and brought to freighter's notice. *Baumback v. Gulf, etc., R. Co.*, 4 Tex. Civ. App. 650, 652, 653, 23 S. W. 693.

A consignee who refuses to accept the goods on the ground of delay in delivery by the carrier can not be held liable for demurrage fixed by the rules of the carrier, of which he had no notice, unless the rate of demurrage is shown to be reasonable. *Baumbach v. Gulf, C. & S. F. Ry. Co.*, 4 Tex. Civ. App. 650, 23 S. W. 693.

Defendant claimed \$200 for storage due, which was more than the value of the lumber. The rules of defendant provided that storage would be charged for cars if not unloaded within twenty-four hours after notice of arrival—for first day, \$1, second, \$2.50, third and succeeding days, \$5 per day; and plaintiff was notified that unless he received the lumber it would be stored for his account. The decisions which hold that a carrier which delivers to the consignee a loaded car, to be unloaded by him, may charge reasonable demurrage, fixed by regulation and brought to the notice of the freighter, relates to ordinary cases, when the carrier discharges its duty and delivers the car within the proper time, and by the consignee's delay in unloading is deprived of the use of the car; but while the plaintiff refuses to receive the car, he did not adopt by agreement a rate

of demurrage fixed by a rule of which he is not shown to have had notice, and which seems to apply to a different state of facts; and there being no evidence that the charges were reasonable, the court could well conclude that the amount claimed was unreasonable. *Baumbach v. Gulf, etc., R. Co.*, 4 Tex. Civ. App. 650, 23 S. W. 693.

A corporation was organized to compress cotton, and operated a compress. It did not authorize shippers to consign cotton to it, and did not accept any cotton as consignee. As agent of the owners, it delivered cotton to a railroad for transportation and collected from the railroad the charges for compression. Held, that the corporation was not liable to the railroad company for demurrage; there being no contractual relation between the corporation and the railroad with reference to the shipment of cotton. *Missouri, K. & T. Ry. Co. of Texas v. Capital Compress Co.*, 50 Tex. Civ. App. 572, 110 S. W. 1014.

**Sufficiency of Notice.**—Where one ships carloads of grain to himself at a station on a connecting line, and the grain in transit is transferred from the cars in which it was first shipped to the cars of the connecting line, on its arrival at its destination, a notice by the carrier to the shipper of the arrival of the number of cars of grain consigned, in its cars bearing certain numbers, is sufficient notice, without informing him in what cars it was originally shipped, or into what cars it had been transferred in transit, to render him liable for demurrage on his failure to unload it within proper time after arrival. *Galveston, H. & S. A. Ry. Co. v. Hunt (Civ. App.)*, 32 S. W. 549.

In such case he can not complain of being charged for demurrage accruing thereafter. *Galveston, etc., Ry. v. Hunt (Civ. App.)*, 32 S. W. 549, 550.

## 2. Liability of Consignor.

A shipper of corn, who, knowing that the one to whom he consigned it could not pay for it, and knowing also that he himself was expected to pay for the use of the car while the corn was in it, allowed it to remain on the tracks until he sold it to another party, is liable for the use of the car. *Hunt v. Missouri, K. & T. Ry. Co. (Civ. App.)*, 31 S. W. 523.

## 3. Lien.

See post, "Lien," IX, D.

## C. STORAGE.

Detention of goods by a carrier being wrongful, it has no valid claim for storage. *Southern Pac. Co. v. Redding*, 43 S. W. 1061, 17 Tex. Civ. App. 440, affirmed in 93 Tex. 650, no op.

A consignee who refuses to accept the goods on the ground of delay in delivery by the carrier can not be held liable for demurrage and storage fixed by the rules of the carrier, of which he had no notice, unless the rates of demurrage and storage are shown to be reasonable. *Baumbach v. Gulf, C. & S. F. Ry. Co.*, 4 Tex. Civ. App. 650, 23 S. W. 693.

## D. LIEN.

### 1. Existence.

#### a. In General.

A carrier has lien on the shipment for the freight charges without the payment of which the owner or consignee is not entitled to delivery. *Missouri, etc., R. Co. v. Rines & Co.*, 37 Tex. Civ. App. 618, 84 S. W. 1092; *Texas, etc., R. Co. v. Klepper*, 29 Tex. Civ. App. 590, 69 S. W. 426; *Gulf, etc., R. Co. v. Browne*, 27 Tex. Civ. App. 437, 66 S. W. 341; *Gulf, etc., R. Co. v. North Texas Grain Co.*, 32 Tex. Civ. App. 93, 74 S. W. 567.

It is a well-established principle that a common carrier has a lien for the proper charges on goods received from one who has authority to deliver them for transportation. *Hahl*

*v. Laux*, 42 Tex. Civ. App. 182, 185, 93 S. W. 1080; *Ryan & Co. v. M. K. & T. R. Co.*, 65 Tex. 13.

A carrier must accept goods tendered it for shipment before it demands the freight, but may refuse to carry till charges are paid. *Texas, etc., R. Co. v. Hays*, 2 App. Civ. Cases, § 390.

Where lumber intended for plaintiff at Baird, Texas, was shipped to "Beard," Texas, through mistake of plaintiff's agent at the initial point in signing a shipping bill ordering it consigned to plaintiff at such latter point, and from there it was sent to plaintiff at Baird, which was on defendant company's line, defendant was entitled to hold the lumber for payment of the increased freight charges covering the entire route over which the lumber was so transported, and was not liable in damages for refusal to deliver to plaintiff upon his tender of what would have been the proper amount of freight charges but for such mistake. *Texas, etc., R. Co. v. Klepper*, 29 Tex. Civ. App. 590, 69 S. W. 426.

#### b. Goods Shipped by One without Authority.

The rule seems to be that there is no lien in favor of the carrier where the goods have been received from a wrongful holder or from one not authorized to ship them. And in such case the true owner can maintain an action for conversion, however innocent the defendant may be. *Liefert v. Galveston, etc., R. Co. (Civ. App.)*, 57 S. W. 899, 901.

Where an owner clothed a third person with apparent authority to act for him in securing the transportation of property, the carrier, transporting the property pursuant to a contract with the third person, may look to the owner for his reasonable charge, and hold a lien on the property for the same. *Hahl v. Laux*, 93 S. W.

1080, 42 Tex. Civ. App. 182; *Ryan & Co. v. M. K. & T. R. Co.*, 65 Tex. 13; *Liefert v. Galveston, etc., R. Co. (Civ. App.)*, 57 S. W. 899, 901.

Where goods were wrongfully delivered by a carrier to a steamship company instead of the owner, and were carried to another place, the company, having notice of the ownership, had no lien on the goods for freight, and on selling them was liable for conversion; for, though it was the duty of such company to receive goods tendered it for shipment by connecting carriers, it was not exempt from liability for goods shipped by one without authority. *Liefert v. Galveston, L. & H. Ry. Co. (Civ. App.)*, 57 S. W. 890.

#### 2. Waiver and Discharge.

As a common carrier's lien is inseparably associated with possession of the goods and is dependent upon such possession, it follows that it will cease whenever the goods are unconditionally delivered. *Hahl v. Laux*, 42 Tex. Civ. App. 182, 185, 93 S. W. 1080.

Where a carrier did not deliver the goods transported, but the owner took them from the carrier without the consent of the latter, the carrier's lien was not lost. *Hahl v. Laux*, 93 S. W. 1080, 42 Tex. Civ. App. 182.

"Effect of Bond for Security."—See ante, "Bond for Security of Freight," IX, A, 2, c.

#### 3. Enforcement.

A carrier is entitled to retain freight charges out of goods refused by the consignee and sold under his directions. *Gulf, etc., R. Co. v. Browne*, 27 Tex. Civ. App. 437, 66 S. W. 341.

Under Rev. St., art. 288, directing the manner in which sales of freight shall be made by express companies, to pay charges thereon, if the consignee refused to accept the property on due notice, and thereupon the consignor directed the company to sell it, in the absence of specific directions as to the manner in which the sale

should be made, such directions to sell would only authorize a sale in the manner prescribed by statute; but, where the consignee consented to or ratified the sale as made, he will not thereafter be heard to object to it. *Hodges v. Peacock*, 2 Willson, Civ. Cas. Ct. App. § 826.

Under Rev. Stat. 1895, art. 327, a railroad selling freight for charges thereon without giving notice prescribed by art. 328, is held liable as for a conversion thereof. *Gulf, etc., Ry. v. North Texas Grain Co.*, 32 Tex. Civ. App. 93, 74 S. W. 567.

A buyer refused to receive certain grain shipped by rail. The railroad requested the parties interested to direct the disposition of the grain, which they refused to do, and it was subsequently sold at a loss to pay freight and storage charges, under Rev. St. 1895, art. 327, which authorized the railroad to sell the grain to pay the charges thereon accrued on giving notice of the sale as prescribed by article 328. Held, that the sale without notice was illegal, rendering the railroad liable to the owner of the grain as for a conversion thereof. *Gulf, C. & S. F. Ry. Co. v. North Texas Grain Co.*, 74 S. W. 567, 32 Tex. Civ. App. 93.

The oats were not perishable freight, within the meaning of Rev. St. 1895, art. 331, providing for a sale of such freight on five days' notice. *Gulf, C. & S. F. Ry. Co. v. North Texas Grain Co.*, 74 S. W. 567, 32 Tex. Civ. App. 93.

Where the freight charges which defendant had the right to collect exceeded the value of the lumber, it was not, it seems, liable to plaintiff for such value because it had sold the lumber for less than the amount of such charges at private sale, instead of a public sale as directed by the statute. *Texas, etc., R. Co. v. Klepper*, 29 Tex. Civ. App. 590, 69 S. W. 426.

#### 4. Right to Overplus.

A consignee of certain corn, on being notified of arrival, refused to accept the same, unless the carrier would agree to allow him damages for an alleged shortage. After negotiations the carrier agreed to allow for the shortage, but insisted on collecting demurrage during the negotiations, which the consignee refused to pay, whereupon the carrier sold the corn, and after paying all charges due it had an overplus in its hands arising from the proceeds of the sale. Held, that the consignee, in an action against the carrier for alleged conversion, was entitled to judgment for such overplus, though the carrier was entitled to the charges and demurrage claimed. *Spurlock v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.), 90 S. W. 1124.

### X. Actions for Injury, Loss or Nondelivery.

#### A. RIGHT OF ACTION.

##### Effect of Suit against Party to Whom Goods Wrongfully Delivered.

—See ante, "Action against Person to Whom Goods Wrongfully Delivered," VIII, B, 9, c.

#### B. NATURE AND FORM OF ACTION.

While it is true that in one sense a cause of action against a common carrier may be for the breach of a particular contract, yet in so far as it seeks a recovery of damages for a violation by the carrier of the duty which it owes to the public, it also sounds in tort. *Ft. Worth, etc., R. Co. v. McAnulty*, 7 Tex. Civ. App. 321, 326, 26 S. W. 414. See, also, *G. C. & S. F. R. Co. v. Levy*, 59 Tex. 542, 548, and *Galveston, etc., R. Co. v. Roemer*, 1 Tex. Civ. App. 191, 20 S. W. 843.

**Trover.**—See post. "Exemplary Damages," XI, B, 13.

**C. JURISDICTION AND VENUE.**

The courts of Texas have jurisdiction of an action for goods lost by the Texas & Pacific Railway Company while in course of transportation by that company, though they were lost in another state, and the contract of transportation was limited to that state. *Mayer, etc., Co. v. Brown*, 4 App. Civ. Cases, § 128, 16 S. W. 788.

**Amount in Controversy.**—In an action against a carrier for damage to a shipment, the damage alleged was \$1,000, "wherefore plaintiff prays \* \* \* that he have judgment for his damages, interest, and costs of suit." Held, that the prayer for interest referred to interest on the judgment, and the cause was within the jurisdiction of the county court. *Atchison, etc., R. Co. v. Dawson* (Civ. App.), 90 S. W. 65.

**Venue.**—A railway corporation of another state, having offices and agents, but no line of road, in this state, can be sued for damages to goods in any county in which by its bill of lading it has contracted to deliver them, though it has limited its liability to damages concurring on its own line; and can not claim the privilege of being sued in a county in which it has an agent. *Texas, etc., R. Co. v. Hornbeck*, 90 Tex. 496, 39 S. W. 564.

An action on a contract for transportation by a wagoner and common carrier, and delivery of goods at a certain place, may commence in the county where the defendant resides. *Barrow v. Philleo*, 14 Tex. 345, 346. See the title **VENUE**.

**D. CITATION OR PROCESS.**

In a suit against an incorporated railway company, citation may be served upon a local agent representing the company in the county in which such suit must be brought (Rev. Stat., 1223). A petition alleged

that a defendant incorporated company had an office "for the transaction of business as a common carrier in the city of Austin, Travis county, Texas, at which place the agent of said company is Robert S. Collins." The suit was brought in Travis county. Held, that service of citation on Robert S. Collins was sufficient to hold the defendant to answer the petition, and that no judicial ascertainment of the agency was required to authorize a judgment by default. *Houston, etc., R. Co. v. Burke*, 55 Tex. 323.

When service of citation is made upon the agent of an incorporated railway company who resides in the county where the suit is brought, the defendant company, though its principal office may be elsewhere, is not entitled to be served with a certified copy of the petition. *Houston, etc., R. Co. v. Burke*, 55 Tex. 323.

**E. LIMITATION OF ACTIONS.**

Article 3354, Rev. Stat., providing that actions for conversion of personal property must be brought within two years after right of action accrues, applies to actions against a carrier for loss of goods in transit. *Galveston, etc., R. Co. v. Clemons*, 19 Tex. Civ. App. 452, 453, 47 S. W. 731; *Galveston, etc., R. Co. v. Roemer*, 1 Tex. Civ. App. 191, 195, 20 S. W. 843; *Martin v. Western Union Tel. Co.*, 6 Tex. Civ. App. 619, 26 S. W. 136. See, also, *Ft. Worth, etc., R. Co. v. McAnulty*, 7 Tex. Civ. App. 321, 26 S. W. 414.

Where goods were improperly shipped from Breham, Texas, on January 23, 1871, and were lost; the owner was residing near Bremond, in Texas, and brought suit February 6, 1873, there being no evidence of his actual knowledge. Held, that a verdict for plaintiff, disregarding the plea of two years' limitations, was properly found. The mere lapse of time from the 23d of January to the

6th of February is not sufficient to raise a presumption that he must have known of the conversion of the goods. *Houston, etc., R. Co. v. Adams*, 49 Tex. 748.

In suit against carrier for conversion of shipment, the limitation does not commence to run from the date of conversion, but from the time plaintiff had notice thereof, or was chargeable with such notice. *Gulf, etc., Ry. v. Humphries*, 4 Tex. Civ. App. 333, 335, 23 S. W. 556, following *Houston, etc., R. Co. v. Adams*, 49 Tex. 748.

When actual knowledge of the conversion is not shown, the statute can not commence to run against the consignee before it was his duty to apply for the delivery of the goods. The time within which the owner is bound to apply for or demand them evidently depends upon the terms of the contract under which they were freighted, the usual length of time required to transport freight from the place of delivery to its point of destination, the reasonable course of business at the place of its delivery and other attending circumstances. *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 762.

Where a common carrier delivered goods to a stranger, the statute of limitation would not run against consignee until he had notice of their conversion or the lapse of time had been sufficient to charge him with notice of it. *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 762.

A petition which alleges nondelivery of cotton called for by a bill of lading, and that the railroad company did not deny issuing the bill of lading, but claimed that the consignor demanded and received back the cotton, sufficiently alleges a cause of action for conversion, to prevent the statute of limitation from running against an amendment alleging conversion. *Missouri, etc., R. Co. v. McFadden* (Civ. App.), 32 S. W. 18, reversed in 89 Tex. 137, 138.

Where an action is brought against a railroad company and a consignor to recover cotton called for by a bill of lading but not delivered, alleging a conversion by redelivery to the consignor, and the railroad company pleads conversion by the consignor, if the consignor fails to plead limitations against the cause of action of the railroad company, the overruling of an exception by the railroad company urging the defense of limitation against the plaintiffs' cause of action, is immaterial. *Missouri, etc., R. Co. v. McFadden* (Civ. App.), 32 S. W. 18, reversed in 89 Tex. 137, 138.

## **F. PARTIES.**

### **1. Parties Plaintiff.**

#### **a. Interest and Capacity.**

##### **(1) Necessity.**

Where, in an action against a carrier for loss of freight, there was no evidence that plaintiffs were either the shippers or the consignees, the only evidence of their interest being a direction in the bill of lading to notify them of arrival, they were not entitled to recover. *E. R. Dalbey & Co. v. Mexican Cent. Ry. Co.* (Civ. App.), 105 S. W. 1154.

One B., to whom butter had been consigned over defendant's road turned it over to plaintiffs, with a request that they sell it for his account, and sue defendant for damages through delay in delivery. Held, that plaintiff had no cause of action; the claim of B. not having been assigned to them, and they not having been his factors, and entitled to possession of the butter, when the cause of action accrued. *Gulf, C. & S. F. Ry. Co. v. Wolston* (Civ. App.), 23 S. W. 233.

##### **(2) Capacity in Which Plaintiff Sues.**

If plaintiff suing a railway company for damages to goods injured by fire while in the possession of the company for shipment had not averred that he was suing for the use of the insurance company to which he had

transferred one-half of his right of action, defendant might have defeated his suit by showing the transfer of the cause of action. *East Line & Red River Ry. Co. v. Hall*, 64 Tex. 615.

**Stipulations Perfecting Insurance.**—See the title CARRIERS, ante, p. 304. See, also, the titles INSURANCE; SUBROGATION.

**b. Consignor.**

A consignor has the right to sue in his own name for breach of a contract of carriage without reference to the property in the goods. *Missouri Pac. Ry. Co. v. Smith*, 84 Tex. 348, 19 S. W. 509; *Texas, etc., R. Co. v. Klepper* (Civ. App.), 24 S. W. 567, 568; *Southern Kansas R. Co. v. Morris*, 100 Tex. 611, 612, 102 S. W. 396, affirmed in 99 S. W. 433; *Heffron v. Pollard*, 73 Tex. 96, 11 S. W. 165; *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 44, 33 S. W. 109, affirming 29 S. W. 806.

The fact that the contract of shipment was with the consignee alone is sufficient to authorize him to maintain suit. *Missouri Pac. R. Co. v. Smith*, 84 Tex. 348, 19 S. W. 509; *Texas, etc., R. Co. v. Klepper* (Civ. App.), 24 S. W. 567.

"The English doctrine seems to be, that as a general rule the owner of the goods, whether consignor or consignee, must bring the action for a breach of the contract to carry and deliver the goods in safe condition;" but the American cases hold, that when the contract is made directly with the consignor, he, as the party to the contract, has the right to sue in his own name for the breach without reference to his property in the goods. "The shipper is the party in interest to the contract, and it does not lie with the carrier who made the contract with him to say, upon a breach of it, that he is not entitled to recover the damages unless it be shown that the consignee objects, for without that it will be presumed that the

action was commenced and is prosecuted with the knowledge and consent of the consignee and for his benefit." This rule is logically deducible from correct principles and is both just and convenient in practice. *Missouri Pac. R. Co. v. Smith*, 84 Tex. 348, 351, 19 S. W. 509; *Southern Kansas R. Co. v. Morris*, 100 Tex. 611, 612, 102 S. W. 396, affirming 99 S. W. 433.

A bill of lading given by a common carrier to a shipper is sufficient evidence of such shipper's ownership to entitle him to sue for failure to transport the goods. *Parks v. Gulf, C. & S. F. Ry. Co.* (Civ. App.), 30 S. W. 708.

Shipper in whose name bill of lading is taken may sue carrier for damages for nondelivery or loss of goods. *Houston, etc., R. Co. v. Stewart & Co.*, 1 App. Civ. Cases, § 1246.

When goods are to be shipped to a given point, and the consignee is not mentioned, the consignor may sue for loss. *E. L. & R. R. Co. v. Hall*, 64 Tex. 615, 620.

A shipper who contracts with a carrier may recover damages to shipment without joining any other person having interest in goods as party plaintiff. *Galveston, etc., R. Co. v. Barnett* (Civ. App.), 26 S. W. 782, 783; *Missouri Pac. R. Co. v. Smith*, 84 Tex. 348, 19 S. W. 509; *Texas, etc., R. Co. v. Klepper* (Civ. App.), 24 S. W. 567.

Though ordinarily the owner is the person to demand compensation of a carrier for loss to goods in transit, yet one who has a special property therein, as a factor, or one having a special agreement for carrying them, as the shipper in whose name the bill of lading is taken, may sue. *Houston & T. C. Ry. Co. v. Stewart*, 1 White & W. Civ. Cas. Ct. App. § 1247.

A shipper of goods can not recover for damages thereto, if another per-



son is a part owner thereof, and is not made a party to the suit. *Missouri Pac. Ry. Co. v. Rushin*, 3 Willson, Civ. Cas. Ct. App. § 317.

In the case of the *Missouri Pac. R. Co. v. Smith*, 84 Tex. 348, 19 S. W. 509, the exact form and terms of the contract of carriage do not appear from the record. The defendant, however, pleaded that the shipment was under a special contract in writing made between the plaintiff and itself. The testimony showed that the contract was made with the plaintiff alone and ostensibly for his own benefit. He seems to have been both consignor and consignee. It was held, that the plaintiff could maintain his guilt and there was no error in refusing to admit evidence that other persons were interested in the shipment. In this case the bill of lading was made out in the name of the plaintiff and no other person appears as a party to the transaction and is governed by the case of the *Missouri Pac. R. Co. v. Smith*. *Southern Kansas R. Co. v. Morris*, 100 Tex. 611, 612, 102 S. W. 396, affirming 99 S. W. 433. See, to the same effect, *Texas, etc., R. Co. v. Klepper* (Civ. App.), 24 S. W. 567, 568.

#### c. Consignee.

The consignee of the goods can generally, but not always, maintain a suit against the carrier for their conversion. *Gulf, etc., R. Co. v. Humphries*, 4 Tex. Civ. App. 333, 335, 23 S. W. 556, citing *Missouri Pac. R. Co. v. Smith*, 84 Tex. 348, 19 S. W. 509 and *G. H. & S. F. R. R. v. Freeman*, 57 Tex. 156.

The consignee of goods has such an interest therein as entitled him to sue the carrier for their loss. *Texas & P. Ry. Co. v. Turner*, 43 Tex. Civ. App. 608, 97 S. W. 509.

Where a contract of shipment showed a certain person as consignor, he was entitled in an action for injuries to the shipment to recover the entire

damages, notwithstanding that other persons had an interest in the shipment. Judgment (Civ. App.), 99 S. W. 433, affirmed. *Southern Kansas Ry. Co. of Texas v. Morris*, 100 Tex. 611, 102 S. W. 396.

Where, in an action by a consignee to recover for damages to goods in transit, the carrier denies the consignee's title, and alleges that title remained in the consignor, it is improper to instruct that the law would not presume a sale unless cash was paid, or the goods actually delivered, as, notwithstanding this, the intention might have been to vest such title in the consignee as would authorize the maintenance of his action. *Texas Cent. R. Co. v. Dorsey*, 70 S. W. 575, 30 Tex. Civ. App. 377.

Where a carrier has instructions not to deliver property to a consignee until a draft attached to the bill of lading has been paid, such property does not belong to the consignee until delivered, and hence he can not maintain an action for injuries to it while in the carrier's hands. *Cudahy Packing Co. v. Dorsey*, 63 S. W. 548, 26 Tex. Civ. App. 484.

Goods being shipped on bill of lading consigning them to the shipper or his order, with draft on purchaser for their price attached, paid by him, and the goods delivered, the shipper on claim for damage because goods were spoiled, denied liability for injury after shipment and referred the buyer to the railway for compensation for the loss. Held, that this did not estop either the carrier or the shipper from claiming that the title and right to recover for injury in transit had not passed to plaintiff till payment and delivery, though admissible as evidence of the intention of the parties as to passing title on shipment. *Texas, etc., R. Co. v. Dorsey*, 30 Tex. Civ. App. 377, 70 S. W. 575.

Where a contract of sale provides that the property is to be delivered

to the buyer at a certain place, and the seller ships it to the buyer at such place, the right of action for loss or injury thereto by the carrier is in the consignor, since, until the delivery of the property, it is at his risk. *Missouri Pac. R. Co. v. Scott*, 4 Tex. Civ. App. 76, 26 S. W. 239.

**d. Factor or One Having Special Property.**

A shipper having a special property only as a factor in goods lost by a carrier may sue in his own name therefor. *Houston & T. C. Ry. Co. v. Stewart*, 1 White & W. Civ. Cas. Ct. App. § 1247. See *Gulf, etc., R. Co. v. Wolston* (Civ. App.), 23 S. W. 233, 234.

**e. Assignee of Claim.**

An agent contracting for shipment of property of another by rail, and receiving, after suit brought, a transfer of the interest of the owner in the damages occasioned, will be permitted to recover in his own name from the carrier for injuries in transit. *Texas, etc., R. Co. v. Davis*, 93 Tex. 378, 54 S. W. 381, 55 S. W. 562, reversing 54 S. W. 381. See *Gulf, etc., R. Co. v. Wolston* (Civ. App.), 23 S. W. 233; *E. L. R. R. Co. v. Hall*, 64 Tex. 615; *Gulf, etc., R. Co. v. Humphries*, 4 Tex. Civ. App. 333, 23 S. W. 556; *Texas, etc., R. Co. v. Klepper* (Civ. App.), 24 S. W. 567, 568.

**Owner of Claim at Institution of Suit.**—The owner of an entire claim for damages to a shipment sued for at the time of the institution of the suit, may maintain such action against the carrier. *Texas, etc., R. Co. v. Klepper* (Civ. App.), 24 S. W. 567; *Gulf, etc., R. Co. v. Humphries*, 4 Tex. Civ. App. 333, 23 S. W. 556.

If plaintiff in an action against a carrier for the conversion of goods was owner of the claim at the time of the suit, it is immaterial that he was not the owner of the goods at conversion. *Gulf, etc., R. Co. v. Humphries*, 4 Tex. Civ. App. 333, 335, 336, 23 S.

W. 556, citing *G. H. & S. A. R. R. v. Freeman*, 57 Tex. 156.

**f. Partner.**

One partner may maintain suit against a carrier for damages for injury caused partnership property. *Missouri Pac. R. Co. v. Smith*, 84 Tex. 348, 19 S. W. 509; *Southern Kansas R. Co. v. Morris*, 100 Tex. 611, 612, 102 S. W. 396, affirming 99 S. W. 433.

**g. Joinder of Parties.**

See ante, "Consignor," X, F, 1, b; "Partner," X, F, 1, f.

**2. Parties Defendant.**

**a. Receivers.**

Where the suit grows out of a contract made by receivers to safely transport plaintiff's property, under Rev. Stat., §§ 2 and 6, of Act of 1889, plaintiff has the right to sue the receivers. *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 21 S. W. 411.

**b. Discontinuance as to Parties.**

See the titles DISMISSAL, DISCONTINUANCE AND NONSUIT; JUDGMENTS AND DECREES; SHIPS AND SHIPPING.

**3. Intervention.**

Where the assignee of a bill of lading sued forwarding merchants for the unlawful detention of the goods, the consignors may be permitted to intervene and defend, claiming that the goods were detained by virtue of their right of stoppage in transitu. *Chandler v. Fulton*, 10 Tex. 2.

**4. Interpleading Carrier in Action for Price of Damaged Goods.**

In an action for the price of goods damaged in transit, defendant's answer, bringing in the railroad company, held to show that defendant sought alternative relief against the company, if he was liable for the purchase price. *Gulf, etc., R. Co. v. Browne*, 27 Tex. Civ. App. 437, 66 S. W. 341.

**G. PLEADING.**

**1. Petition or Complaint.**

A petition alleging that defendant's

agent wrongfully, willfully, and wantonly took possession of and withheld a bill of lading on which lumber was shipped to plaintiff, and that the agent's acts were authorized and ratified by defendant, states a tort for which actual and exemplary damages may be recovered. *Alderson v. Gulf, etc., R. Co.* (Civ. App.), 23 S. W. 617, affirmed in 93 Tex. 678, no op.

In an action against a carrier for damages to plaintiff's shipment of apples, damages arising after arrival of the apples and before their delivery could not be recovered under an allegation of the petition that the apples were damaged on their arrival at destination. *Cane Hill Cold Storage & Orchard Co. v. San Antonio & A. P. Ry. Co.* (Civ. App.), 95 S. W. 751.

Where plaintiff stated in his petition that he was the owner of certain goods injured by fire while in the possession of a railroad company for shipment, and that he had transferred one-half of his right of action to an insurance company and that his suit was for one-half the damages sustained for the use of the insurance company the latter allegation was proper to protect the interest of the company though it was not made a plaintiff and it was not necessary to show how the insurance company acquired its interest. *East Line & Red River Ry. Co. v. Hall*, 64 Tex. 615.

**Pleading Contract of Carriage.**—In an action against carrier for loss of freight, where plaintiff pleads the contract of carriage, its provisions inure to the benefit of defendant without being pleaded by it. *Houston & T. C. R. Co. v. Groves*, 48 Tex. Civ. App. 45, 106 S. W. 416.

In an action against a carrier for damages to a shipment, plaintiff not having declared on a bill of lading in his petition, he was required to prove its execution in order to introduce it in evidence. *St. Louis & S. F. R. Co.*

*v. Watkins*, 45 Tex. Civ. App. 321, 100 S. W. 162.

Where a petition in an action against a railroad for the loss of freight sets forth a bill of lading as a contract between parties and alleges that it was executed by agents of railroad and railroad does not deny its execution under oath, there is no error in admitting bill of lading in evidence. *Texas, etc., R. Co. v. Logan*, 3 App. Civ. Cases, § 186.

**Allegation of Time When Carrier Received Goods.**—A petition in an action against a carrier for damage to goods must allege the time when the carrier received the goods. *Missouri Pac. Ry. Co. v. Creath*, 3 Willson, Civ. Cas. Ct. App. § 83.

**Allegation of Breach of Contract.**—

Where, in an action against a railway company to recover the value of a carload of wheat which was shipped over the road and not delivered, the petition does not mention a contract to notify the consignee of the receipt of the wheat at its destination, or allege a breach of such condition, plaintiff can not recover on the ground of such breadth. *Gulf, C. & S. F. Ry. Co. v. Darby*, 67 S. W. 129, 28 Tex. Civ. App. 229.

**Declaration on Bill of Lading or Contract Unnecessary.**—A petition alleging that defendant is a common carrier, and fully setting out the fact constituting the cause of action for injuries in transit to a shipment and charging a breach of duty imposed on defendant by law, is sufficient without an express declaration on any bill of lading or contract of carriage which may have been made. *St. Louis, etc., R. Co. v. Berry*, 42 Tex. Civ. App. 470, 93 S. W. 1107.

In an action for the loss of goods, a petition alleging that the goods had been delivered to defendant railroad company, and were in its custody, by virtue of a contract of shipment, and that while in its custody they were destroyed by fire, is sufficient, without

any allegation as to the issuance of a bill of lading. *Martin v. Ft. Worth & D. C. Ry. Co.*, 3 Tex. Civ. App. 556, 22 S. W. 1007.

**Allegation of Ownership.**—In an action by a consignee against the carrier to recover for damage to goods in transit, the general allegation that the consignee had purchased the goods from the consignor, and was the owner thereof at the time they were damaged, is a sufficient allegation of ownership. *Texas Cent. R. Co. v. Dorsey*, 70 S. W. 575, 30 Tex. Civ. App. 377.

**Allegation of Consideration for Special Contract to Replace or Pay for Damaged Goods.**—Plaintiff having ordered a boat which was shipped by defendant's steamship line, found when it arrived at Galveston that it was seriously damaged, and refused to receive it; whereupon defendant agreed with plaintiff, that if it did not replace the boat with a new or perfect one within a reasonable time, it would pay plaintiff the value of the damaged boat. The facts alleged show a good consideration for the special contract sued on. *New York, etc., Steamship Co. v. Island City Boating, etc., Ass'n*, 2 Tex. Civ. App. 490, 21 S. W. 1007.

**Amendment of Petition Correcting Allegations as to Loss.**—See the title AMENDMENTS, vol. 1, p. 221.

**Sufficiency to Prevent Running of Statute of Limitations.**—See ante, "Limitation of Actions," X, E.

## 2. Plea or Answer.

The sufficiency of the answer must be determined by the case made by the petition, and that it might be a good answer to some case is not sufficient; the answer must present a defense to the case made by the petition. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 172, 2 S. W. 574.

**Necessity for Pleading Defense.**—Defenses to an action against a carrier for failure to deliver goods that the defendant had been released from contract, or that the goods were only par-

tially lost, must be specially pleaded. *Houston, etc., R. Co. v. Harn*, 44 Tex. 628, 630.

In an action against a carrier for failure to deliver freight, to which the carrier pleaded general denial and loss of freight by the act of God, the carrier could not prove that plaintiff had released the contract for shipment or that there was a partial loss; such defenses should have been pleaded. *Houston & T. C. R. Co. v. Harn*, 44 Tex. 628.

Where plaintiff suing a railway company for injury to goods by fire while in its possession awaiting shipment, alleges a transfer to an insurance company of one-half of his right of action and that the suit was for the use of such company, if defendant relied on anything in the transfer to defeat the action as that the cause of action had been devoted to an illegal purpose it should have set it up in its answer. *East Line & Red River Ry. Co. v. Hall*, 64 Tex. 615.

**Effect of General Denial.**—In an action against common carriers for failure to deliver goods shipped by them, a general denial puts the plaintiff upon the proof of his cause, whatever else the defendant may have pleaded. *Fowler v. Davenport*, 21 Tex. 626, 627.

**General Denial and Special Plea.**—Where the plaintiff's right to recover depended upon the fact being shown that defendants were partners in or jointly concerned in freighting cotton which was freighted and lost, and there was a plea of the general denial, and a special plea admitting the joint ownership, it was held that each plea presented a separate issue and the admissions contained in the special plea must be taken in reference only to the issue presented by it; and that the admission thus made does not dispense with the necessity of the plaintiff's proving the partnership or joint ownership except as to the issue presented by such spe-

cial plea. *Fowler v. Davenport*, 21 Tex. 626, 627.

A plea of *non est factum* verified by the oath of the defendant is necessary to render freight bills or receipts alleged to have been executed by the defendant inadmissible without proof of their execution in an action for damages against a carrier for injury to goods. *Barrow v. Philleo*, 14 Tex. 345, 346. See the title PLEADING.

Plea of *non est factum* to bill of lading, executed by carrier's agent is not necessary, where plaintiff's petition does not charge that defendant executed it or authorized its execution, or that a partnership existed between it and the connecting carrier executing it. *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 552, 21 S. W. 554.

**Special Plea Setting up Fraud of Shipper and Mistake of Agent.**—In an action against a carrier by a shipper for its failure to deliver more than 49 cases of shoes, when 55 cases were mentioned in the bill of lading, defendant answered by a special plea admitting the issuance of a bill for 55 cases, and that the car contained only 49 cases on its arrival at destination, but it was alleged that not more than 49 cases were delivered to the carrier, and that the reason the bill was issued for 55 cases was that plaintiff attempted to defraud defendant by falsely and fraudulently representing to its agent at the point of shipment that he had hauled 55 cases to the station and placed that many in the car, and induced the agent to sign the bill of lading in question. Held, that the special plea fairly set up a defense of mistake on the part of defendant's agent. *Cohen Bros. v. Missouri, K. & T. Ry. Co. of Texas*, 44 Tex. Civ. App. 381, 98 S. W. 437.

In an action against a carrier for failure to deliver all the articles mentioned in the bill of lading, the fact that the answer, in addition to a general denial, contained a special defense that the bill was procured by fraud of the shipper did not preclude the defense

of a mistake on the part of the carrier's agent in making out the bill. *Cohen Bros. v. Missouri, K. & T. Ry. Co. of Texas*, 98 S. W. 437, 44 Tex. Civ. App. 381.

**Pleading Seeking Award of Damaged Goods.**—In an action against a railroad to recover the value of goods damaged in transit, defendant, on being held liable for the damages sued for, is not entitled to an order awarding the damaged goods to it in the absence of a proper pleading on its part seeking to recover such goods. *Missouri, K. & T. Ry. Co. v. Kahn* (Civ. App.), 91 S. W. 816.

**Right of Carrier to Plead Inconsistent Matters.**—See the titles PLEADING; SHIPS AND SHIPPING.

**Denial of Execution of Bill of Lading.**—See ante, "Petition, or Complaint," X, G, 1.

**Pleading Stipulations Limiting Carrier's Common-Law Liability.**—See the title CARRIERS, ante, p. 304.

### 3. Supplemental Petition.

There was no error in the action of the court below in overruling defendant's special exception to plaintiff's supplemental petition. The original petition stated a good cause of action as against a general demurrer, and it was not excepted to specially, and the supplemental petition was simply a reply to and a denial of the matters set up in defendant's answer in avoidance of the cause of action set up by plaintiff in his original petition. *Texas, etc., R. Co. v. Turner*, 43 Tex. Civ. App. 608, 97 S. W. 509 (see 101 Tex. 663, no op.).

## H. ISSUES, PROOF AND VARIANCE.

In suit against a carrier to recover the value of a carload of fruit, lost by reason of delay in transportation, when the petition alleged that the defendant not only failed and refused to comply with its obligation, but converted to its own use the carload of fruit, it was sufficient to admit proof

not only of conversion, but of loss by negligent breach of the contract. Missouri, etc., *R. Co. v. Barnes & Co.*, 2 App. Civ. Cases, § 575.

Plaintiff alleged that several shippers had transferred their claims to him, but did not declare on the written transfer. This instrument assigned the shipper's claims against the St. Louis, Arkansas & Texas Railway Company, without the words "in Texas," which appeared in defendant's name in the petition. Held, that under the allegations in the petition it was proper to admit the written transfer, and identify by parol testimony the claims referred to therein with those sued on. *St. Louis, A. & T. Ry. Co. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. 1008.

Where, in an action against a carrier for damages to plaintiff's shipment of apples, the complaint charged defendant with negligence in closing the air vents in the cars, whereby the apples were spoiled, defendants were properly permitted, on cross-examination of one of plaintiff's witnesses, to ask if plaintiff had not, at another trial, claimed damages on different grounds, without any special allegation in regard thereto in defendant's answer. *Cane Hill Cold Storage & Orchard Co. v. San Antonio & A. P. Ry. Co.* (Civ. App.), 95 S. W. 751.

A shipper sued a common carrier on its common-law liability for negligence resulting in injuries to the property shipped. In defense a written contract between the parties was shown, which was not, however, effective to vary the common-law liability of the carrier in the premises. Held, that the variance, if any, was not fatal. *San Antonio & A. P. Ry. Co. v. Dolan* (Civ. App.), 85 S. W. 302.

Where a petition, in an action against a railroad company for failure to furnish cars for the transportation of corn, alleged that plaintiff had suffered by a decline in the market value of corn, evidence as to injury to such

corn owing to the failure to transport it was not admissible, since it was not within the issue presented by the petition. *Gulf, C. & S. F. Ry. Co. v. Hodge & Long*, 10 Tex. Civ. App. 543, 30 S. W. 829.

Where, in an action against a carrier for failure to deliver goods, defendant pleads specially an offer to deliver the goods, on payment of freight, plaintiff, under a general denial, may prove that the offer was accompanied by a demand for the bill of lading. *Gulf, C. & S. F. Ry. Co. v. Booton*, 4 Willson, Civ. Cas. Ct. App. § 230, 15 S. W. 909.

Where, in an action against an express company for failing to deliver plaintiff's trunk, it was shown that a trunk answering the description of plaintiff's and containing the same list of articles and a book with plaintiff's name was found in a railway baggage room at another station, the burden being on plaintiff to prove a delivery of the trunk to the express company, it was error to refuse to permit the latter to ask plaintiff on cross-examination whether he had not bought a ticket to the station where the trunk was found and checked the trunk on such ticket, instead of delivering it to defendant. *Wells, Fargo & Co. v. Hanson*, 41 Tex. Civ. App. 174, 91 S. W. 321.

In an action by a consignee of perishable freight against the carrier and consignor to recover for damages thereto, the consignee's title was in issue; the claim being that the property belonged to the consignor. In a supplemental petition, and by way of estoppel, the consignee alleged that he had presented a claim to the company, which it had refused to pay, saying that, if the goods were damaged, it was the fault of the carrier, from which the consignee must collect his claim, whereby the consignee was induced to sue the carrier. Held, that the facts so alleged were admissible under the consignee's general allega-

tion of ownership. *Texas Cent. R. Co. v. Dorsey*, 70 S. W. 575, 30 Tex. Civ. App. 377.

**Contract Other than Alleged.**—Plaintiff having ordered a boat which was shipped by defendant's steamship line, found when it arrived that it was seriously damaged, and refused to receive it; whereupon defendant agreed that if it did not replace the boat with a new or perfect one within a reasonable time, it would pay plaintiff the value of the damaged boat. It was held that evidence of cost of the boat was properly excluded, there was nothing in the pleadings to authorize the introduction of such evidence. The defendant could not introduce evidence of another and different contract than the one alleged by plaintiff unless it had itself alleged it. *New York, etc., Steamship Co. v. Island City Boating, etc., Ass'n*, 2 Tex. Civ. App. 490, 491, 21 S. W. 1007.

**Special Items of Damage.**—In a suit against a railway company for negligently breaking a newspaper folding machine in transit, evidence as to special items of damage can not be given when such items are not alleged in the petition. *Missouri Pac. Ry. Co. v. Breeding*, 4 Willson, Civ. Cas. Ct. App. § 154, 16 S. W. 184. See post, "Pleading and Proof," XI, B, 15, c.

## I. EVIDENCE.

### 1. Presumptions and Burden of Proof.

In all cases of loss or injury to goods intrusted to a common carrier, the burden of proof is on the carrier to exempt itself from liability. *G., C. & S. F. Ry. Co. v. Golding*, 3 Willson, Civ. Cas. Ct. App. § 35.

Proof of delivery of goods to a carrier and their loss while in its hands makes out a prima facie case. *Missouri Pacific Ry. Co. v. William Barnes & Co.*, 2 Willson, Civ. Cas. Ct. App. 576; *Missouri Pac. R. Co. v. Scott*, 4 Tex. Civ. App. 76, 26 S. W. 239.

In an action against a carrier for

the value of property lost in transportation, plaintiff must show that defendant was a carrier that the property was received as freight, and that defendant failed to deliver it at the place of destination. *Missouri Pac. Ry. Co. v. Jo. P. Douglas & Sons*, 2 Willson, Civ. Cas. Ct. App. § 29.

Where it is shown, in an action against a carrier, that the goods were delivered to the carrier, and were lost or destroyed while in its possession, a prima facie case is established, which can only be rebutted by a showing on the part of the carrier that the loss was due to the act of God, a public enemy, an inherent defect in the goods, or negligence on the part of the shipper, or to some cause against which the carrier had relieved itself from liability by special contract with the shipper. *Gulf, C. & S. F. Ry. Co. v. Roberts* (Civ. App.), 85 S. W. 479.

In an action against a carrier for injury to goods in transit, the burden is on plaintiff to show that defendant injured the goods, or to at least make proof of facts raising a presumption to that effect. *Texas & P. Ry. Co. v. Capper*, 38 Tex. Civ. App. 61, 84 S. W. 694.

**Negligence.**—In absence of proof to the contrary, it must be presumed that loss of goods was the result of the carrier's negligence. *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 606, 16 S. W. 441; *Gulf, etc., R. Co. v. Zimmerman & Co.*, 81 Tex. 605, 608, 17 S. W. 239; *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 403, 82 S. W. 346.

Where a carrier receives goods which are not delivered at destination it is presumed the loss was due to the carrier's negligence in absence of explanation. *Southern Pacific Ry. Co. v. D'Arcais*, 27 Tex. Civ. App. 57, 64 S. W. 813; *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 606, 16 S. W. 441.

"When the thing is shown to be under the management of the defendant or his servants, and the accident

is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." *Gulf, etc., R. Co. v. Zimmerman & Co.*, 81 Tex. 605, 608, 17 S. W. 239.

In an action against a carrier for a shortage in a shipment, it was not incumbent on plaintiff to prove negligence on the part of defendant; defendant being liable, unless it could show the loss caused by an act of God or the public enemy, by the fault of the owner, or by reason of the seizure of the property under legal process. *Gulf, C. & S. F. Ry. Co. v. Belton Oil Co.*, 45 Tex. Civ. App. 44, 99 S. W. 430.

Where a contract of carriage does not limit the carrier's common-law liability, a shipper, in an action against the carrier, need not show that the goods were lost by the carrier's negligence. *Gulf, etc., R. Co. v. Roberts* (Civ. App.), 85 S. W. 479, 480.

Where in an action against a carrier for the value of goods shown to have been lost in transit no evidence is offered to explain the loss or show the absence of negligence, the law presumes the loss to have been occasioned by the carrier's negligence. *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 82 S. W. 346.

Where the evidence fails to disclose by what means the injuries were produced or when or where on the trip they occurred, it is correct to treat the carrier as responsible in that respect. *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 275, 15 S. W. 568, 18 S. W. 948.

If the rule is that the company must furnish evidence of the circumstances attending the loss so as to clear itself of the charge of negligence, it can and will be produced whenever their testimony is favorable. If it is to the contrary, the witnesses may not

be forthcoming. It is a salutary rule which presumes the existence of a fact against a party who has the means of disproving it in his power and fails to make use of them. And, for this reason, it is safest to presume that a carrier is negligent who refuses to show to the contrary, when, if such is the fact, he has but to call his own agents to the witness stand. His employees are with the goods during the whole time they are under his charge, by day and by night. They are with them at all places, whether at depots or when the train is at its greatest speed, or the ship is in mid-ocean. The owner is presumptively absent. *Ryan & Co. v. M. K. & T. R. Co.*, 65 Tex. 13, 20.

Where goods are lost by some agency excepted by the carrier in the bill of lading, plaintiff, in order to make a prima facie case of negligence has merely to aver and prove that they were delivered to the carrier and were not received at the point of destination. *Ryan v. Missouri, Kansas & T. Ry. Co.*, 65 Tex. 13.

This makes a prima facie case of negligence which the carrier can only rebut by showing loss by agency excepted at common law or by express stipulation. *Ryan & Co. v. M. K. & T. R. Co.*, 65 Tex. 13, 19.

Under an ordinary bill of lading, if the goods are lost by act of God, or through agency excepted in bill of lading, the burden is upon the carrier to show that his negligence did not contribute to bring about the accident. *Ryan & Co. v. M. K. & T. R. Co.*, 65 Tex. 13, 18.

To avoid liability, the carrier must show that the loss was caused by excepted agency, and also rebut presumption of negligence, burden of proof being on him who best knows the facts. *Ryan & Co. v. M. K. & T. R. Co.*, 65 Tex. 13, 19.

Mr. Greenleaf, in his work on Evidence, vol. 2, § 219, states the law to



be that "even if the acceptance of the goods is special, the burden of proof is still on the carrier to show not only that the cause of the loss was within the terms of the exceptions, but, also, that there was on his part no negligence or want of due care." *Ryan & Co. v. M., K. & T. R. Co.*, 65 Tex. 13, 20.

After proof of the loss due to the negligence of the carrier, it is incumbent on him to establish the existence of the conditions which shield him from liability. *Gulf, etc., R. Co. v. Zimmerman & Co.*, 81 Tex. 605, 608, 17 S. W. 239.

**That Injury Occurred While Property in Possession of Carrier.**—No damages are recoverable from a carrier for injury to a machine in absence of evidence that the machine was injured while in the possession of the defendant or connecting carrier. *Missouri Pac. R. Co. v. Breeding*, 4 App. Civ. Cases, § 154, 16 S. W. 184.

**Identity of Goods.**—Where, in an action against a carrier for injuries to goods transported, plaintiff proved bill of lading for transportation to destination, and a delivery of certain goods a month after at destination in a damaged condition, in the absence of contrary evidence the presumption was that they were the goods covered by the bill. *Barrow v. Philleo*, 14 Tex. 345.

**Condition of Goods When Delivered by Connecting Line.**—Unless it is shown that freight was delivered to defendant or some connecting line in good condition, it is presumed that it was delivered to the consignee in the same condition in which it was received by the carrier for shipment. *Missouri Pac. Ry. Co. v. Breeding*, 4 Willson, Civ. Cas. Ct. App. § 154, 16 S. W. 184.

**Upon What Line Goods Injured.**—Where evidence fails to show that goods were ever out of carrier's possession, it is not necessary for shipper

to show upon what line of railway the goods were injured. *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 526, 21 S. W. 411.

In an action for damages against defendants as receivers of a railroad company for injury to a museum delivered to defendants for shipment for exhibition, in the absence of a showing that the museum was ever out of the possession of defendants, and that it was last in their possession, it was not error for the court to refuse a requested instruction requiring plaintiff to show upon what line of railway the damage was done to the property. *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 21 S. W. 411.

**Character and Value of Goods.**—A judgment in an action against a carrier for goods lost could not be sustained where the evidence failed to show the character and value of the goods. *Houston & T. C. R. Co. v. McGlosson*, 1 White & W. Civ. Cas. Ct. App. § 224.

**That Fire Not Caused by Carrier's Negligence.**—See ante, "Fire," V, B, 2, c, (b), cc.

**Whether or Not Loss Occasioned by Act of God, Public Enemy, etc.**—See ante, "General Rule," V, B, 2, a.

**Failure to Protect Goods after Becoming Aware of Damage from Storm.**—See ante, "Floods and Washouts," V, B, 2, c, (2), (b), dd; "Unprecedented Storms, Tornadoes, Whirlwinds, etc.," V, B, 2, c, (2), (b), gg.

**Custom to Close Air Vents.**—See ante, "Opening and Closing Air Vents," V, I, 3.

**As to Delivery.**—See ante, "In General," VIII, A, 1.

## 2. Admissibility.

**Title to Property Shipped.**—See ante, "Consignor," X, F, 1, b; "Consignee," X, F, 1, c.

In an action against a carrier, it was error to exclude testimony tending to show that the property shipped did not

belong to plaintiff, but to one of the defendants, as alleged by them, and that plaintiff had knowledge of the character and condition of the car, and therefore his acquiescence in the use of that car by the defendant in transporting the onions. *Missouri, K. & T. Ry. Co. of Texas v. Moore*, 105 S. W. 532, 47 Tex. Civ. App. 531.

**Fact of Delivery.**—The fact of delivery or not is susceptible of positive proof, which is the best evidence, and in such case proof of usage or custom as to delivery is inadmissible. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 130, 9 S. W. 749.

**Evidence as to Value.**—In an action against a railroad for damages by failure to deliver to plaintiff household goods at their destination in as good condition as when received, the exclusion of evidence of their "actual" value at the point of destination, on the ground that the witnesses were not qualified to testify to the "market" value of the goods at such point, was erroneous. *Benedict v. Chicago, R. I. & P. Ry. Co. (Civ. App.)*, 91 S. W. 811.

Where, prior to the shipment of bees, plaintiff informed the carrier's agent that he had sold the bees at \$3.65 per stand, delivered, and after the bees had been injured in transportation plaintiff examined them, and was familiar with their market value and the extent of their injury, he was entitled to testify as to the amount of damages sustained, less than the price for which the bees had been sold. *International, etc., R. Co. v. Aten (Civ. App.)*, 81 S. W. 346.

**Evidence of damage to other freight** than that specified in the statement of the cause of action, and as to the amount of such damage, is inadmissible and it is error to admit such testimony. *Missouri Pac. R. Co. v. Smith*, 84 Tex. 348, 351, 19 S. W. 509.

**Cause of Damages.**—On an issue as to the cause of damage to a shipment in transit, the testimony of a witness

that it was his judgment, from the general appearance of the shipment, that it was due to the improper storing or packing of the goods in the car, was admissible as the statement of a fact, and not merely an opinion. *Texas, etc., R. Co. v. Warner*, 42 Tex. Civ. App. 280, 93 S. W. 489, affirmed in 101 Tex. 664, no op.

**High-Water Mark of Flood and of Preceding Floods.**—See ante, "Floods and Washouts," V, B, 2, c, (2), b, dd.

**Evidence as to Party Having Right to Designate the Route.**—See ante, "Selection of Route — Deviation and Diversion," V, C.

**Failure to Ice.**—See ante, "Icing," V, I, 2.

**Documentary Evidence—Plaintiff's Claim Filed before Suit Brought.**—In an action against a carrier for injuries to goods, plaintiff's claim, filed before suit brought, was admissible as tending to show that at that time he claimed a less amount of damages than the amount stated in his petition. *Missouri, K. & T. Ry. Co. of Texas v. Clayton (Civ. App.)*, 84 S. W. 1069.

Where the agent of defendant carrier testified that plaintiff had never claimed more than a certain amount of damages to a shipment, plaintiff could introduce, in rebuttal, a written claim for a larger sum, which he had presented to the carrier through such agent. *Galveston, etc., R. Co. v. Tuckett (Civ. App.)*, 25 S. W. 150.

**Bill of Lading.**—In an action for damages for injury to goods delivered to the defendant carrier for transportation, the bill of lading, being alleged in the petition to have been signed by the defendant, is admissible in evidence without proof of its execution, if its execution be not denied by the defendant under oath in his answer. *Barrow v. Philleo*, 14 Tex. 345, 346. See the title DOCUMENTARY EVIDENCE.

Where, in an action against a carrier for damages to a shipment, plaintiff

alleged that defendants belonged to a certain system and were partners, and partnership was not denied, the bill of lading, although executed by one of the partners, was admissible against them all. *St. Louis & S. F. R. Co. v. Watkins*, 45 Tex. Civ. App. 321, 100 S.W. 162.

**Dray Receipts.**—Where, in an action against connecting carriers for injuries to cotton, certain dray receipts were given by witness for the cotton on delivery thereof to a steamship company, such receipts were not objectionable, in that they were not shown to have been executed by the witness. *Houston, etc., R. Co. v. Bath*, 40 Tex. Civ. App. 270, 90 S.W. 55, affirmed in 101 Tex. 641, no op.

**Letter from Claim Agent.**—A letter received by due course of mail, purporting to be written by the general claim agent of a railroad corporation, and upon its printed letter heads, in reply to a letter addressed to the corporation or to such claim agent and sent through the mail, is presumptively genuine and authorized, and is admissible in evidence without further proof that such person is the general claim agent of the corporation or that the letter was written by the party by whom it purports to be signed. *St. Louis, etc., R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 82 S.W. 346.

**Offer to Settle.**—An offer of an attorney for defendant in an action of trover for conversion of a car of coal, made after suit brought, in which the attorney stated that it was the desire of defendant to end the litigation, and to pay the fair value of the coal at the time and place it was taken, and that he did not doubt that such payment would be made, is inadmissible; no tender of payment of any damages having been made. *Gulf, etc., R. Co. v. Cleburne Ice, etc., Co. (Civ. App.)*, 79 S.W. 836.

**Agent's Certificate Giving Amount of Goods Destroyed.**—An agent of a railroad company, on the day after a

fire, drew up a statement in the form of a certificate, giving the amount of plaintiff's goods destroyed while in the possession of the company, etc. The railroad company introduced the deposition of the agent as to the same facts. Held, that the statement was admissible evidence to contradict the deposition in case it disagreed with the statement, and the attention of the witness was called to that fact. *E. L. & R. R. Co. v. Hall*, 64 Tex. 615.

**The books of a shipper,** shown to have been kept by a competent bookkeeper in the usual course of its business, were admissible against the carrier to establish the weights of carloads of cotton seed as shown by entries therein, though neither the bookkeeper making the entries nor the person who weighed the cars and announced the result testified with reference thereto. *Gulf, etc., R. Co. v. Belton Oil Co.*, 45 Tex. Civ. App. 44, 99 S.W. 430.

**Expert and Opinion Evidence.**—In an action against carriers for injuries to cotton, witnesses who had qualified as experts were entitled to testify that in their opinion the cotton had been damaged by fresh, and not by salt, water. *Houston, etc., R. Co. v. Bath*, 40 Tex. Civ. App. 270, 90 S.W. 55, affirmed in 101 Tex. 641, no op.

In an action against a carrier for the loss of a stock of merchandise, experts' evidence as to the value of the goods after they had testified that such value was fixed by the cost price plus the cost of carriage, and that, except as varied by the freight to different points, such property had a uniform value in the section of the state in which the business was carried on, was competent and sufficient to establish the extent of the loss, being unobjectionable on the ground that the experts called such value the market value. *Texas, etc., R. Co. v. Townsend (Civ. App.)*, 106 S.W. 760.

In an action for the loss of several barrels of molasses in shipment, testi-

mony that "some of the barrel heads showed to have been staved inwards by heavy blows from the outside," was not a conclusion of the witness, but testimony as to a fact. *International, etc., R. Co. v. Drought & Co.* (Civ. App.), 100 S. W. 1011.

In an action for the loss of several barrels of molasses in shipment, testimony that the witness had inspected the shipment at a certain point, but was unable to stop the leakage, as all of the barrels seemed to be in good condition, and the leaking appeared to be from fermentation, was not a conclusion of the witness. *International, etc., R. Co. v. Drought & Co.* (Civ. App.), 100 S. W. 1011.

Testimony of a carrier's agent at the delivering point, that barrels in which flour was shipped were green when loaded on the cars, and that, by piling them several tiers deep, the barrels were bent out of shape, and the flour spoiled, may be regarded as a statement of an opinion. *Gulf, etc., R. Co. v. Frank Co.* (Civ. App.), 48 S. W. 210.

**Respecting Cause of Burning of Wagon Load of Goods in Course of Transportation**—See the title EXPERT AND OPINION EVIDENCE.

**Declarations and Admissions.**—A conversation with the companies' agent, within the scope of his authority to transact the business with plaintiff in which he was engaged when he made the statements reproduced by the witness, may be admissible. *Texas, etc., R. Co. v. Felker*, 40 Tex. Civ. App. 604, 90 S. W. 530, citing *Pecos, etc., R. Co. v. Latham*, 13 Tex. Ct. Rep. 662; *Missouri, etc., R. Co. v. Kyser*, 38 Tex. Civ. App. 355, 87 S. W. 389; and *International, etc., R. Co. v. True*, 23 Tex. Civ. App. 523, 57 S. W. 977, affirmed in 94 Tex. 705, no op.

Where an agent of a carrier, while engaged in tracing and locating a car, stated that it had not yet reached a certain place, the declaration was admissible as part of the *res gestæ* in an

action for damages to the shipment contained in the car, as was also a statement made by another agent when he was attempting to adjust plaintiff's claim for damages, and when he and plaintiff were examining the shipment to ascertain the damages. *St. Louis, etc., R. Co. v. Watkins*, 45 Tex. Civ. App. 321, 100 S. W. 162.

**Declaration of Freight Claim Agent.**

—In an action for loss of freight, evidence that declarations were made by a general agent of the railway company, invested with authority to adjust claims against it, within the scope of his agencies, show that the authority of the freight claim agent was such as to render his report as to the claim in question binding as admissions against carrier. *Missouri Pac. R. Co. v. German*, 84 Tex. 141, 142, 19 S. W. 461.

In *Missouri Pac. R. Co. v. Sherwood, etc., Co.*, 84 Tex. 125, 19 S. W. 455, the testimony did not authorize the admission of declarations of such agent.

**Hearsay.**—See ante, "Safe Custody and Preservation," V, I.

**Custom and Usage—Custom and Usage of Other Roads.**—Where goods are destroyed by fire in a railway depot, evidence of custom of other railway companies as to their methods of lighting their freight depots was properly excluded. *Texas, etc., R. Co. v. Payne*, 15 Tex. Civ. App. 58, 60, 38 S. W. 366, following *Weatherford, etc., R. Co. v. Duncan*, 10 Tex. Civ. App. 479, 31 S. W. 562, affirmed in 88 Tex. 611.

Where goods in transit, while lying in the carrier's freight house, were destroyed by fire, evidence as to the custom of other railroad companies to keep oil and to fill and light their lamps in their freight rooms is inadmissible. *Texas & P. Ry. Co. v. Payne* (Tex. Civ. App.), 38 S. W. 366, 15 Tex. Civ. App. 58.

### 3. Weight and Sufficiency.

To hold a common carrier liable for

the value of property lost in shipment, the proof must show that the property was received as freight by a common carrier, that the carrier failed to deliver it, and the market value of the property at the place of destination at time it should have been delivered. *Missouri Pac. R. Co. v. Douglas & Sons*, 2 App. Civ. Cases, § 28.

Plaintiff shipped two lots of fruit trees over defendant's railway; one lot to purchasers, which were delayed in their arrival, on account of which the purchasers refused to take them, and plaintiff had to sell them at a loss. When plaintiff shipped these trees, he notified the agent of defendant of his contract with the purchasers, and that, if the trees did not reach them by a certain time, they would be a total loss to him, as the purchasers would not take them after that date. The other lot were frozen and killed in transit. They were in good order when shipped. Held, that a verdict awarding plaintiff damages for both lots would be sustained. *Texas & P. Ry. Co. v. Talley*, 2 Willson, Civ. Cas. Ct. App. § 766.

**Production of Bill of Lading or Proof of Contents.**—See ante, "Production and Surrender of Bill of Lading and Receipt for Goods," VIII, A, 4, b. And see the title CARRIERS, ante, p. 304.

**Proof of Execution of Bill of Lading.**—In an action against a carrier for damages to a shipment, proof of the execution of the bill of lading might be made by circumstantial evidence. *St. Louis & S. F. R. Co. v. Watkins*, 100 S. W. 162, 45 Tex. Civ. App. 321.

**Non Est Factum.**—Where plaintiffs in an action for the conversion of a shipment by carrier entered a plea of non est factum in answer to defendant's plea setting up contract of shipment, and execution of such contract by plaintiffs is not proved, the court properly charged that plaintiffs were not bound by such contract. *Missouri*,

etc., *R. Co. v. De Bord*, 21 Tex. Civ. App. 691, 701, 53 S. W. 587, affirmed in 93 Tex. 690, no op.

**Evidence as to Receipt by Carrier in Good Order.**—In an action to recover of defendants for injury to goods while in transit, evidence of a witness that he assisted in packing the goods, and that he knew they were put up in such a manner that there was no possibility of their sustaining injury, except from neglect or carelessness, was sufficient to show a delivery of the merchandise to the common carrier in good order. *Hall v. Morrison*, 20 Tex. 179.

**Character and Value of Goods.**—A judgment in an action against a carrier for goods lost could not be sustained where the evidence failed to show the character and value of the goods. *H. & T. C. Ry. v. McGlosson*, 1 White & W. Civ. Cas. Ct. App. § 224.

**Title and Ownership.**—In an action by "E. F. Dawson" for damages to a shipment, evidence of a shipment by "Dawson & Co." was insufficient to show ownership. *Atchison, etc., R. Co. v. Dawson* (Civ. App.), 90 S. W. 65.

Where, in an action against a carrier for damages to a shipment, the evidence showed plaintiff to be the owner of a part of the goods, but the evidence was not sufficient to enable the court on appeal to separate the damages, a judgment for plaintiff would be reversed. *Atchison, etc., R. Co. v. Dawson* (Civ. App.), 90 S. W. 65.

**Negligence in Exposing Goods to Flood.**—See ante, "Floods and Washouts," V, B, 2, c, (2), (b), dd.

**Leaky Condition of Cars Where Damage Caused by Flood.**—See ante, "Floods and Washouts," V, B, 2, c, (b), dd.

**Evidence as to Cause of Fire.**—See ante, "Fire," V, B, 2, c, (2), (b), cc.

**Refusal to Deliver.**—See ante, "Liability for Failure or Refusal to Deliver," VIII, A, 5.

**Proof of Delivery to Unauthorized Person, Misdelivery.**—See ante, "In General," VIII, B, 9, a.

**Removal of Goods from Destination before Expiration of Twenty Hours.**—See ante, "In General," VIII, B, 9, a.

**Loss by Fire.**—See ante, "Fire," V, B, 2, c, (2), (b), cc.

#### J. WITNESSES.

In an action for the loss of several barrels of molasses in shipment, the question, "Did you make any demand upon the defendant for the value of said damaged goods?" addressed to a witness, was not leading. *International, etc., R. Co. v. Drought & Co.* (Civ. App.), 100 S. W. 1011.

#### K. NONSUIT.

See post, "Questions for Jury," X, L.

#### L. QUESTIONS FOR JURY.

Where, in an action against a carrier for nondelivery of plaintiff's trunk, plaintiff testified without objection that B. delivered the trunk to the carrier for transportation, such evidence justified a submission of the issue of the delivery of the trunk to the carrier to the jury. *Wells, Fargo & Co. v. Harrison*, 91 S. W. 321, 41 Tex. Civ. App. 174.

Where, in an action against a carrier for loss of goods received for transportation, a prima facie case of liability is established by proof that the goods were delivered to the carrier and were destroyed while in its possession, the question whether the carrier discharged the burden of proof that the goods were destroyed by an act of God, the public enemy, inherent defects therein, or negligence of the shipper is for the jury, except where evidence is so overwhelming as to leave no room for a reasonable doubt that the prima facie case has been destroyed. *Fentiman v. Atchison, T. & S. F. Ry. Co.*, 98 S. W. 939, 44 Tex. Civ. App. 455.

In an action against a carrier for loss of freight from a flood, evidence examined, and held to require the submission to the jury of the question whether the carrier was negligent in exposing the goods to the danger of

the flood. *Fentiman v. Atchison, T. & S. F. Ry. Co.*, 98 S. W. 939, 44 Tex. Civ. App. 455.

Where, in an action against a carrier for loss of goods, plaintiff's claim before suit brought, which was for less than the amount sued for, was introduced in evidence, and he undertook in his evidence to give an explanation why some of the items were omitted from the claim and why the petition claimed more than the claim presented to the railroad, whether his explanation was reasonable and proper was for the jury. *Missouri, K. & T. Ry. Co. of Texas v. Clayton* (Civ. App.), 84 S. W. 1069.

#### Failure to Set Aside Nonsuit.

Where, in an action against a carrier for injuries to household goods during transportation, evidence as to the actual value of the goods at their destination was erroneously excluded, the failure of the court to set aside the judgment of nonsuit was reversible error. *Benedict v. Chicago, R. I. & P. Ry. Co.* (Civ. App.), 91 S. W. 811.

**Delivery by Custom.**—See ante, "Constructive Delivery—Usages and Custom," IV, C, 2.

#### M. INSTRUCTIONS.

In an action by a consignee against the carrier and consignor for damages to the freight consigned, the court may properly instruct the jury to find against the consignor if they should find that the freight was damaged before it was delivered to the carrier. *Cudahy Packing Co. v. Dorsey*, 33 Tex. Civ. App. 565, 78 S. W. 20.

The carrier is entitled to have issue as to damage before receipt for shipment submitted to jury. *Texas Cent. R. Co. v. Dorsey*, 30 Tex. Civ. App. 377, 70 S. W. 575.

In an action for the value of a shipment of second-hand vehicles lost by a carrier, an instruction that the jury, in determining the value of the property, were authorized to take into con-

sideration, among other things, the question whether the property was new or second-hand, is not objectionable as submitting the issue as to whether the property was new or second-hand. *Texas & P. Ry. Co. v. Wilson Hack Line*, 101 S. W. 1042, 46 Tex. Civ. App. 38.

In an action by a consignee against the carrier to recover for goods damaged in transit, the defendant, claiming that the goods were damaged before received for shipment, was entitled to have that issue distinctly submitted to the jury. *Texas Cent. R. Co. v. Dorsey*, 70 S. W. 575, 30 Tex. Civ. App. 377.

In an action against a railway company for goods which had been placed near its tracks for shipment and destroyed by fire, in which one theory for recovery was that the fire was caused by the negligence of the railway, and another theory was that it was burned after it had been delivered into the possession of the railway as a common carrier, it was error to instruct that, if the fire was caused by the defendant's locomotive, defendant was liable, as defendant, on the theory first stated, was entitled to have submitted the issue of plaintiff's contributory negligence in exposing the cotton to danger by fire. *Missouri, K. & T. Ry. Co. of Texas v. Beard*, 78 S. W. 253, 34 Tex. Civ. App. 188.

In an action against a railway company for the value of goods placed near its tracks for shipment and destroyed by fire, an instruction on the theory that the evidence of the custom and course of dealing in permitting goods to accumulate on the platform for shipment might be sufficient to constitute possession by defendant as a carrier, was irreconcilably conflicting with an instruction that the defendant would not be liable as a common carrier unless the cotton was received by it for immediate shipment and it had received shipping instructions from the plaintiff. *Missouri, K.*

*& T. Ry. Co. of Texas v. Beard*, 78 S. W. 253, 34 Tex. Civ. App. 188.

Where, in an action for damages to plaintiff's shipment of apples through alleged negligence of defendant carrier, the petition fixed all damages claimed at the time of the arrival of the apples at their destination, plaintiff could not complain of an instruction that the measure of damages was the difference between the market value of the apples in the condition in which they arrived and their value had they arrived in proper condition, though the evidence showed that the apples arrived during the night and were not delivered until the following day. *Cane Hill Cold Storage & Orchard Co. v. San Antonio & A. P. Ry. Co. (Civ. App.)*, 95 S. W. 751.

**Charge as to Willful Conversion.**—Where the only evidence of a demand and refusal for goods alleged to have been converted by a carrier was evidence of plaintiff's attorney that he demanded pay for the goods, the court erred in charging on the issue of willful conversion. *Gulf, Colorado & S. F. Ry. Co. v. Humphries*, 4 Tex. Civ. App. 333, 23 S. W. 556.

In a suit against a carrier for conversion, where the only proof of demand and refusal was that the local attorney had requested the defendant to pay for the goods, a charge in effect that if defendant refused to comply with such request, it was liable for willful conversion, was error. *Gulf, etc., R. Co. v. Humphries*, 4 Tex. Civ. App. 333, 23 S. W. 556.

**Charge in Conjunctive or Disjunctive.**—Where, in an action against a carrier for damages to plaintiff's shipment of apples, plaintiff charged that through defendant's negligence the apples were heated, scalded, and decayed, he could not complain of a charge in the conjunctive, in the absence of a request that the heating, scalding, and decaying be disjunctively submitted. *Cane Hill Cold Storage.*

etc., *Co. v. San Antonio, etc.*, R. Co. (Civ. App.), 95 S. W. 751.

**Repetition of Charge Stating Issues and Duties and Liabilities of Carrier.**

—The court gave a charge, requested by plaintiff, which included a statement of the issues as they had already been stated in the general charge, and also defined the duties and liabilities of common carriers substantially as given in the general charge, thus repeating in the charge these matters. It was held that these issues and duties could not be too well understood by the jury, and the repetition, though unnecessary, was not error. *Galveston, etc., R. Co. v. Tuckett* (Civ. App.), 25 S. W. 150.

**Charge on Weight of Evidence as to Market Value.**—The suit was for damages for injury to a museum, delivered to the defendant for shipment to Dallas for exhibition at the fair, and loss of profits by reason of failure to transport and deliver. The petition alleged that plaintiff "lost all opportunity to make money at said point by exhibiting his collection of birds, animals, etc., and lost his own time, besides the expense of keeping and paying his employees, and his trouble, vexation, and worry." It was a charge on the weight of evidence to tell the jury that the articles had no general market value. The evidence as to the nature of the articles, and the manner of their collection and preparation, tended to show that they were all such specimens as might have a market value. *Yoakum v. Durn*, 1 Tex. Civ. App. 524, 21 S. W. 411.

**As to Burden of Showing on What Line Loss Occasioned.**—See ante, "Presumptions and Burden of Proof," X, 1.

**Instruction as to Presumption of Sale to Consignee.**—See ante, "Consignee," X, F, 1, c.

**As to What Constitutes Delivery to Carrier.**—See ante, "What Constitutes Form and Requisites," IV, C.

**N. VERDICT AND JUDGMENT.**

Plaintiff delivered goods to a carrier for shipment to a way station on a connecting line, under a bill of lading naming itself as consignee, and reciting that all liability thereunder as a common carrier would terminate on arrival of the goods at place of delivery, and that within 24 hours after their arrival they might be removed and stored at owner's expense. About 24 hours after reaching their destination, and before notice to the consignee, the goods were removed by the railroad company to a point two miles distant, where they were delivered to a third party without authority from the consignee. Held, that since defendant would be liable as a warehouseman of its liability as a carrier was terminated 24 hours after the arrival of the goods, under the stipulation in the bill of lading, it was immaterial that the trial court based its judgment on its liability as a carrier. *St. Louis S. W. Ry. Co. of Texas v. Hall & Brown Woodworking Mach. Co.*, 56 S. W. 140, 23 Tex. Civ. App. 211.

Where, in an action against a carrier for conversion, the evidence showed only a probable delivery to one not authorized to receive the property and the question of delivery and authority was not submitted to the jury, a finding that the carrier was guilty of conversion was unwarranted. *Gulf, Colorado & S. F. Ry. Co. v. Humphries*, 4 Tex. Civ. App. 333, 23 S. W. 556.

In a suit against a carrier for conversion where the evidence merely shows that there might have been a conversion by delivery to a wrong person, and the question of such delivery, or whether the person to whom it was delivered was authorized to receive goods, was not submitted to the jury, a judgment against the defendant will not be sustained. *Gulf, etc., R. Co. v. Humphries*, 4 Tex. Civ. App. 333, 336, 337, 23 S. W. 556.

**Special Verdict.**—In an action against



a railroad company for the value of goods sold by it after the consignee's refusal to receive them, a special verdict that the goods were not of the quality ordered by the consignee is insufficient to support a judgment for plaintiff for the proceeds of the sale. *Finley v. Lewis* (Civ. App.), 39 S. W. 974.

**Statutory Interest Penalty.**—Where a verdict against defendant railroad company for damages resulting from failure to deliver a shipment contained no mention of the statutory interest penalty of 5 per cent. per month, and plaintiff's petition was insufficient to support a judgment therefor, it was error for the court to allow such interest penalty in entering judgment on the verdict. *Gulf & I. Ry. Co. v. Gregory* (Civ. App.), 59 S. W. 310.

**Verdict for Agreed Sum Where Notice of Loss Waived.**—See the title CARRIERS, ante, p. 304.

**Taking Judgment against Part of Parties Sued.**—See the title JUDGMENTS AND DECREES.

**Res Adjudicata.**—In this case the plaintiff, after the defendant had recovered judgment against him in a justice's court, for freight, recovered judgment against defendant in the district court, in another suit, for \$147.81, for damages to the goods; and on an issue of fact, whether the same damages had been claimed in reconvention before the justice and adjudicated, the justice's docket not showing whether they were or not, and the testimony being conflicting, although preponderating in favor of the defendant, the court refused to reverse the judgment. *Hall v. Morrison*, 20 Tex. 179.

**Interest.**—See ante, "Interest," VII, H, 2, g.

## O. APPEAL AND ERROR.

When it is stipulated that bills of lading should not be copied into the statement of facts, but that reference should be made thereto as attached to the pleadings, the omission to insert

them at the end of the pleadings, and their insertion at the end of the statement of facts, is immaterial. *Houston, etc., R. Co. v. Williams* (Civ. App.), 31 S. W. 556.

Where, in an action against a carrier for injuries to fruit, the evidence was sufficient to raise an issue of fact whether the fruit was damaged on defendant's road through the negligence of its servants, a verdict in favor of plaintiff for an amount justified by the evidence, will not be disturbed on appeal. *St. Louis, etc., R. Co. v. Wester* (Civ. App.), 96 S. W. 769.

**Harmless Error in Instructions.**—In an action against a carrier for the loss of goods, the evidence as to the loss being practically undisputed, a charge misleading and confusing as to the value of the goods can not avail the defendant, being detrimental, if at all, only to plaintiff. *Texas, etc., R. Co. v. Townsend* (Civ. App.), 106 S. W. 760.

In an action against a carrier for the destruction of goods in transit, plaintiff testified to the market value of the goods at their destination, while defendant's witnesses testified to their value at the point of shipment, and estimated such value at a sum far less than plaintiff's estimate. The court charged that the evidence of defendant's witnesses was admitted for its tendency to disprove plaintiff's testimony, and not to establish value as a basis for the verdict. Held, that as the charge was correct in so far as it stated that defendant's evidence was incompetent to establish value, and any error in permitting the evidence to be used at all was favorable to defendant, the charge was not prejudicial to defendant. *Gulf, etc., R. Co. v. Roberts* (Civ. App.), 85 S. W. 479, 480.

**Waiver of Error in Charge.**—In an action against a carrier for goods lost, plaintiff's failure to request a proper charge on the measure of the carrier's liability did not constitute a waiver of

error in a charge given, limiting the carrier's liability to the exercise of ordinary care. *Bibb v. Missouri, etc., R. Co.*, 37 Tex. Civ. App. 508, 84 S. W. 663.

## **XI. Damages for Injury, Loss, Conversion or Misdelivery of Goods.**

### **A. LIABILITY.**

The liability of a common carrier to make compensation for goods or property lost by it extends at common law not only to the duty imposed upon it by law to safely transport the goods, but also to its responsibility to make reparation by way of damages in favor of the owner of the property to the fullest extent fixed and allowed by law in such cases. *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 606, 16 S. W. 441.

A carrier is liable to a shipper for any damages resulting to a shipper by reason of its breach of contract to carry. This is so whether the carrier is a natural person or a corporation. *Gulf, etc., Ry. Co. v. McCorquodale*, 71 Tex. 41, 46, 9 S. W. 80.

Under the Texas statutes the liability of a common carrier for loss of freight is that imposed by the rules of the common law. *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, 340, 13 S. W. 191; *Missouri Pac. R. Co. v. Douglas & Sons*, 2 App. Civ. Cases, § 28.

**As to Effect of Stipulations Limiting Liability for Loss or Injury or Fixing Value of Goods.**—See the title CARRIERS, ante, p. 304.

### **B. EXTENT OF LIABILITY, MEASURE AND ELEMENTS OF DAMAGE.**

#### **1. In General.**

"In case of injury to or loss of property by the carrier's fault, he is required to make compensation on the basis of its market value at the place of destination." *Missouri, etc., R. Co. v. Webb & Co.*, 20 Tex. Civ. App. 431, 439, 49 S. W. 526.

## **2. Loss or Nondelivery.**

### **a. In General.**

"The general rule of damages in an action against a common carrier, where he is liable for loss or for nondelivery of any portion of the goods which he undertook to deliver, is the value of the goods at the time and place where they should have been delivered, with interest, less the proper charges of transportation." *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 606, 16 S. W. 441. See, to the same effect, *Galveston, etc., Railway v. Efron* (Civ. App.), 38 S. W. 639; *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209, 213; *Missouri Pac. R. Co. v. Hewett*, 2 App. Civ. Cases, § 273. And see *Texas, etc., R. Co. v. Martin*, 2 App. Civ. Cases, §§ 342, 343; *International, etc., R. Co. v. Nicholson*, 61 Tex. 550, 553, stating the same rule except as to allowance of interest. See post, "Freight, Allowance and Deduction," XI, B, 9; "Interest," XI, B, 10.

In an action against a carrier for goods lost in transit, the measure of damages is the value of such goods at the place of destination. *Texas & P. Ry. Co. v. Davis*, 2 Willson, Civ. Cas. Ct. App. § 196. *Pacific Exp. Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 42 S. W. 795; *International, etc., R. Co. v. Parish*, 18 Tex. Civ. App. 130, 132, 43 S. W. 1066; *Gulf, etc., R. Co. v. Roberts* (Civ. App.), 85 S. W. 479.

The net value of goods at destination is the true criterion of damages for goods lost in course of transportation by a common carrier. *Fowler v. Davenport*, 21 Tex. 626; *Wolfe v. Lacy, etc., Co.*, 30 Tex. 349, 351; *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 16 S. W. 441; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749; *Galveston, etc., R. Co. v. Efron* (Civ. App.), 38 S. W. 639; *Texas, etc., R. Co. v. Taylor*, 3 App. Civ. Cases, § 192; *Gulf, etc., R. Co. v. Booton*, 4 App. Civ. Cases, § 230, 15 S. W. 909; *T. B. & H. R. Co. v. Montgomery*, 4 App. Civ. Cases, § 238, 16 S. W. 178.

In an action for goods lost in transit, where the freight has been paid, the measure of damages is the market value at destination, with interest. *Galveston, etc., R. Co. v. Efron* (Civ. App.), 38 S. W. 639.

The measure of damages for destruction of merchandise in transit is its reasonable value at the time and place of destruction, with legal interest. (1896) *Texas & P. Ry. Co. v. Payne*, 38 S. W. 366, 15 Tex. Civ. App. 58; (1897) *Galveston, H. & S. A. Ry. Co. v. Efron* (Civ. App.), 38 S. W. 639.

An instruction that the measure of damages is the highest market value at the destination, less freight charges, is erroneous, as it makes the retail price, including profits, the measure of damages. *Texas & P. Ry. Co. v. Payne*, 38 S. W. 366, 15 Tex. Civ. App. 58.

In an action against a railroad company for injuries to goods in transit, where the jury were unable to separate any damage done the articles before delivery from that which might have occurred after delivery, defendant was entitled to a verdict. *Missouri, K. & T. Ry. Co. of Texas v. Wood*, 63 S. W. 654, 26 Tex. Civ. App. 500.

The measure of damages for loss of goods by the negligence of a carrier in transportation is the value of the goods at the place of destination. *Southern Pac. Co. v. D'Arcais*, 64 S. W. 813, 27 Tex. Civ. App. 57.

This is the rule where the goods were not intended for market. *Texas, etc., R. Co. v. Taylor*, 3 App. Civ. Cases, § 192.

**Contract Price for Which Goods Sold.**—Where, in an action against a carrier for loss of freight by reason of its failure to furnish a suitable car, there was evidence justifying a recovery of the contract price for which the goods were sold, and, if the market value was the proper measure of damages, plaintiff would have been entitled to recover more than the verdict, de-

fendant was not prejudiced by an instruction authorizing a recovery of the contract price. *Houston & T. C. R. Co. v. Wilkerson Bros.* (Civ. App.), 82 S. W. 1069.

**Where Title Passed to Buyer.**—A seller and purchaser agreed that the property in goods should pass to the purchaser when delivered to the carrier at the place of shipment, but that the seller should retain the right of possession until a draft for the purchase price, with bill of lading attached, was paid. The carrier lost the goods in transit. Held that, the title having passed to the buyer, the carrier was liable, not merely for the sale price, but for the value of the goods, unless a less amount would cover the damage. *Texas & P. Ry. Co. v. Wilson Hack Line*, 46 Tex. Civ. App. 38, 101 S. W. 1042.

**Freight in Which There Is Inherent Defect.**—The measure of damages for total loss of freight in which there is an inherent defect is the price less the freight charges they would have brought in the market at the place of destination in the condition they would have been in had the company exercised due care and this price less freight charges at the time they should have arrived if shipped and delivered in reasonable time. In case of partial loss, the measure of damages would be the difference in such price less freight and the value of the animals at the same place at the time of arrival. *Missouri Pacific Ry. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, citing *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

#### b. Conversion of Property by Carrier.

The measure of damages for the conversion of a consignment of property by the carrier at the point of destination is the value of the property at that place, less the freight charges. *Missouri, K. & T. Ry. Co. of Texas v. C. H. Rines & Co.*, 37 Tex. Civ. App. 618, 84 S. W. 1092.

The measure of damages for conversion of a car of coal is the reasonable market value of the coal per ton at the place where it was taken. *Gulf, etc., R. Co. v. Cleburne Ice, etc., Co.* (Civ. App.), 79 S. W. 836.

The measure of damages for the conversion of cotton is its value at the time of conversion. *Houston & T. C. Ry. Co. v. Stewart*, 1 White & W. Civ. Cas. Ct. App. § 1249:

Where carriers converted a car load of potatoes shipped, the measure of damages is the market value of the potatoes at the time of their conversion, with interest thereon, less the freight charges due them. *Carter & Corey v. International & G. N. Ry. Co.* (Civ. App.), 93 S. W. 681. See post, "Freight, Allowance and Deduction," XI, B, 9; "Interest," XI, B, 10.

The consignee of a car load of onions having refused to accept the same because of its damaged condition, the carrier, after a delay of eight days, shipped the property to another place to be sold for freight charges. After such shipment, but before sale, the consignee demanded the property, offering to pay the charges, which the carrier refused. Held a conversion of the property, the sale not being such as is provided for by Rev. St. 1895, arts. 320, 329. *Missouri, K. & T. Ry. Co. of Texas v. C. H. Rines & Co.*, 84 S. W. 1092, 37 Tex. Civ. App. 618.

**Value of Use and Time Lost Endeavoring to Recover Property.**—In an action to recover of a railroad company for the wrongful conversion of machinery shipped to plaintiff, it appeared that the machinery referred to arrived on the 16th of September, and plaintiff often inquired of the agent, but was informed that it had not arrived; that in November he heard accidentally that it had arrived, and was again told by the agent that it was not in the warehouse. After examination he found it. The agent refused to receive the amount of freight speci-

fied in the bill of lading. Plaintiff purchased the machinery for his gin, and notified the agent, when he first inquired, that he needed it at an early date, and damage resulted from delay. Held, that the measure of damages was the value of the property, together with the value of the use of the same, and the time lost in going from and to defendant's office in endeavoring to recover the property. *Texas & P. Ry. Co. v. Curry*, 2 Willson, Civ. Cas. Ct. App. § 453.

**Statutory Penalty and Damages for Refusal to Deliver.**—See the title CARRIERS, ante, p. 304.

**Exemplary Damages.**—See post, "Exemplary Damages," XI, B, 13.

#### c. Misdelivery.

Unless a carrier has contracted to carry the goods to their destination to fulfill a contract at a greater price, or knew of such contract, he can not be charged with more than the market value of the goods, less freight charges at their destination, by reason of his failure to deliver to the person authorized to receive them under the bill of lading. *Grayson County Nat. Bank v. Nashville, C. & St. L. Ry.* (Civ. App.), 79 S. W. 1094.

#### d. Partial Loss.

See post, "Injury," XI, B, 3.

A shipper is not justified in refusing to receive goods carried for him by rail because one of a number of boxes is missing, and, the goods tendered having been sold according to law to pay freight and storage charges, he can not recover their value. *Gulf, C. & S. F. Ry. Co. v. Booton*, 4 Willson, Civ. Cas. Ct. App. § 67, 15 S. W. 502.

Consignee of sewing machines, shipped in knocked down form in boxes and crates, must receive them when tendered by carrier, although one box was missing, since he can recover only for the portion not tendered him. *Gulf, etc., R. Co. v. Booton*, 4 App. Civ. Cases, § 67, 15 S. W. 502.

**Evidence.**—See post, "Evidence," XI, D.

### 3. Injury.

#### a. In General.

Where goods have been damaged in the course of transportation through the fault of the carrier, the measure of damages is the difference between the value of the goods as, or in the condition when, delivered, and what their value would have been, if they had not been damaged, at the time and place where they were to be delivered according to the contract. *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209, 213; *Texas, etc., R. Co. v. Truesdell*, 21 Tex. Civ. App. 125, 51 S. W. 272, affirmed in 93 Tex. 125, no op.; *Missouri, etc., R. Co. v. Webb & Co.*, 20 Tex. Civ. App. 431, 439, 49 S. W. 526; *Missouri, etc., R. Co. v. Jarrell*, 38 Tex. Civ. App. 425, 86 S. W. 632, affirmed in 101 Tex. 649, no op.; *Texas, etc., R. Co. v. Arnold*, 16 Tex. Civ. App. 74, 40 S. W. 829; *Texas, etc., R. Co. v. Klepper* (Civ. App.), 24 S. W. 567; *Reeves v. Texas, etc., R. Co.*, 11 Tex. Civ. App. 514, 32 S. W. 920; *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161; *Texas, etc., R. Co. v. Berchfield*, 12 Tex. Civ. App. 145, 148, 33 S. W. 1022; *Gulf, etc., Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806; *San Antonio, etc., R. Co. v. Wright*, 20 Tex. Civ. App. 136, 49 S. W. 147; *Gulf, etc., Co. v. Hume*, 6 Tex. Civ. App. 653, 24 S. W. 915, reversed in 87 Tex. 211; *St. Louis, etc., R. Co. v. Smith*, 11 Tex. Civ. App. 550, 32 S. W. 828; *International, etc., R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186, 189, 23 S. W. 754.

In a suit for injury to property by fault of a carrier, the measure of damages is the difference between its value when delivered at its destination and what its value would have been if it had not been damaged in course of transportation, and not between its value when received and its value when delivered; and, in the absence of

evidence of what its value would have been at its destination had it been properly transported, a verdict can not stand. *Galveston, H. & S. A. Ry. Co. v. Silegman* (Civ. App.), 23 S. W. 298.

**Perishable Property.**—Under a complaint alleging that perishable property of plaintiff was injured by frost by reason of defendant's negligence, and that plaintiff was unable to fill orders previously taken for their sale, being compelled to sell them at a reduced price, the measure of damages is the difference between their value before and after the injury, and a verdict for a larger sum than the alleged original value of the property can not be sustained. *Galveston, H. & H. R. Co. v. Bell*, 2 Posey Unrep. Cas. 517.

**Fruit.**—In an action against a carrier for damages sustained owing to the improper handling of a shipment of fruit, the measure of damages was the difference in the market value of the fruit, had it arrived in proper condition, and its market value in the condition in which it did arrive. *St. Louis, I. M. & S. Ry. Co. v. Henry* (Civ. App.), 81 S. W. 334.

Where a shipment of fruit arrived at its destination in the night, its market value on the next day was the market value to be employed in determining the measure of damages in an action against the carrier for damages to the fruit caused by improper handling. *St. Louis, I. M. & S. Ry. Co. v. Henry* (Civ. App.), 81 S. W. 334.

**Machine Broken in Transit.**—The measure of damage for breaking a machine in transit is the difference between the value of the machine at the place of delivery at the time and in the condition in which it ought to have arrived, and its value at the time and in the condition in which it was delivered, not including the amount plaintiff may have expended in repairing it. *Missouri Pac. Ry. Co. v. Breeding* (Civ. App.), 16 S. W. 184, 4 Tex. App. Civ. 219.

In an action against a carrier for injuries to a machine which plaintiff received and used notwithstanding the injuries, the measure of damages was the difference between the value of the machine at the place of delivery at the time and in the condition in which it should have arrived and its value at the time and in the condition it was delivered. *Missouri Pac. Ry. Co. v. Breeding*, 4 Willson, § 154, 16 S. W. 184.

In an action against a railroad for damages done to a thresher and consequent loss of profits resulting from time lost in having the thresher repaired, the measure of damages was the difference between the value of the thresher at its destination in its condition when it arrived there, and its value in the condition it would have been in, had it not been injured, in view of all the facts and circumstances of the case. *Chicago, R. I. & G. Ry. Co. v. Calvert*, 91 S. W. 825, 41 Tex. Civ. App. 236.

**b. Right of Owner to Abandon Goods**  
—Liability of Carrier as for a Conversion.

As a general rule, the fact that goods are injured in transportation, through causes for which the carrier is responsible, does not of itself justify the consignee in refusing to receive them, but he must accept them, and hold the carrier responsible for the injury. *Gulf, etc., R. Co. v. Jackson*, 4 App. Civ. Cases, § 47, 15 S. W. 128; *Baumback v. Gulf, etc., R. Co.*, 4 Tex. Civ. App. 650, 23 S. W. 693; *Gulf, etc., R. Co. v. Pitts & Son*, 37 Tex. Civ. App. 212, 83 S. W. 727; *Gulf, etc., R. Co. v. Everett*, 37 Tex. Civ. App. 167, 83 S. W. 257; *Gulf, etc., R. Co. v. Booton*, 4 App. Civ. Cases, § 230, 15 S. W. 909; *Houston, etc., R. Co. v. Harn*, 44 Tex. 628, 629.

In such the owner can not abandon them and go against the carrier as for a total loss, but is bound to receive the goods when tendered, and is only entitled to compensation to the

extent of the injury done them. *Houston, etc., R. Co. v. Harn*, 44 Tex. 628, 629.

If goods transported by a carrier are not so injured as to become worthless, the owner is bound to receive them, and is entitled to recover damages only for delay or injury. *Galveston, H. & S. A. Ry. Co. v. Van Winkle*, 3 Willson, Civ. Cas. Ct. App. § 445.

Where a carrier contracts to transport goods, it is bound to deliver them in good condition to the consignee, and if, during the transportation of a box of goods, some of them are stolen and the balance damaged, the owner is not bound to receive the remaining damaged portion thereof, but may maintain an action against the carrier for the value of all the goods as shipped. *Texas & P. Ry. Co. v. Martin*, 2 Willson, Civ. Cas. Ct. App. § 342.

Where property is injured in transportation through the negligence of the carrier, the owner can not refuse to accept it, and sue for its market value, but may recover only for the injury. *Gulf, C. & S. F. Ry. Co. v. Everett & Long*, 37 Tex. Civ. App. 167, 83 S. W. 257; *Missouri, etc., R. Co. v. Moore*, 47 Tex. Civ. App. 531, 105 S. W. 532.

In an action against a railroad for damage to goods in transit, it was proper not to permit plaintiff to show the market value where the damage occurred, the market value at destination being the proper test. *Texas & P. Ry. Co. v. Dishman & Tribble*, 38 Tex. Civ. App. 277, 85 S. W. 319.

Where a car load of chops was injured in transit by wetting, the fact that the consignee was in the wholesale trade, to which the chops, in their damaged condition, were unsuitable, did not entitle him to refuse to accept them and sue the carrier for their original value. *Gulf, C. & S. F. Ry. Co. v. H. B. Pitts & Son*, 37 Tex. Civ. App. 212, 83 S. W. 727.

Where the verdict in favor of the

consignee in an action for the value of damaged chops injured in transportation was the same as plaintiff would have been entitled to recover had he accepted and sold the chops for their reasonable value in their damaged condition, the fact that he unlawfully refused to accept the same and sued for their value, instead of the difference between the value as shipped and as delivered, was immaterial. *Gulf, C. & S. F. Ry. Co. v. H. B. Pitts & Son*, 83 S. W. 727, 37 Tex. Civ. App. 212.

#### 4. Market Value at Shipping Point.

See ante, "In General," XI, B, 1. As to constructive limitation to value at shipping point, see the title CARRIERS, ante, p. 304.

#### 5. Market Value at Destination.

In General.—See ante, "Loss or Non-delivery," XI, B, 2; "Injury," XI, B, 3.

#### 6. Value at Nearest Market.

The measure of damages for the destruction by a carrier of a collection of birds and animals in a museum is the value of such specimens at the nearest market, rather than the value of the owner's time in collecting them. *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 21 S. W. 411.

#### 7. Cost of Reproduction, Actual Value or Loss to Owner.

##### a. Nonmarketable Property Generally.

The property injured or destroyed being nonmarketable, the measure of damages, in case the property could be reproduced or replaced, would be the cost of reproducing or replacing the same as indicated by the testimony. But, if it is impracticable to replace any portion of the property, the value of the property to the owner would furnish the proper rule upon which he should recover. *T. & P. R. Co. v. Curry*, 64 Tex. 85, 87; *International, etc., R. Co. v. Simcock*, 81 Tex. 503, 17 S. W. 47; *Houston, etc., R. Co. v. Burke*, 55 Tex. 323, and *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491, 550.

The measure of damages in a suit against a carrier for loss of articles

having no market value and useful chiefly to owner, is the actual money value of articles to owner or the actual loss in money sustained by him. *International, etc., R. Co. v. Nicholson*, 61 Tex. 550, 553; *Gulf, etc., R. Co. v. Clark*, 2 App. Civ. Cases, § 512; *Texas, etc., R. Co. v. Cook*, 2 App. Civ. Cases, § 659.

The property having no market value at the point of destination, the measure of recovery is the actual value. *Texas, etc., R. Co. v. Wilson Hack Line*, 46 Tex. Civ. App. 38, 101 S. W. 1042, affirmed in 102 Tex. 595, no op.; *International, etc., R. Co. v. Nicholson*, 61 Tex. 550, 553.

"This must not be any fanciful price that he might for special reasons place upon them; nor, on the other hand, the amount for which he could sell them to others, but the actual loss in money he would sustain by being deprived of the value of the articles." *Houston, etc., R. Co. v. Ney* (Civ. App.), 58 S. W. 43; *International, etc., R. Co. v. Nicholson*, 61 Tex. 550.

The rule that the ordinary measure of damage for goods lost by carrier, where goods are not intended for market, is fair market value thereof at destination, does not apply where there is no market for them. *Texas, etc., R. Co. v. Taylor*, 3 App. Civ. Cases, § 192.

Where, in an action against a carrier for damages sustained in transit to goods which have no market value, the only evidence of value is the price at which plaintiff has sold similar articles, it is not error to instruct the jury to look to the original cost of the articles injured, in estimating plaintiff's damage. *Houston & T. C. R. Co. v. Ney* (Civ. App.), 58 S. W. 43.

Injuries to Museum.—See ante, "Value at Nearest Market," XI, B, 6.

##### b. Portraits, Paintings, etc.

In regard to a family portrait which might be reproduced, the artist and the subject both being still accessible, it

is not perceived why the owner would not be entitled to supply the lost portrait, and to recover of the carrier the cost. This is said to be the owner's right in case of lost articles generally. *Houston, etc., R. Co. v. Burke*, 55 Tex. 323, 343.

But when it is impracticable to replace the painting, and where the original cost was incurred at a time long past, and under circumstances differing widely from those affecting the present value, the charge should, at all events, be qualified or explained so as to guard the jury against making the first cost and the cost of replacing the exclusive measure of value. Damages because of the peculiar value attached by the owner to the portraits, the "pretium affectionis" as it is styled, is not allowable; but as works of art, paintings by artists of established reputation, of subjects calculated to give those paintings value in the eyes of those who buy such works of art, lost portraits have a value, aside from any peculiar value for family reasons. *Houston, etc., R. Co. v. Burke*, 55 Tex. 323, 343.

#### c. Household Goods and Furniture.

Where household goods in use are injured while being transported by a carrier, the measure of damages is the difference in their actual value just prior to and just subsequent to the injury, and not the difference in the market value of similar goods at the nearest second-hand stores. *Wells, Fargo Exp. Co. v. Williams* (Civ. App.), 71 S. W. 314.

Where household goods in use are injured during transportation by a carrier, the measure of damages is the difference in their actual value just prior and just subsequent to the injury, and not the difference in the market value of similar goods at second-hand stores at or nearest their destination. *Benedict v. Chicago, R. I. & P. Ry. Co.* (Civ. App.), 91 S. W. 811; *Wells Fargo Exp. Co. v. Williams* (Civ. App.), 71 S. W. 314.

In a suit for damages against a common carrier for the loss of second-hand clothing belonging to plaintiff, table furniture, and the like, having no special marketable value, and which were useful chiefly to the owner, it would seem that the measure of damages would be, not their loss at the place of intended delivery, but the value of such things to their owner; not a price suggested by his partiality for them, nor yet what he could sell them for, but the actual loss in money he would sustain by being deprived of such articles of domestic use. *International & G. N. Ry. Co. v. Nicholson*, 61 Tex. 550.

The measure of damages for the loss of household goods received by a carrier for shipment is their full market value at the point of destination, and not their rental value. *Missouri Pac. R. Co. v. Hewett*, 2 Willson, Civ. Cas. Ct. App. § 273.

Plaintiff brought this suit against the railroad company to recover the alleged value of certain household goods lost by said company while in transit on its line of railroad, and for the rental value of a sewing machine which was among said lost goods. Held, that the suit was not to recover damages for delay in transporting and delivering the goods, but damages for failing entirely to deliver the goods, and that the only damages recoverable was the fair market value at the point of destination of goods lost, with legal interest thereon from the date when the goods should have been delivered. *Missouri Pac. Ry. Co. v. Hewett*, 2 Willson, Civ. Cas. Ct. App. § 273.

On the failure of a common carrier to deliver second-hand bedding and clothes which he has contracted to transport, the owner is entitled to recover the value of the goods to him, not any fanciful price that he might for special reasons place on them, nor, on the other hand, the amount for which he could sell them to others, but the actual loss in money he would sus-



tain by being deprived of articles so specially adapted to the use of himself and family. *Gulf, C. & S. Ry. Co. v. Clark*, 2 Willson, Civ. Cas. Ct. App. § 514.

Where goods lost by a common carrier while being transported by it have no special marketable value, but are useful chiefly to the owner, such as second-hand clothing, the measure of damages is the actual loss in money sustained by the owner by being deprived of such articles. *Texas & P. Ry. Co. v. Cook*, 2 Willson, Civ. Cas. Ct. App. § 661.

#### **d. Second-Hand Goods, Clothing and Vehicles.**

See ante, "Household Goods and Furniture," XI, B, 7, c.

**Second-Hand Vehicles.**—In an action for the value of second-hand vehicles lost by a carrier, where they have no market value, the measure of recovery is their actual value. *Texas & P. Ry. Co. v. Wilson Hack Line*, 46 Tex. Civ. App. 38, 101 S. W. 1042, affirmed in 102 Tex. 595, no op.

#### **Questions for Jury—Evidence.**

Where there is no market value for the article in question, alleged to have been lost through carrier's negligence, the value must be ascertained by the jury as a fact, considering the circumstances which would have affected the market value had there been one. *G. H. & S. A. R. Co. v. Watson*, 1 App. Civ. Cases, § 813. See post, "Relative Value of New and Second-Hand Articles," XI, D, 4.

In ascertaining the value of household goods in use for the purpose of ascertaining the damages sustained by the injury or destruction thereof, the original cost of the property, the manner in which it has been used, its general condition and quality, the percentage of its depreciation from use, damage, age, decay, or otherwise, are all proper to be submitted to the jury. *Wells, Fargo Exp. Co. v. Williams* (Civ. App.), 71 S. W. 314.

In an action for the value of a consignment of second-hand vehicles lost by a carrier, where they had no market value, the jury, in determining their actual value, could take into consideration their cost when new and at second-hand, what plaintiff paid for them, and their condition when they left the seller, and all facts disclosing their history which would enable them to determine what they were fairly worth. *Texas & P. Ry. Co. v. Wilson Hack Line*, 101 S. W. 1042, 46 Tex. Civ. App. 38.

#### **8. Expenses of Owner.**

**Sending for Goods.**—As an element of damages for improperly withholding freight, plaintiff should be allowed expenses incurred in sending for it. *Gulf, etc., R. Co. v. Loonie*, 84 Tex. 259, 263, 19 S. W. 385.

**Expenses in Mitigating or Averting Owner.**—The rule that the owner of property which is injured in transportation must exert himself to prevent damages or render the injury as slight as possible, and, when he has done so, may recover his reasonable and necessary labor or expense performed or incurred for the purpose, has no application where he had been allowed to recover the general measure of damages. *St. Louis, etc., R. Co. v. Foster* (Civ. App.), 89 S. W. 450, 451.

#### **9. Freight, Allowance and Deduction.**

Where recovery is based on the value of goods at destination, freight charges unpaid should be deducted; and if paid of course the value of the property, without reference to the charges, is the criterion. *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 606, 16 S. W. 441, citing *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749; *Carter v. International, etc., R. Co.* (Civ. App.), 93 S. W. 681; *Missouri, etc., R. Co. v. Rines & Co.*, 37 Tex. Civ. App. 618, 84 S. W. 1092; *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209, 213.

The measure of the plaintiff's dam-

ages is the value of the lost goods at the time and place where they should have been delivered, with interest, less the proper charges of transportation; and, the charges of transportation having already been paid, it is error for the court to permit plaintiff to recover the amount so paid in addition to the value of the goods, with interest. *Galveston, H. & S. A. Ry. Co. v. Ball*, 80 Tex. 602, 16 S. W. 441.

The object of the law is to give compensation for the injury, and no more. The carrier is compelled to pay the enhanced value of the property at the place of delivery. The owner, therefore, in recovering this value at the terminal point receives in substance and effect the benefits of the transportation as fully as if the goods had been transported and delivered to him, in which event he would have been bound to pay the cost of transportation. For these reasons, perhaps, the law gives the carrier the benefit of the freight charges in assessing the damages. *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 607, 16 S. W. 441.

This is liberal in favor of the owner of the goods, because generally it will give him the full benefit of his speculation in commerce, without the trouble and hazards of resale at the market to which it is to be shipped. He recovers more from the carrier, usually, than he could from an insurer's office. For the insurer is only responsible according to the invoice prices and charges. The freight then should be deducted, although the articles did not arrive, or were not delivered. There may be variations and qualifications to this rule of damages, dependent on circumstances. *Fowler v. Davenport*, 21 Tex. 626, 627, 636.

In an action against a carrier for the loss of goods delivered to it for transportation, the freight charges can be deducted from the amount of damages only in case it has not been actually paid. *International & G. N. Ry. Co. v. Nicholson*, 61 Tex. 550.

So held in a suit for the loss of articles having no marketable value. *International, etc., R. Co. v. Nicholson*, 61 Tex. 550, 554.

In such case when no sum was alleged or proved by the shipper and no amount was specified in the bill of lading, it was not error to fail to charge on the subject. *International, etc., R. Co. v. Nicholson*, 61 Tex. 550.

Here there was no proof whatever as to the amount agreed upon or as to whether or not it had been paid. The bill of lading left the amount blank, showing that no sum had been agreed upon by the parties. What the rate of charge in such cases was lay peculiarly within the knowledge of the defendant, and should have been proved by the company if it had not been paid. Without such proof the jury could not have deducted the freight, and there was no necessity for any charge upon that subject. *International, etc., R. Co. v. Nicholson*, 61 Tex. 550, 554.

Only when plaintiff recovers against a carrier the value of the goods at the point of their destination can the freight unpaid be deducted in estimating the damages. *Missouri Pac. R. Co. v. William Barnes & Co.*, 2 Willson, Civ. Cas. Ct. App. 576.

**Where the value found by the court was the cost and value of the property at the initial point and not the destination the carrier would not perhaps be entitled to the freight on property it never delivered.** The measure of damages in that contingency would be the actual cost or value of the goods lost and the cost of transportation, with interest, if no market value was shown at the place of delivery. *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 607, 16 S. W. 441.

Where plaintiff recovers against a common carrier the value of the goods at the point of their shipment, in an action for the loss thereof or damage thereto, it is proper to add thereto

the amount of freight paid thereon by plaintiff. *Missouri Pac. Ry. Co. v. Barnes*, 2 Willson, Civ. Cas. Ct. App. § 579.

#### 10. Interest.

##### a. Liability for.

It has been generally held by the courts that the jury may allow interest upon damages arising out of the breach of a contract made by a carrier for the carriage and delivery of goods. *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209; *Wolfe v. Lacy, etc., Co.*, 30 Tex. 349, 351; *Watkins v. Junker*, 90 Tex. 584, 587, 40 S. W. 11, reversing 38 S. W. 1129; *Rio Grande R. Co. v. Cross*, 5 Tex. Civ. App. 454, 23 S. W. 529, affirmed in 93 Tex. 648, no op.; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Carter v. International, etc., R. Co.* (Civ. App.), 93 S. W. 681. But see *Texas, etc., R. Co. v. Martin*, 2 App. Civ. Cases, §§ 342, 343; *Texas, etc., R. Co. v. Davis*, 2 App. Civ. Cases, § 191.

In a suit for injury to property by a carrier, interest is not recoverable, *eo nomine*, but may be allowed by way of indemnification, as a part of the damages; it is an element of the damages, to be included as such by plaintiff in his claim and by the jury in the verdict. *San Antonio, etc., R. Co. v. Addison*, 96 Tex. 61, 70 S. W. 200.

In an action against a carrier to recover for goods lost, it was proper to allow interest on the amount of the damages from the day of the loss. *Missouri Pac. Ry. Co. v. Barnes*, 2 Willson, Civ. Cas. Ct. App. § 581; *Texas, etc., R. Co. v. Payne*, 15 Tex. Civ. App. 58, 60, 38 S. W. 366; *Galveston, etc., R. Co. v. Efron* (Civ. App.), 38 S. W. 639.

The rule allowing interest in case of nondelivery and in cases in which goods are delivered by the carrier in a damaged condition depends on the same principle; and in either case has

for its purpose the giving of compensation or indemnity to the injured party. To give indemnity, the owner must be placed as near as may be in the same position he would have occupied had the carrier complied with his contract, which was that he would transport the cotton in the condition in which he received it without unnecessary delay. *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209, 213.

It was proper to instruct the jury to compute legal interest upon the amount of damages found from date of the loss. *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716.

It was proper to allow interest on the damages from the time they accrued to date of judgment; and there was no error in rendering judgment for principal and interest to date of judgment, and then in providing that this combined sum of principal and interest should bear legal interest from date of judgment. *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209, 212; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 111, 17 S. W. 834; *Heidenheimer v. Johnson & Co.*, 76 Tex. 200, 206, 13 S. W. 46; *International, etc., R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186, 191, 23 S. W. 754.

**Interest, as a legal incident**, to the damage for loss or injury of goods shipped should not be allowed; but it is settled that interest by way of punitive damages for any fraud, delinquency, or injustice done by the carrier to the owner may be awarded. Upon this ground interest is not allowed as a legal incident or natural consequence upon the amount that may be assessed by the jury; but as punitive or vindictive damages for the fraud, delinquency, or injustice done on the part of the carrier, and as a punishment on him for such willful wrong or gross neglect. *Fowler v. Davenport*, 21 Tex. 626, 635; *Wolfe v. Lacy, etc., Co.*, 30 Tex. 349, 350, 351; *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209, 213.

This rule was followed and interest allowed in the case of *Wolfe v. Lacy, etc., Co.*, 30 Tex. 349, 350, which was a suit against a common carrier for injury done to cotton while in course of transportation. *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209, 212.

Where interest has been allowed upon a breach of a bill of lading, as a legal incident, it has been where the distinction between the allowance of interests upon contracts in which an agreement to pay interest is expressed or can be implied in which it is the duty of the court to instruct the jury to give interest, it being a matter of law; and the allowance of interest under circumstances, by way of mulct or punishment for some fraud, delinquency or injustice of the debtor or for some injury done by him to the creditor in which cases it is matter of fact or damages in other cases and allowed by the jury by analogy to interest; it has not been adverted to or the question was not raised. *Fowler v. Davenport*, 21 Tex. 626, 627, 637.

Interest on the amount of damage to goods while in the hands of a carrier may be allowed as punitive damages, where he was guilty of gross negligence. *Wolfe v. Lacy*, 30 Tex. 349.

Interest should not be allowed on damages from a loss by a common carrier, unless there is fraud, delinquency, or injustice on his part. *Fowler v. Davenport*, 21 Tex. 626.

Where property is lost or destroyed while in charge of a common carrier, where there is any fraud, delinquency, or injustice on the part of the carrier, interest may be allowed on the value thereof, by way of punishment therefor. *Texas & P. Ry. Co. v. Martin*, 2 Willson, Civ. Cas. Ct. App. § 343.

A carrier contracted to transport goods, and, when the owner called for them at the place of destination, some of the goods had been stolen, and the balance were in a damaged condition.

The owner was not permitted to take the goods without paying full freight thereon for the goods which had been abstracted, which he declined to do, and recovered a judgment against the carrier for the value of the goods shipped, with interest. Held, that the judgment would not be disturbed because, it awarded interest, because of such unjust and unreasonable exaction made on plaintiff when he demanded his goods. *Texas & P. Ry. Co. v. Martin*, 2 Willson, Civ. Cas. Ct. App. § 343.

#### **Need Not Be Asked in Pleadings.**

—Interest may be allowed on the amount of damages sustained, though it is not asked for in the pleadings. *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *International, etc., R. Co. v. Lewis* (Civ. App.), 23 S. W. 323, 324; *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209.

In an action against a railroad for damages to a shipment of grain, interest can not be recovered as an element of damages sustained, unless it is specifically pleaded, or the amount sued for is sufficient to cover the damages allowed as interest and such other sum as may be included in the recovery. *Missouri, etc., R. Co. v. Dawson Bros.* (Civ. App.), 84 S. W. 298.

**Recovery for the full amount claimed can not be increased by interest thereon** from date of accrual of the cause of action, because not authorized by the pleading; and error in allowing such increase is properly raised by an assignment that the judgment was not authorized by the pleadings. *San Antonio, etc., R. Co. v. Addison*, 96 Tex. 61, 70 S. W. 200. See, also, *Missouri, etc., R. Co. v. Dawson Bros.* (Civ. App.), 84 S. W. 298.

The verdict of the jury upon issues of fact submitted to them constitutes the sole basis for the judgment; the court can not add to their award of damages for injuries to shipment by a carrier, interest on the amount from

the date of the injury. *San Antonio, etc., R. Co. v. Addison*, 96 Tex. 61, 70 S. W. 200.

The appellate court, being authorized to render such judgment as the court below should have done (Rev. Stat., art. 1027), when plaintiff, in addition to a recovery on verdict, of the full amount claimed, has judgment for interest thereon from the accrual of his cause of action, should reverse and render judgment for only the amount claimed and awarded by the verdict. *San Antonio, etc., R. Co. v. Addison*, 96 Tex. 61, 70 S. W. 200.

#### b. Rate.

Where, after the conversion of property, the legal rate of interest is reduced, the owner is entitled to the legal rate from the conversion to the time the rate is changed, and to the reduced rate from then to the date of the trial. *Gulf, etc., R. Co. v. Humphries*, 4 Tex. Civ. App. 333, 23 S. W. 556.

Where, in an action to recover for goods lost in transitu over defendant railroad company's road, there was judgment for plaintiff, the court properly allowed interest on the value of the goods at 8 per cent. until the law changing such rate to 6 per cent. went into effect, since plaintiff was entitled to the current rate of legal interest on the value of the goods lost. *Rio Grande R. Co. v. Cross*, 5 Tex. Civ. App. 454, 23 S. W. 529; *Same v. Munoz* (Civ. App.), 23 S. W. 531; *Same v. Petitpain*, Id; *Same v. Cross* (Civ. App.), 23 S. W. 1004; *Gulf, etc., R. Co. v. Gray* (Civ. App.), 24 S. W. 921.

#### 11. Mental Anguish.

The suit was for damages for injury to a museum, delivered to the defendant for shipment to Dallas for exhibition at the fair, and loss of profits by reason of failure to transport and deliver. The petition alleged that plaintiff "lost all opportunity to make money at said point by exhibiting his collection of birds, animals, etc., and

lost his own time, besides the expense of keeping and paying his employees, and his trouble, vexation, and worry." Plaintiff testified, without objection, that he experienced great mental anxiety on account of the delay of the museum. Under this state of facts, the jury should have been told that the plaintiff could not recover for his mental anguish. *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 21 S. W. 411.

#### 12. Profits.

See post, "Profits," XI, B, 12.

The retail price, where a quantity of merchandise is sued for, can not properly measure the value. The retail price would be unjust, for the merchant in fixing that price takes into consideration not only the first cost of the goods, but store rent, clerk hire, insurance, and a probable amount of bad debts, and adds to all these a percentage of profit. *Texas, etc., R. Co. v. Payne*, 15 Tex. Civ. App. 58, 33 S. W. 366; *Heidenheimer & Co. v. Schlett*, 63 Tex. 394.

This measure does not exclude the enhanced value which may have attached to the goods at the place of conversion over what may have been their purchase price in the distant market in which they may have been bought, though this enhanced value may be properly described as profit, but the value recovered must be measured by the exact condition of the merchandise at the time and the place of conversion. *Blum v. Merchant*, 58 Tex. 400, 404; *Texas, etc., R. Co. v. Payne*, 15 Tex. Civ. App. 58, 60, 38 S. W. 366.

The proper measure excludes any estimate of profits to be realized from sales at retail, and in a condition different from that in which they were at the time of conversion. *Tucker v. Hamlin*, 60 Tex. 171, 174; *Texas, etc., R. Co. v. Payne*, 15 Tex. Civ. App. 58, 60, 38 S. W. 366.

**Evidence.**—See post, "Retail Price and Profits," XI, D, 1, b, (5).

**13. Exemplary Damages.**

Where the driver of an express company's wagon refused to deliver an express package, with malicious disregard of the rights of the consignee, and the express company ratified his act, the consignee was entitled to exemplary damages. *Gary v. Wells, Fargo & Co.'s Express* (Civ. App.), 40 S. W. 845.

In an action for conversion of a car of coal, in which exemplary damages were claimed, it was error to refuse defendant's special charge that, if the coal was taken through error in marking the car, the jury should find for the defendant as to any claim for exemplary damages, the issue having been raised by the evidence. *Gulf, etc., R. Co. v. Cleburne Ice, etc., Co.* (Civ. App.), 79 S. W. 836.

In trover for conversion of a car of coal, the plaintiff is entitled to show, on the issue of exemplary damages, that defendant had seized and appropriated other cars of coal than the one involved in the suit. *Gulf, etc., R. Co. v. Cleburne Ice, etc., Co.* (Civ. App.), 79 S. W. 836. See ante, "Conversion of Property by Carrier," XI, B, 2, b.

**14. Remote and Speculative Damage.**

There can be no recovery of damages under an allegation that, by reason of defendant's failure to deliver lumber, plaintiff was unable to build a house for which she would have received certain rent, this being too remote. *Alderson v. Gulf, C. & S. F. Ry. Co.* (Civ. App.), 23 S. W. 617, affirmed in 93 Tex. 678, no op.

The following charge was given: "If you find that by reason of the total or partial loss of some of the articles belonging to the collection or museum, the whole collection is depreciated in value, and rendered unfit for profitable exhibition, you will consider such incidents and results, for the purpose of determining the actual damage you find the plaintiff has sustained." Under the evidence in the case, this

charge was error. Such depreciation could only result from a general lessening of interest in the museum, by reason of the loss of certain specimens, and as an element of damage it is too uncertain and speculative. *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 21 S. W. 411.

**15. Special Damages.****a. Liability—Necessity for Notice.**

To render a carrier liable for special damages growing out of circumstances producing a peculiar loss to plaintiffs by delay of transportation, notice at the time of shipment should have been given the carrier of such facts and circumstances so that it could protect itself by the use of care and diligence corresponding to any supposed necessity for its exercise. *Galveston, Houston & H. R. Co. v. Bell*, 2 Posey, Unrep. Cas. 517; *Harmon v. Callahan* (Civ. App.), 35 S. W. 705, 706; *Missouri, etc., R. Co. v. Allen*, 39 Tex. Civ. App. 236, 87 S. W. 168; *Missouri, etc., R. Co. v. Belcher*, 89 Tex. 428, 35 S. W. 6; *Gulf, etc., R. Co. v. Pickens* (Civ. App.), 58 S. W. 156.

In action against an express company for damages for failure to deliver an order-book accompanying a shipment of fruit trees, and which was necessary in order that the trees might be delivered to customers as ordered, recovery can not be had unless the company is shown to have had notice that the order-book was in the package and knew that it was necessary for consignee to have the book in order to deliver the trees, and failure to so charge is error. *Wells, etc., Co. v. Battle*, 5 Tex. Civ. App. 532, 534, 24 S. W. 353.

The suffering of plaintiffs' families, from cold and inconvenience, by the failure of defendant to deliver them a bill of lading of clothing and household goods shipped, is not the natural and proximate result of a breach of the shipping contract, where defendant was not informed by plaintiffs of their

necessitous condition, and the consequent sufferings from cold that might ensue from their inability to buy other clothing and goods if those shipped were not promptly delivered. *St. Louis S. W. Ry. Co. of Texas v. May* (Civ. App.), 44 S. W. 408.

#### **b. What Constitutes.**

##### **(1) In General.**

The loss sustained by consignor by reason of carrier's failure to deliver at destination named in bill of lading, held special. *Gulf, etc., R. Co. v. Pickens* (Civ. App.), 58 S. W. 156.

##### **(2) Profits.**

In an action against a railroad for damages done to a thresher and consequent loss of profits resulting from time lost in having the thresher repaired, plaintiff was entitled to recover damages sustained by reason of not being able to thresh all the grain he had contracted to thresh, where it appeared that he had shipped the thresher for the purpose of threshing wheat, and had made contracts to thresh certain crops, and had notified defendant's agent of that fact prior to the shipment. *Chicago, R. I. & G. Ry. Co. v. Calvert*, 91 S. W. 825, 41 Tex. Civ. App. 236.

The plaintiff notified defendants, when he shipped the museum, of the purpose for which it was being shipped; defendant is therefore liable for such damages as plaintiff might probably sustain by reason of the failure to have the museum there for exhibition, in the way of lost profits; not *eo nomine* as net profits, but as damages, to be determined by ascertaining the probable net profits. And in this case, the court having authorized the jury to allow the plaintiff for expenses incurred by himself and his employees, he should have defined net profits. The expense of the trip to Dallas, and board there, should have been deducted from the gross profits, if recovery of net profits *eo nomine* was allowed. *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 21 S. W. 411.

#### **c. Pleading and Proof.**

Where the property is to be delivered in compliance with a contract, the damages that might be sustained are special in character, and the pleadings and evidence must show that such damages were contemplated by the transportation company when the property was received for shipment. *Houston, etc., R. Co. v. Brown*, 33 Tex. Civ. App. 237, 238, 76 S. W. 580; *Gulf, etc., R. Co. v. Gilbert*, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320; *Wells, etc., Co. v. Battle*, 5 Tex. Civ. App. 532, 534, 24 S. W. 353; *Gulf, etc., R. Co. v. Pickens* (Civ. App.), 58 S. W. 156, 157.

To lay a basis for greater damage against a carrier for injury to or non-delivery of property shipped than the difference in value when shipped and when the goods are received or lost, plaintiff must allege such special damages as will render the carrier amenable to damages beyond the general rule. *Galveston, Houston & H. R. Co. v. Bell*, 2 Posey, Unrep. Cas. 517.

Where, in an action against a carrier for failure to deliver cotton at the destination named in the bill of lading, the consignor claimed damages suffered by reason of the consignee's refusal to accept after having procured samples, which he would not have done if the cotton had been delivered at the proper place, plaintiff could not recover, in the absence of proof that the carrier was instrumental in permitting the consignee to procure the samples, or that it had any knowledge of the contract between plaintiff and the consignee, since such damages were special, and not the proximate result of the carrier's breach of contract. *Gulf, C. & S. F. Ry. Co. v. Pickens* (Civ. App.), 58 S. W. 156.

#### **C. DUTY OF OWNER TO MITIGATE OR AVERT.**

See ante, "Expenses of Owner." XI. B, 8.

A shipper of fruit trees that became

injured during the transportation can not recover for such further injuries as he might have averted by properly caring for the trees. *Missouri Pac. Ry. Co. v. Rushin*, 3 Willson, Civ. Cas. Ct. App. § 318.

#### D. EVIDENCE.

##### 1. Market Value at Destination.

###### a. Presumptions and Burden of Proof.

A court can not presume that goods lost by a carrier had no market value in place of destination, and a finding "of full value" by jury will be deemed the value at that place. *Galveston, etc., Ry. Co. v. Ball*, 80 Tex. 602, 607, 16 S. W. 441.

###### b. Admissibility.

##### (1) Market Reports.

Testimony of a witness as to the market value of property shipped at a certain point, based upon daily reports of the market at that point, is not hearsay evidence. *International, etc., R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186, 23 S. W. 754; *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 301, 12 S. W. 815. See the title HEARSAY EVIDENCE.

##### (2) Amount Paid by Consignee in Settlement.

Where the consignee of corn sold it, and the purchaser paid for it before delivery, and subsequently complained that the corn was damaged, and the consignee compromised a suit with him, in an action by the consignee against the carrier for negligence in causing the damage to the corn defendant could show the amount paid by the consignee in settlement of the action against him, the consignee being only entitled to such compensation as would make him whole. *St. Louis, etc., R. Co. v. McDermitt Grain Co.* (Civ. App.), 87 S. W. 355.

##### (3) Value of Whole Shipment Where Loss Partial.

In a suit against a carrier for loss of cotton by fire, testimony as to the value of the whole amount destroyed

is admissible as showing the value of the part involved in the suit. *Missouri Pac. R. Co. v. Sherwood, etc., Co.*, 84 Tex. 125, 136, 137, 19 S. W. 455.

##### (4) Cash Value at Time of Loss.

To prove the value of the cotton lost in transitu, one of the consignors testified as to its cash value, at the time of the loss, per pound gross. The weights were given in the bill of lading, and they, together with the classification of the cotton, were obtained from the invoice of the cotton shipped. The classification therein was fixed on samples furnished the consignors by their sampler in accordance with a custom of trade, which also allowed the seller to make complaint in case he was dissatisfied with the classification. No such complaint was made. The invoice was not produced, and no objection was made to the statement of its purport by the witness. Held, that the evidence was properly admitted to show value. *Missouri Pac. Ry. Co. v. Gernan*, 84 Tex. 141, 19 S. W. 461.

##### (5) Retail Price and Profits.

Evidence of the amount that might be realized from a sale of the goods at retail, or as to the price they would have sold for at public auction, is inadmissible. *Texas & P. Ry. Co. v. Payne*, 38 S. W. 366, 15 Tex. Civ. App. 58; *Miller v. Jannett*, 63 Tex. 82, 87; *Schooler, etc., Co. v. Hutchins*, 66 Tex. 324, 332, 1 S. W. 266.

Evidence of what profit might be derived from such sale was inadmissible. *Texas, etc., R. Co. v. Payne*, 15 Tex. Civ. App. 58, 60, 38 S. W. 366; *Miller v. Jannett*, 63 Tex. 82, 87.

##### (6) Cost of Repairs.

In an action against a railroad for damages done to a thresher, and consequent loss of profits resulting from time lost in having the thresher repaired, where it did not distinctly appear that the thresher had a market value at destination, evidence, as to the cost of repairing the thresher, was



properly admitted. *Chicago, R. I. & G. Ry. Co. v. Calvert*, 91 S. W. 925, 41 Tex. Civ. App. 236.

**c. Weight and Sufficiency.**

In a suit for injury to property by fault of a carrier, in the absence of what its value would have been at its destination had it been properly transported, a verdict can not stand. *Galveston, etc., R. Co. v. Silegman* (Civ. App.), 23 S. W. 298, 300.

Evidence by plaintiff as to the market value of goods, destroyed in transit, at their destination, is sufficient to sustain a finding in accordance with such evidence, although witnesses for defendant who saw the goods, or part of them, at the point of shipment, estimated the value of those which they saw at a much less figure than plaintiff's estimate. *Gulf, C. & S. F. Ry. Co. v. Roberts* (Civ. App.), 85 S. W. 479.

Where carriers sold a car load of potatoes without giving the buyers an opportunity to inspect them, the amount received at the sale does not show the market value of the potatoes. *Carter & Corey v. International & G. N. Ry. Co.* (Civ. App.), 93 S. W. 681.

In an action for the value of cotton lost in transitu, a witness for plaintiff testified, with reference to the value of the cotton, that the value of 473 bales, of which the cotton in the suit was a part, was in excess of \$24,649.50. Held, that the testimony, while admissible, was not sufficient to prove value, in the absence of facts at least showing the average weight, value, and quality of the cotton, or showing that such average weight, value, or quality could not be ascertained. *Missouri Pac. Ry. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643.

In an action against a carrier for conversion of 222 bales of cotton, in which it appeared that plaintiff was entitled to recover for 3 bales, the fact that the bales were of different weights and classification, and that it was not

shown what the weight and classification of the 3 bales were, did not constitute a failure of proof as to the value of the 3 bales, since their value might be regarded as 3-222 of the entire value; the burden being on the carrier to show that they were of less than the average value, if such was the case. Judgment (Civ. App.), 72 S. W. 1033, modified. *First Nat. Bank v. San Antonio & A. P. R. Co.*, 77 S. W. 410, 97 Tex. 201.

The railway could not defeat recovery on the ground that there was no proof of the value of the particular bales in question—a few out of a large number whose aggregate value was proved; being in possession of defendant and never having been in possession of plaintiff, the latter could recover on the basis of the average price of the lot, per bale, unless those in question were shown to be of less value. *First Nat. Bank v. San Antonio, etc., R. Co.*, 97 Tex. 201, 77 S. W. 410, affirming in part and reversing in part 72 S. W. 1033.

Where there is no evidence to show that the machine injured was delivered to the carrier in good condition, or that it was injured while in the carrier's possession, a verdict for plaintiff for \$137 is unsupported by the evidence, though he testifies that at the time of the trial—two years after the receipt of the machine—it is worthless, but that he has used it during that time with only \$37.50 paid for repairs. *Missouri Pac. Ry. Co. v. Breeding*, 4 Willson, Civ. Cas. Ct. App., § 154, 16 S. W. 184.

In an action to recover for injuries to goods shipped with defendants, evidence that the plaintiff had been "damaged to the amount of at least \$200" was sufficient to show the amount of plaintiff's damage. *Hall v. Morrison*, 20 Tex. 179.

In an action to recover for cotton shipped over defendant's road, and alleged to have been destroyed by de-

fendant's negligence, proof of the price at which the cotton was contracted to be sold is sufficient to show the market value at its destination. *Galveston, etc., R. Co. v. Efron* (Civ. App.), 38 S. W. 639.

**Market Value in Bulk Equal to Retail Price.**—The testimony as to the market value of stoves damaged in transportation was not restricted to their price at retail. The testimony showed that the stoves could not be had in Llano; that the only place where they could be gotten was in St. Louis; that the supply in Llano was not equal to the demand for such goods at the time, and that, if said goods had not been damaged, their actual market value at Llano at the time they were delivered would have been in the aggregate the sum of \$438; and that at that time they could have been sold for that amount. It was held that the testimony as to the market value of the stoves was sufficient to justify a judgment for the market value. Their market value in bulk, under the circumstances, might have been equal to the amount they would have brought at retail prices in the aggregate. *St. Louis, etc., R. Co. v. Watkins*, 45 Tex. Civ. App. 321, 100 S. W. 162.

## **2. Intrinsic Value or Value at Other Point.**

The general measure of damages for the loss of goods by a common carrier is the market value of the goods at the place of destination at the time they should have been delivered; and, unless it is shown that they had no market value, evidence of their intrinsic value, or of their market value at some other place—as the point of shipment—is incompetent. *Gulf, C. & S. F. Ry. Co. v. Roberts* (Civ. App.), 85 S. W. 479.

In an action to recover for household goods destroyed in transportation, evidence of their intrinsic value held properly admitted. *Missouri, etc., R. Co. v. Davidson*, 25 Tex. Civ. App. 134, 60 S. W. 278.

In an action by the consignee against the carrier for failure to deliver goods shipped, where there was evidence that the goods had no market value at the place of delivery, it was proper to admit evidence of the amount paid for them in other cities, where it was also shown that the prices paid were those charged by dealers in such goods, and that the goods were reasonably worth the same amount at the place of delivery. *New York & T. S. S. Co. v. Weiss* (Civ. App.), 47 S. W. 674.

## **3. Original Cost and Cost of Reproduction.**

**Admissibility.**—In an action for loss of a family portrait the original cost and the probable expense of reproduction may be considered in estimating the damages. *Houston & T. C. R. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808.

**Weight and Sufficiency.**—In an action against a carrier for household goods destroyed in transportation, damages will not be held excessive merely because plaintiff's testimony as to their value seems improbable. *Missouri, etc., R. Co. v. Davidson*, 25 Tex. Civ. App. 134, 60 S. W. 278.

## **4. Relative Value of New and Second-Hand Articles.**

In an action against a carrier for the loss of second-hand goods delivered to it for transportation and lost, it is not error to exclude a question asking the witness "what per cent. was lost on goods by being used, or the value of second-hand goods." *International & G. N. Ry. Co. v. Nicholson*, 61 Tex. 550.

In a suit to recover the value of second-hand clothing, lost by carrier in course of transportation, it was not error to exclude the testimony of a witness as to the relative value of new and second-hand goods, when the witness stated that he was a dealer in new goods only and had no knowledge as an expert as to the value of second-

hand clothing. *International, etc., R. Co. v. Nicholson*, 61 Tex. 550, 551.

Carriage dealers and repairers, shown to have sufficient knowledge of the cost and value of second-hand vehicles, were competent to testify as experts in an action against a carrier for the loss of a shipment of second-hand vehicles. *Texas, etc., R. Co. v. Wilson Hack Line*, 46 Tex. Civ. App. 38, 101 S. W. 1042, affirmed in 102 Tex. 595, no op.

In an action against a carrier for the value of a shipment of second-hand vehicles, evidence of the plaintiff's president and witnesses, called by him as to the value of the vehicles new, and their value second-hand, at the time they should have reached the purchaser, is not objectionable as invading

the province of the jury. *Texas, etc., R. Co. v. Wilson Hack Line*, 46 Tex. Civ. App. 38, 101 S. W. 1042, affirmed in 102 Tex. 595, no op.

#### 5. Payment of Freight.

In an action for damages to property in transportation, it is competent for plaintiff to prove payment of freight charges, in order that the charge should not be deducted from the difference in value at destination in the condition in which the property arrived and that in which it was delivered. *Missouri, etc., R. Co. v. Jarrell*, 38 Tex. Civ. App. 425, 86 S. W. 632, affirmed in 101 Tex. 649, no op.

#### 6. Profits.

See ante, "Retail Price and Profits," XI, D, 1, b, (5).

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BY CHAS. W. FOURL.

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### CROSS REFERENCES.

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 1; ACTIONS, vol. 1, p. 113; AMENDMENTS, vol. 1, p. 203; APPEAL AND ERROR, vol. 1, p. 313; CARRIERS, ante, p. 304; CARRIERS OF GOODS, ante, p. 502; CARRIERS OF PASSENGERS; COMPROMISE AND SETTLEMENT; CONFLICT OF LAWS; CONFUSION OF GOODS; CONNECTING CARRIERS; CONSOLIDATION OF ACTIONS; CONSTITUTIONAL LAW; CONTRACTS; CONVERSION AND RECONVERSION; CORPORATIONS; COSTS; COURTS; DAMAGES; DECLARATIONS AND ADMISSIONS; DISMISSAL, DISCONTINUANCE AND NONSUIT; EXPERT AND OPINION EVIDENCE; FENCES; FOREIGN CORPORA-

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As to bills of lading, see the title CARRIERS, ante, p. 304. As to connecting carriers, see the title CONNECTING CARRIERS.

### **I. Nature of Liability.**

Carriers of animals were, at one time, held to be merely private carriers, subject only to such liabilities as were imposed on such bailees, or as were fixed by contract of parties, but this has ceased to be the law. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 169, 2 S. W. 574.

#### **Common Carriers Subject to Exception as to Inherent Vice of Cattle.**

—In this state a carrier assumes the same degree of liability in the carriage of livestock as it does in any other class of freight, subject to such exceptions, on account of the inherent nature of the property, as justice and common fairness would impose. *St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1131, 1136; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Missouri Pac. R. Co. v. Harris*, 1 App. Civ. Cases, § 1257; *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611, 8 S. W. 312; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567; *Gulf, etc., R. Co. v. Baird*, 75 Tex. 256, 266, 12 S. W. 530.

**Railroad an Insurer.**—A railroad receiving stock for transportation becomes an insurer. *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 317, 4 S. W. 567; *Missouri, etc., R. Co. v. Russell*, 40 Tex. Civ. App. 114, 117, 88 S. W. 379, affirmed in 101 Tex. 649, no op.

But, as carriers of live stock they are not insurers of animals against injuries arising from or attributable to the natural or proper vices, or the inherent natural propensities and habits of the animals themselves, and which could not be prevented by foresight, vigilance

and care. See, also, to the same effect *Hutchinson on Carriers*, § 221. *Texas, etc., R. Co. v. Hunter & Co.*, 47 Tex. Civ. App. 190, 193, 104 S. W. 1075; *Missouri, etc., R. Co. v. Russell*, 40 Tex. Civ. App. 114, 117, 88 S. W. 379, affirmed in 101 Tex. 649, no op. See post, "Inherent Vice—Delay Contributing to Damage," VII, C, 4; "Inherent Vice of Animals," VIII, D, 3.

#### **Modification of Liability by Contract.**

—Whenever a railroad company receives live stock, to be transported over its road from one place to another, such company assumes all the responsibility of a common carrier, except so far as such responsibilities may be modified by special contract. *Missouri Pac. Ry. Co. v. Graves*, 2 Willson, Civ. Cas. Ct. App. § 680. See post, "Limitation of Liability," X.

### **II. Duty to Receive and Carry.**

A railway company is required by statute to receive and forward freight, including live stock delivered to it for transportation. *Ft. Worth, etc., R. Co. v. Galton*, 45 Tex. Civ. App. 67, 100 S. W. 166.

But this duty of the carrier to accept and carry the goods may arise either upon his common-law obligation to that effect or upon some express contract made by him in that behalf. See *Hutch. on Carr.*, 2d Ed., § 768c. *Missouri, etc., R. Co. v. Webb & Co.*, 20 Tex. Civ. App. 431, 438, 49 S. W. 526.

**Cattle Must Be Tendered within Seasonable Hours and Reasonable Notice.**—In the absence of a contract

previously entered into, the carrier is bound under its common-law duty to receive for shipment cattle or other property when tendered within seasonable hours and upon reasonable notice. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 690, 29 S. W. 565.

### III. Duties as to Transportation.

#### A. DUTY AS TO CARS.

##### 1. In General.

**Must Furnish Sufficient Number of Cars.**—Under contract for shipment of cattle whereby shipper agrees to load and unload them, it is the duty of the railroad to furnish sufficient cars to carry them, and the railroad is liable for damages, resulting from failure to furnish sufficient cars. *International, etc., R. Co. v. Pool*, 24 Tex. Civ. App. 575, 577, 59 S. W. 911.

**Low Racks Injuring Cattle.**—Where a calf was injured in the racks of pens provided by a carrier, during transportation, through the negligence of the carrier in making the racks so low that the calf could get into them by its own voluntary action, the carrier is not relieved from liability. *Gulf, C. & S. F. Ry. Co. v. Dunman* (Civ. App.), 81 S. W. 789.

**Protruding Bolt.**—Where one of the plaintiffs on application was tendered a single car in which to transport his mules, and this he merely "bedded down," and nailed planks around to prevent the mules from getting their feet through the openings, he did not thereby relieve the carrier from liability for injuries to one of the mules by reason of its negligence in permitting a bolt to protrude within the car. *St. Louis & S. F. R. Co. v. Brosius & Le Compte*, 105 S. W. 1131, 47 Tex. Civ. 647.

**Defective Car—Need Not Demand Other Cars in Writing.**—Where shippers held their cattle at a certain point on account of a railroad's failure to furnish cars at an agreed time, they

could recover on account of defects in the cars finally furnished them, whether they demand other cars in writing or not. *Gulf, C. & S. F. Ry. Co. v. Irvine & Woods* (Civ. App.), 73 S. W. 540.

##### 2. Cars Must Be Suitable.

Where stock is received for shipment, it is the duty of the carrier, in shipping the same, to furnish suitable and adequate accommodations for them. *Hutch. Carr.*, § 292; *Missouri Pac. R. Co. v. Kingsbury* (Civ. App.), 25 S. W. 322, 323; *Missouri Pac. R. Co. v. Nicholson*, 2 App. Civ. Cases, § 168.

##### Can Not Avoid Duty by Contract.

It is the duty of railroad company to furnish suitable cars to transport live stock that it undertakes to carry, and it can not avoid this duty by contract. *G. C. & S. F. R. Co. v. Wilhelm*, 3 App. Civ. Cases, § 458.

**Car Too Small for Cattle.**—Plaintiff had shipped some stock safely in a car, and, on arriving at a certain point, reshipped them to their destination over defendant's road. Defendant, notwithstanding plaintiff's protest, furnished a smaller car than the one the stock had been before shipped in, in consequence of which the stock injured each other. Held, that defendant, having had the means of furnishing a larger car when demanded, and shown its necessity, was negligent in not doing so, and liable therefor. *Missouri Pac. Ry. Co. v. Graves*, 2 Willson, Civ. Cas. Ct. App. 678.

**Bedding Cars—Ordinary Care Necessary.**—A carrier of live stock, having undertaken to bed the cars, whether bound to or not, must exercise at least ordinary care to see that they are properly bedded. *Houston & T. C. R. Co. v. Mayes*, 97 S. W. 318, 44 Tex. Civ. 31.

**Shipper Expressing Satisfaction with Bedded Car.**—In an action against a railroad company for damages to cattle shipped over its road, resulting from alleged negligence in failing to

properly bed the cars, the defendant alleged that plaintiff was present when the cars were bedded, and expressed his satisfaction therewith, and thereupon the defendant ceased to bed the cars, and they were turned over to him to be loaded. Held, that such facts, if found, constituted a defense. *Texas Cent. R. Co. v. O'Laughlin* (Civ. App.), 72 S. W. 610.

**Parol Evidence to Show Contract for Bedded Cars.**—As a bill of lading for shipment of cattle raises an implied obligation to furnish suitable cars, and to transport the cattle within a reasonable time, parol evidence is inadmissible, in an action against a carrier for injuries to cattle shipped over its road, to show a parol agreement prior to the bill of lading to furnish "bedded" cars, and to make close connection with another carrier, though bedded cars were the only suitable cars, and transportation with reasonable dispatch would have made the close connection. *Galveston, H. & S. A. Ry. Co. v. Silegman* (Civ. App.), 23 S. W. 298. See, generally, the title PAROL EVIDENCE.

### 3. Duty to Place in Particular Position in Train.

A carrier is not bound to furnish a stock shipper with a caboose with a platform nor to place the shipper's stock cars next to the caboose or in any particular position in the train. *Receivers of International & G. N. Ry. Co. v. Armstrong*, 4 Tex. Civ. App. 146, 23 S. W. 236.

### 4. Effect of Stipulation That Shipper Accepts Cars.

A stipulation in the bill of lading that a shipper of cattle accepts the cars furnished can not prevent his showing that the cars were not suitable, as this would be an attempt to limit the carrier's duty. *Galveston, H. & S. A. Ry. Co. v. Silegman* (Civ. App.), 23 S. W. 298.

### 5. Under Texas Statute.

#### a. In General.

**Statute Requires Carrier to Furnish**

**Cars within Reasonable Time after Written Request.**—Under articles 4494 and 4496, Rev. Stat., as soon as reasonable time elapses after cattle are offered for transportation, it becomes the duty of railroad company to furnish adequate accommodation for such purpose, and for failure to perform this duty it is liable in damages. *Davis v. Texas, etc., R. Co.*, 91 Tex. 505, 44 S. W. 822, reversing 42 S. W. 1008.

**Shipment beyond State—Waiving Objection.**—In an action against a railroad company, under the statute, for failing to furnish cars for the shipment of stock within the required time after demand, a contention that the railroad, which was wholly within the state, was not required, under the statute, to furnish cars for a shipment outside of the state, could not be considered, where its right to limit the use of cars to shipments inside the state was not asserted at the time the cars were furnished. *Houston & T. C. R. Co. v. Buchanan*, 84 S. W. 1073, 38 Tex. Civ. 165. See post, "Duties as to Transportation beyond Own Line," III, G.

**Shipper Can Sue for Breach of Contract.**—But the act of legislature prescribing penalty for carrier's failure to furnish freight-cars after demand, does not estop shipper from suing for breach of contract to furnish cars for transportation of beef cattle. *Missouri Pac. R. Co. v. Harmonson*, 4 App. Civ. Cases, § 91, 16 S. W. 539. See post, "Duties as to Transportation beyond Own Line," III, G.

**Statute Strictly Construed.**—But such statute being penal, will be strictly construed. *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2, reversing 40 S. W. 431.

**Provision as to Penalty Void as to Interstate Shipment.**—Rev. St. 1895, arts. 4497, 4499, imposing a penalty on carriers for delay in furnishing cars for shipments, are invalid under the federal constitution, as an interference with interstate commerce. *Texas, etc., Ry. Co. v. Allen* (Civ. App.), 98 S. W.

450; *Houston, etc., R. Co. v. Mayes*, 44 Tex. Civ. App. 621, 622, 99 S. W. 1166, reversing *Houston, etc., R. Co. v. Mayes*, 36 Tex. Civ. App. 606, 83 S. W. 53, affirmed in 98 Tex. 620, no op.

**b. What Constitutes Reasonable Time.**

What was a "reasonable time," within which to furnish cars under Rev. Stats., arts. 4494, 4496, in the absence of an agreement, is a question of fact for the jury and depends upon all the circumstances, such as the place and character of the shipment, the amount of freight being then offered and on hand for transportation at that and other points on the line, etc. *Davis v. Texas, etc., R. Co.*, 91 Tex. 505, 509, 44 S. W. 822, reversing 42 S. W. 1008; *Pecos, etc., R. Co. v. Evans-Snider-Bud Co.*, 42 Tex. Civ. App. 60, 64, 93 S. W. 1024, affirmed in 100 Tex. 190.

And is not a fact to be proved by any witness. *Pecos, etc., R. Co. v. Evans-Snider-Bud Co.*, 42 Tex. Civ. App. 60, 64, 93 S. W. 1024, affirmed in 100 Tex. 190.

**Furnishing Cars to Another Whose Order Had Been Overlooked.**—In an action for damages to cattle, alleged to have been caused by defendant railroad company's negligent failure to furnish cars within a reasonable time after request, the evidence showed that the cars were on hand when plaintiff's cattle were tendered for shipment, but were furnished to another shipper, whose prior order had been overlooked, and that no effort was made to obtain cars for plaintiff till about the time the cars mentioned were turned over to the other shipper. Held, that a requested charge that, if defendant used ordinary care and diligence, it was not liable, was not required by the evidence. *Texas & P. Ry. Co. v. Powell*, 79 S. W. 86, 34 Tex. Civ. App. 575.

**Instruction That Weather and Rush of Business Could Be Taken into Consideration Not Injurious to Defendant.**

—In an action against a carrier for delay in furnishing cars for shipment of live stock an instruction that, in determining what would be a reasonable time, the jury might take into consideration the weather and the unusual rush of business, if there were such, could not be complained of by defendant. (Civ. App.) *Pecos & N. T. Ry. Co. v. Evans-Snider-Bud Co.*, 93 S. W. 1024, judgment affirmed, 100 Tex. 190, 97 S. W. 466, 42 Tex. Civ. App. 60.

**Instruction Assuming Time between Shipper's Request and Tender of Cattle Was Reasonable Time.**

—In an action for damages to cattle by failure of defendant railway company to furnish cars within a reasonable time after they were ordered, the court charged that if defendant failed to furnish cars in a reasonable time, and plaintiff tendered his cattle on a certain day, and defendant refused to receive them because not having cars, thereby compelling plaintiff to hold them, to their injury, plaintiff could recover. Another charge stated that, if defendant was not negligent in failing to furnish cars at the time plaintiff tendered the cattle, the verdict should be for defendant. Held that, construing the instructions together, the first was not erroneous, as assuming that the time between plaintiff's request for the cars and the tendering of the cattle was a reasonable time in which to obtain the cars. *Texas & P. Ry. Co. v. Powell*, 79 S. W. 86, 34 Tex. Civ. App. 575.

**Charge Assuming Delay in Furnishing for Nine Days as Unreasonable.**

—In an action of damages for failure to furnish cars to a shipper within a reasonable time it was not error for the charge to assume that a failure to furnish the cars for nine days after order made for them was negligence, since the statute makes a failure to furnish them for six days ground for the statutory penalty in such case.

Texas, etc., *R. Co. v. Smith*, 34 Tex. Civ. App. 571, 79 S. W. 614, affirmed in 98 Tex. 635, no op.

### c. Application for Cars.

#### (1) Must Be in Writing.

Where the shipper brought an action for statutory penalty for breach of an agreement to furnish cars at a certain time, although the demand was not in writing as required by the statute, such demand may be pleaded as a basis for the recovery of damages in delay in making the shipment. *Houston, etc., R. Co. v. Brown*, 37 Tex. Civ. App. 595, 598, 85 S. W. 44.

**Oral Agreement Changing Written Request for Stable Cars.**—Where the shipper made a written demand for stable cars, but afterwards orally agreed with the railroad agent to accept cars of any kind, this did not entitle him to recover the statutory penalty for failure to furnish the cars, the oral agreement not being such a written demand as the statute requires. *Texas, etc., R. Co. v. Barrow*, 33 Tex. Civ. App. 611, 77 S. W. 643, affirmed in 101 Tex. 663, no op.

#### (2) Must Specify Time Cars Are Desired.

An application for cars for the shipment of cattle specifying that they should be furnished "as soon as possible," specifies no time whatever and is not a sufficient compliance with Rev. Stat., art. 4498, providing for the recovery of the penalty and damages by the shipper, as such statute is penal, and the rule applies, that he who seeks a recovery and penalty under such a statute must bring himself strictly within the provisions of the law. *Texas, etc., R. Co. v. Hughes*, 99 Tex. 533, 536, 91 S. W. 567; *Texas, etc., R. Co. v. Shipman* (Civ. App.), 98 S. W. 449.

#### (3) To Whom Application Must Be Made.

The local station agent in charge of the railroad's transportation may be considered as "the superintendent or

person in charge of transportation," upon whom demand for stock cars may be made under the statute. *Austin, etc., R. Co. v. Slator*, 7 Tex. Civ. App. 344, 26 S. W. 233.

Application to a railway agent to furnish cars is a sufficient compliance by the shipper with article 4497, Rev. Stat. *Houston, etc., R. Co. v. Mayes*, 36 Tex. Civ. App. 606, 83 S. W. 53, affirmed in 98 Tex. 620, no op.

#### (4) Right to Demand Stable Cars.

**Stable Cars Not Required.**—While statute requires railway companies to furnish suitable cars for transportation of sheep, goats, hogs, and calves, it is not required, by statute or otherwise, that stable cars shall be furnished for shipment of such freight. *Austin, etc., R. Co. v. Slator*, 7 Tex. Civ. App. 344, 346, 26 S. W. 233.

**Duty to Furnish Stable Cars Where Contemplated by Parties.**—Where the evidence showed that stable cars were the only cars used by a carrier suitable for certain stock, and that no effort was made to furnish any other kind of cars, and the pleadings, evidence, and general charge presented as questions for the jury authorizing recovery failure to furnish suitable cars at the time and place agreed on, and failure to furnish cars within suitable time after tender of stock for shipment, special charges to find for such carrier if stable cars were ordered on a certain date, and it promised to make an effort to get them, and a reasonable effort was made, and the cars procured on or about such date, and to so find if the order was for stable cars, and the carrier did not agree to furnish them on a particular day, were properly refused, since, though stable cars were not mentioned by name, if contemplated in the order it was the carrier's duty to furnish them, and such charges would have prevented recovery for failure to furnish cars in reasonable time after tender of the stock. *International & G. N. R. Co. v.*

True, 57 S. W. 977, 23 Tex. Civ. App. 523.

**d. Penalty.**

Where the shipper demands cars of a particular kind, such as stable cars, he requires of the carrier a duty not imposed by the statute, for a violation of which he must look for redress to an action of damages upon his contract, and not to one to recover the statutory penalty, unless he shows affirmatively that no other cars would be proper or suitable for such freight as he desired to ship. Texas, etc., R. Co. v. Barrow, 33 Tex. Civ. App. 611, 77 S. W. 643, affirmed in 101 Tex. 663, no op.; Austin, etc., R. Co. v. Slator, 7 Tex. Civ. App. 344, 346, 26 S. W. 233.

**B. DUTY TO PROVIDE STOCK PENS.**

**1. In General.**

See post, "Duty to Provide Suitable Places for Feeding and Watering," III, H, 1, c, (5).

Revised Statute, art. 4519, requires a railway company to erect at each of their depot stations or places established by such company for the reception and delivery of freight, suitable buildings and incloses to protect produce, goods, wares, and merchandise, and freight of every description from damages. It was held that, under the designation of inclosures, stock pens for the reception of cattle tendered for shipment are included, and that such pens must be sufficiently safe for the purpose indicated. Houston, etc., R. Co. v. Trammell, 28 Tex. Civ. App. 312, 315, 68 S. W. 716, affirmed in 95 Tex. 680, no op.; Gulf, etc., R. Co. v. Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948.

**Can Not Show Compliance by Delivery to Stockyards Company.**—It is the duty of a carrier of live stock to provide suitable pens for the delivery of cattle, whether delivery is made to the owner or to a connecting carrier, and it can not shift its responsibility by

showing delivery in pens provided by a stockyards company. Texas & P. Ry. Co. v. Felker, 99 S. W. 439, 44 Tex. Civ. App. 420.

**Need Only Have Number Ordinarily Sufficient for Its Business.**—A railroad company, in providing pens for delivering cattle at a certain point, is only required to have such a number of pens as, according to the business of the carrier at that point, is sufficient for the ordinary and usual volume of business, and the business of other carriers there is immaterial. Casey v. St. Louis Southwestern Ry. Co., 83 S. W. 20, 37 Tex. Civ. App. 49.

Plaintiff in an action for injuries to cattle during their transportation over defendant's railway having shown that when the cattle were presented for shipment the pens were not sufficient to accommodate them, it was not error to instruct that it was defendant's duty to furnish stock pens sufficient to accommodate ordinary shipments. Texas & P. Ry. Co. v. Fambrough (Civ. App.), 55 S. W. 188.

**Liable for Shrinkage from Failure of Duty.**—A railroad company agreeing to transport cattle on a certain day is liable for loss by shrinkage resulting from its failure to provide sufficient stock pens for loading the cattle within a reasonable time after they were at the place of shipment. Missouri, K. & T. Ry. Co. v. Woods (Civ. App.), 31 S. W. 237.

**Negligence in Unloading in Crowded Pens.**—A carrier is only liable for such damages as were occasioned by its negligence in unloading them in crowded or otherwise improper pens, or delaying unnecessarily to tender them to the connecting carrier, and only then of course where there is proper predicate in the pleading. Texas, etc., R. Co. v. Felker, 40 Tex. Civ. App. 604, 609, 90 S. W. 530.

**2. Character of Pens Required.**

**a. No Particular Kind Prescribed.**

A railway company is required by

statute to receive and forward freight, including live stock delivered to it for transportation. From this the duty to furnish adequate and suitable pens for the reception of live stock must be implied. There is no statute in Texas, however, applicable to cases of live stock prescribing the particular character of pens or enclosures for the reception of such live stock as may be tendered for shipment, and hence it can not be said, as a matter of law, that a carrier is negligent in permitting its pens to be muddy at the time a shipper places his cattle therein. *Ft. Worth, etc., R. Co. v. Galton*, 45 Tex. Civ. App. 67, 68, 100 S. W. 166.

**Pens Need Not Be Covered.**—Rev. St. 1895, art. 4519, provides that a railroad must erect at every station buildings or inclosures to protect merchandise and freight of every description from damage by exposure to the weather, stock, or otherwise. In an action against a railroad by a shipper of cattle, the court instructed that every railroad is required to erect at every station suitable pens and inclosures to protect such cattle as may be delivered from exposure to the weather, stock, or otherwise. Held, that the instruction was erroneous, since, even if the statute requires railroads to keep pens for cattle, the instruction would have warranted the jury in believing that it was the duty of the railroad to provide covered pens, if not warm stalls. *Ft. Worth & R. G. R. Co. v. Cage Cattle Co.* (Civ. App.), 95 S. W. 705.

#### **b. Pens Must Be Safe and Suitable.**

The railway company in maintaining its stock pens and gates is only required to use ordinary care to keep them in a reasonable safe condition. *Ft. Worth, etc., R. Co. v. Waggoner Nat. Bank*, 36 Tex. Civ. App. 293, 81 S. W. 1050, affirmed in 98 Tex. 616, no op.; *Texas, etc., R. Co. v. Felker*, 40 Tex. Civ. App. 604, 90 S. W. 530; *Houston, etc., R. Co. v. Trammell*, 28

Tex. Civ. App. 312, 315, 68 S. W. 716, affirmed in 95 Tex. 680, no op.

The duty does not devolve upon the shipper to avoid the consequences growing out of improper conditions at the pens after the delivery of the cattle there. This is the place selected by the company to make delivery and it is under the obligation of exercising ordinary care to maintain it in a suitable condition for such purposes. *Texas, etc., R. Co. v. Felker*, 40 Tex. Civ. App. 604, 609, 90 S. W. 530.

**Contributory Negligence of Shipper Not Chargeable Because of Knowledge of Defects.**—Under Rev. Stat., art. 4236, which requires safe and suitable pens to be provided by a railway company, it is liable for damages resulting from defective pens due to its negligence, and contributory negligence of the shipper can not be founded upon his knowledge of the unfitness of the pens. *Galveston, etc., R. Co. v. Jackson* (Civ. App.), 37 S. W. 255; *Gulf, etc., Co. v. Trawick*, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; *E. L. & R. R. Co. v. Hall*, 64 Tex. 615.

**Knowledge of Defective Condition Must Be Alleged and Proved.**—In an action for damages to cattle through infected cattle pens of carrier, it is necessary to allege and prove that the carrier had knowledge of the infected condition of its pens when it received the calves for shipment, or that its ignorance of this fact was due to negligence. *Texas, etc., R. Co. v. Beal*, 43 Tex. Civ. App. 588, 589, 97 S. W. 329.

**Liability for Defective Pens.**—A carrier receiving cattle for shipment, and putting them into pens till they are shipped, is liable for injury resulting to them from defects in the pens due to its negligence. *Galveston, H. & S. A. Ry. Co. v. Jackson* (Tex. Civ. App.), 37 S. W. 255.

**Liable for Defective Pens Whether Having Notice or Not.**—A railroad, negligently failing to maintain adequate



pens for the accommodation of cattle to be shipped over its line, is liable to a shipper for damages sustained by him in consequence thereof, whether the railroad has been served with notice that its shipping pens were inadequate and insufficient, or not. *Texas & P. Ry. Co. v. Slaton* (Civ. App.), 102 S. W. 156.

**Unloading En Route—Horses Escaping from Pens.**—In an action for damage to a shipment of horses by rail, it appeared that there were unloaded at one of defendant's yards en route, that they escaped from the pen in which defendant had placed them, and were damaged while at large. Held, that defendant was an insurer of the horses against damage from such a cause, and hence plaintiff need not show negligence on the part of defendant. *Texas, etc., R. Co. v. Turner* (Civ. App.), 37 S. W. 643.

**Petition Not Claiming Damage for Defective Pens.**—Where the petition in an action against a shipper of calves in consequence of their having been put into pens infected with a contagious disease alleged that the carrier had been notified that the pens had been quarantined, and had permitted the shipper, in ignorance of the fact, to place his calves therein, the court erred in submitting as a ground of recovery the duty of the carrier to have suitable shipping and feeding pens, since no such ground was averred in the petition. *Texas, etc., R. Co. v. Beal*, 43 Tex. Civ. App. 588, 97 Tex. 329.

#### C. DUTY AS TO LOADING AND UNLOADING.

See post, "Requiring Shipper to Care for, Feed and Water Stock," X, B, 9.

A carrier transporting live stock should have the proper machinery and facilities for unloading the stock whenever, in the course of transit, when it is necessary to do so, and it is also bound to unload, feed and water

them at the journey's end if there be delay in making delivery, as the health of the animals may require. *T., B. & H. Ry. Co. v. Montgomery*, 4 Willson § 240, 16 S. W. 178.

**Sufficiency of Evidence to Show Carrier's Negligence.**—In an action for injuries to a horse sustained while being unloaded from a railway car, evidence held sufficient to show that the carrier was negligent in requiring the horse to be unloaded at the place it did. *Gulf, C. & S. F. Ry. Co. v. Prater*, 102 S. W. 739, 46 Tex. Civ. App. 474.

#### D. DEGREE OF CARE REQUIRED.

While it is doubtless true that a person of ordinary prudence would exercise more care in carrying live stock than in carrying dead freight, the standard fixed by law is the same in both—that is, the care of a person of ordinary prudence—which, of course, varies with the circumstances of each case. *Waggoner v. Missouri, etc., R. Co.* (Civ. App.), 92 S. W. 1028; *Missouri, etc., R. Co. v. Kyser*, 43 Tex. Civ. App. 322, 324, 95 S. W. 747.

**Though Owner Accompanies Stock, Carrier Must Give Cattle Proper Attention.**—A carrier of live stock in the absence of special contract, when accompanied by their owner or agent is equally bound to give them that attention which they require as living animals, and may not treat them as inanimate freight. *T., B. & H. Ry. Co. v. Montgomery*, 4 Willson § 240, 16 S. W. 178.

**Care of Person of Ordinary Prudence under Same or Similar Condition Required.**—A charge holding the carrier liable for the damages unless the injuries to the horses were occasioned, "by the act of God, a public enemy, negligence of the shipper, or some vicious propensity of the animals themselves," was erroneous in exacting too high a degree of care, since the carrier was only required to use such care to avoid injury to the horses as

a person of ordinary prudence and care would use under the same or similar circumstances. *Ft. Worth, etc., R. Co. v. Lock*, 30 Tex. Civ. App. 426, 70 S. W. 456.

In action against railroad for injuries to two carloads of horses, instruction that it was defendant's duty in handling them to exercise "such care, prudence, and caution as an ordinarily careful, prudent, and cautious man would have exercised under like circumstances; and, if \* \* \* defendant failed to exercise such prudence and caution, \* \* \* such failure would constitute negligence," was correct. *Texas, etc., R. Co. v. Tribble*, 29 Tex. Civ. App. 104, 67 S. W. 890.

**Degree of Care Measurable by Character of Property—Mare with Foal.**—The degree of duty and care charged to the carrier in safely transporting and handling the shipment is to some extent measurable by the character of the property shipped, and its condition at the time. If mares with foal, were shipped and this fact was not known to the carrier, and it could not have been ascertained or discovered by the exercise of reasonable diligence at the time of the contract of shipment, or before they received the injuries complained of, and such condition would, in order to preserve the stock from injury, require of the carrier a degree of caution and care greater than ordinarily exercised in the shipment of horses or mares not with foal, the carrier should not, under such circumstances, be held liable for depreciation in value of the animals that resulted from the loss of the foal. In the absence of notice or of facts sufficient to charge the carrier with the knowledge that the animals shipped were with foal, such condition should be regarded as a hidden or concealed defect, and the carrier, in handling such shipment, should not be charged with a degree of care or

duty greater than that ordinarily exercised in handling mares without foal. *Missouri Pac. R. Co. v. Fagan* (Civ. App.), 27 S. W. 887, 888.

**Must Not Stop and Start Cars with Violent Jerks.**—It is the duty of a railroad in transporting cattle to so manage its cars as to protect them, as far as this can be done by use of proper care—e. g., to stop and start without violent jerks calculated to throw them down. *Gulf, etc., R. Co. v. Ellison*, 70 Tex. 491, 493, 7 S. W. 785.

**Duty to Care for Stock during Delay in Transportation.**—Where cattle were placed in the hands of the common carrier to be transported to their destination, it was responsible for their safe delivery, and, if the rush of business was such that the cattle were unavoidably detained, it was certain its duty to properly care for them during the detention. 2 *Harris, Dam. Corp.*, p. 919, § 800. *International, etc., R. Co. v. Lewis* (Civ. App.), 23 S. W. 323, 324.

#### **E. DUTY TO CARRY AND DELIVER WITHIN REASONABLE TIME.**

See post, "In General," VII, A.

The duty of the carrier is to use ordinary care or reasonable diligence to transport and deliver cattle within a reasonable time, considering the nature of the shipment. *Chicago, etc., R. Co. v. Kapp*, 37 Tex. Civ. App. 203, 204, 83 S. W. 233; *Sterling v. St. Louis, etc., R. Co.*, 38 Tex. Civ. App. 451, 459, 86 S. W. 655, affirmed in 101 Tex. 661, no op.; *International, etc., R. Co. v. Young* (Civ. App.), 72 S. W. 68; *Missouri Pac. R. Co. v. Nicholson*, 2 App. Civ. Cases, § 168; *Ft. Worth, etc., R. Co. v. Hadley*, 38 Tex. Civ. App. 599, 600, 86 S. W. 932; *Missouri, etc., R. Co. v. Kyser*, 43 Tex. Civ. App. 322, 324, 95 S. W. 747; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 111, 17 S. W. 834; *San Antonio, etc., R. Co. v. Turner*, 42 Tex. Civ. App. 532,

94 S. W. 214; *Gulf, etc., R. Co. v. Beattie* (Civ. App.), 88 S. W. 367; *Ft. Worth, etc., R. Co. v. Daggett* (Civ. App.), 27 S. W. 186, 187, reversed, on another point, in 87 Tex. 322.

Where there is no contract to deliver within a specified time, the law implies a contract to deliver within a reasonable time, and no necessary or reasonable delay constitutes a breach of its duty. *Galveston, etc., R. Co. v. Warnken*, 12 Tex. Civ. App. 645, 647, 35 S. W. 72.

The carrier's duty is to convey animals with reasonable dispatch in view of the character of the shipment, and its liability to injury from detention. *Gulf, etc., R. Co. v. Ellison*, 70 Tex. 491, 7 S. W. 785. This is but a different expression of the rule that it is the carrier's duty to transport the animals in a reasonable time, considering the nature of the shipment. *St. Louis, etc., R. Co. v. Hunt* (Civ. App.), 81 S. W. 322.

**Shipment by Next Regular Train Not Always Sufficient.**—The duty of the carrier is to forward the animals with reasonable dispatch, and more diligence is exacted in some cases than in others, according to the character of the shipment. A charge which would relieve the railroad from liability if the car was sent on by the next regular train, regardless of when the train left, and regardless of the facilities, the carrier had for avoiding delay, is properly refused. *Galveston, etc., R. Co. v. Tuckett* (Civ. App.), 25 S. W. 150, 151.

**Where Floods Wash Track Away.**—If cattle, on account of unprecedented floods destroying carrier's railway tracks, have to be carried by an unusual and circuitous route, or over the road of some other railroad company, the carrier must exercise such diligence as an ordinarily prudent person would, under the circumstances, exercise to secure the transportation of such other means and

without unnecessary delay, but need not charter a train on another road that could transport the live stock at the earliest possible period. *St. Louis, I. M. & S. Ry. Co. v. Jones* (Civ. App.), 29 S. W. 695.

**Necessity for Shipment over Another Line in Case of Delay.**—Whether or not it is the duty of the railroad company to have its freight shipped over another road accessible to it depends upon the character of the freight, the probable length of time that the interruption will exist, the expense of such diversion, and such other facts as a person of ordinary prudence would consider. *St. Louis, etc., R. Co. v. Jones* (Civ. App.), 29 S. W. 695.

**Need Not Delay Regular Freight for Cattle Shipments.**—A carrier is not negligent in failing to delay its regular freight trains in order to handle a shipment of cattle. *San Antonio & A. P. Ry. Co. v. Turner*, 94 S. W. 214, 42 Tex. Civ. App. 532.

**"Proper Time" as "Reasonable Time."**—The use of the words "proper time," in an instruction in an action against a carrier for unreasonable delay in the delivery of a shipment of cattle, was not erroneous, if, when read in connection with the paragraph in which they were used, it could only be understood to mean a reasonable time. *Missouri, K. & T. Ry. Co. of Texas v. Stanfield Bros.*, 90 S. W. 517, 40 Tex. Civ. App. 385.

**Instruction to Convey "with Such Dispatch as Was Reasonably Necessary."**—An instruction in an action against a carrier for damages to a shipment of live stock that it was defendant's duty to transport them "with such dispatch as was reasonably necessary" is substantially correct, the taking into consideration of such delays as were reasonable under the circumstances being implied. *St. Louis Southwestern Ry. Co. v. Hunt* (Civ. App.), 81 S. W. 322.

**Instruction—Requiring Transportation “with All Reasonable Diligence and Speed.”**—Where the court charged that it was the duty of a railroad company to transport cattle received for shipment with all reasonable diligence and speed and within a reasonable time, and it was objected that the duty of the carrier is to exercise reasonable care to safely transport within a reasonable time, and that a charge which requires the carrier to transport within a reasonable time is erroneous, it was held, that if the distinction contended for is not hypercritical, it is too nice to justify the conclusion that the jury were misled by the paragraph referred to, when construed in connection with the entire charge. The two forms of expression are often treated as interchangeable. *San Antonio, etc., R. Co., v. Martin*, 49 Tex. Civ. App. 197, 201, 108 S. W. 981, affirmed, no op.; *St. Louis, etc., R. Co. v. Hunt* (Civ. App.), 81 S. W. 322; *Missouri, etc., R. Co. v. Stanfield Bros.*, 40 Tex. Civ. App. 385, 90 S. W. 517, affirmed in 101 Tex. 649, no op.; *International, etc., R. Co. v. Trump*, 100 Tex. 208, 97 S. W. 464; *Chicago, etc., R. Co. v. Gillett* (Civ. App.), 99 S. W. 712, 713.

**Charge Requiring Carrier to “Promptly Forward.”**—While a carrier is required only to exercise ordinary care to receive and forward cattle with reasonable dispatch, yet a charge requiring the carrier to “promptly” forward the cattle was harmless where it was undisputed that the carrier did unreasonably delay forwarding the cattle. *Texas, etc., R. Co. v. Sherrod* (Civ. App.), 87 S. W. 363, affirmed in 99 Tex. 382, 89 S. W. 956. See, generally, the title *APPEAL AND ERROR*, vol. 1, p. 313.

**Charge Making Carrier Convey in as Safe and Speedy Way “as Possible.”**—In an action for damages to stock shipped over defendant’s road, a charge that a common carrier is re-

quired to carry stock to its destination in as safe and speedy a way “as possible” is erroneous, only reasonable diligence being required. *International & G. N. R. Co. v. Young* (Civ. App.), 72 S. W. 68.

**But a charge that the carrier’s duty is to transport with “ordinary speed”** is not misleading where another charge gave the initial carrier a reasonable time within which to begin the transportation of live stock after the same had been delivered to it. *Houston, etc., R. Co. v. Kothmann*, 37 Tex. Civ. App. 548, 551, 84 S. W. 1089.

**When Error to Instruct as to Carrier’s Duty to Convey “to Destination” within Reasonable Time.**—An instruction that it was defendant railroad’s duty to transport plaintiff’s cattle to their destination with reasonable dispatch should not have been given, in view of a contract limiting defendant’s liability to its own line, and evidence that its line terminated short of the destination. *St. Louis, I. M. & S. Ry. Co. v. Gunter*, 86 S. W. 938, 39 Tex. Civ. App. 129.

**Testimony as to Time Made on Previous Occasions Admissible.**—In an action for delay in shipment of plaintiff’s cattle, testimony as to the time made by the railroad on previous occasions over the same distance was admissible on the question of reasonable time for transportation. *St. Louis, I. M. & S. Ry. Co. v. Gunter*, 86 S. W. 938, 39 Tex. Civ. App. 129.

#### F. DUTY TO SHIP BY PARTICULAR ROUTE.

See the title *CONNECTING CARRIERS*. See post, “Loss by Deviation,” VIII, C, 3.

**Must Ship over Route Desired if Possible.**—Where plaintiffs requested defendant railroad to ship cattle over a certain route, and defendant, without any excuse, refused so to do, it became liable for all losses accruing to plaintiffs by reason of the shipment of the cattle over a longer route.

*Texas & P. Ry. Co. v. Eastin & Knox*, 102 S. W. 105, 100 Tex. 556.

**Carrier Wrongfully Refusing Through Routing.**—Where a shipper of live stock requested a through transportation over the lines of the initial and connecting carrier by a shorter route, and it was wrongfully denied him by the initial carrier, when it, under its traffic arrangements with the other road, had the power or authority to grant it, the initial carrier will be liable for damages resulting from the longer haul, unless protected by a written contract signed by the shipper. *Houston, etc., R. Co. v. Buchanan*, 42 Tex. Civ. App. 620, 625, 94 S. W. 199.

**Carrier Not Having Traffic Arrangements with Connecting Carrier.**—But where a carrier routes cattle shipments over certain connecting lines after it had refused the shipper's request for routing over another and shorter route, it is not liable for damages for the adoption of such longer route, where it had no traffic arrangements with the connecting lines forming the shorter route, and where it had offered to ship by the local rates by such route. *Houston, etc., R. Co. v. Buchanan*, 42 Tex. Civ. App. 620, 625, 94 S. W. 199.

Where a shipper of live stock was informed before the stock was loaded that there could be no through billing to the point of destination other than by a particular route, he could not select a different route and exact a through billing, when the carrier was not prepared to give it, and the shipper had been informed of that fact. *Houston & T. C. R. Co. v. Buchanan*, 94 S. W. 199, 42 Tex. Civ. App. 620.

**Deviation as Depriving of Exemptions of Contract.**—Where the carrier deviates from the route designated by the shipper, that alone deprives it of the exemption of the contract of shipment. *Pecos, etc., R. Co. v. Hughes*, 44 Tex. Civ. App. 135, 139, 98 S. W. 410.

**Carrier Liable for Fraudulently Inducing Shipment over Longer Route.**

—Where a shipper of live stock was led into the execution of a contract for shipment which fixed the route, by means of false information by the agent of the carrier, the shipper was entitled to recover for damages resulting by reason of that route being longer than another route which he had demanded. *Houston & T. C. R. Co. v. Buchanan*, 94 S. W. 199, 42 Tex. Civ. App. 620.

**Evidence as to the customary running time of cattle trains between B. and Ft. Worth over the Ft. Worth & Rio Grande Railway** was admissible on the issue of deviation from the route selected by the shippers, but evidence as to the rate of speed of one freight train at a certain time, is inadmissible. *Gulf, etc., R. Co. v. Irvine* (Civ. App.), 73 S. W. 540, 541.

**G. DUTIES AS TO TRANSPORTATION BEYOND OWN LINE.**

It is a general rule of law, supported by the weight of authority and by sound reasoning, that in the absence of an agreement of course of business to the contrary, the initial carrier is bound only to safely carry and deliver to the next carrier. *Gulf, etc., R. Co. v. Jackson*, 99 Tex. 343, 347, 89 S. W. 968, reversing 86 S. W. 47; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 690, 29 S. W. 565.

But it may by contract become bound for delivery at the final destination of the shipment, although it extends beyond its line. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 690, 29 S. W. 565; *International, etc., R. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 12, 27 S. W. 680, affirmed in 87 Tex. 311.

**The reason a railroad is not liable beyond its own line as a common carrier, in the absence of an express contract, is because it is not a common carrier beyond its own line. The law attaches to it no liability as a**

common carrier beyond the terminus of its own line, and does not compel it to act as a common carrier over other lines not within its control. *Gulf, etc., R. Co. v. Baird*, 75 Tex. 256, 12 S. W. 530. Hence, when this liability does attach, it must be by virtue of some contract assuming it. *Ft. Worth, etc., R. Co. v. McAnulty*, 7 Tex. Civ. App. 321, 323, 26 S. W. 414.

**Furnishing Cars under Circumstances Indicating Intention Cars Should Be Used beyond Own Line.**—But whether a railroad company was bound or not to furnish cars in transporting commodities to market beyond the line of its road, where the railway company did furnish cars under circumstances which indicate that it intended that the cars should be used in transporting the cattle beyond its own line and was guilty of delay, it was liable for the penalty. *Houston, etc., R. Co. v. Buchanan*, 38 Tex. Civ. App. 165, 171, 84 S. W. 1073.

## H. DUTY TO FEED AND WATER.

### 1. Under Texas Statute.

#### a. In General.

A carrier is bound to feed and water cattle shipped over its lines, and the shipper is under no obligation to incur expense in that behalf, especially where the cattle are being unlawfully held at destination by the carrier. *Southern Kansas Ry. Co. of Texas v. J. W. Burgess Co.* (Civ. App.), 90 S. W. 189.

**Carrier Not Relieved by Shipper Undertaking Duty.**—Where a duty is imposed by law on a railroad company to water and feed stock in transit, it is not relieved from liability by showing that the shipper had undertaken that duty, if it appears that by its acts it prevented the shipper from performing it. *Gulf, C. & S. F. Ry. Co. v. Gann*, 8 Tex. Civ. App. 620, 28 S. W. 349.

**Custom as Varying Rule.**—Custom

can not require owner to accompany stock during shipment and to feed and water them at his risk and expense, since the law imposes the duty on the carrier. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749. See the title USAGES AND CUSTOMS.

**Carrier Need Not Unload under All Circumstances.**—Railroad companies are not under the absolute duty of unloading a shipper's stock for rest, feed and water upon his request. Their duties in this respect are well defined by the decisions. They should afford proper facilities and reasonable opportunities for rest, feed and water, but are not required to supply these upon a mere request of the shipper without regard to the reasonableness or necessity of the demand. *Missouri, etc., R. Co. v. Clark*, 35 Tex. Civ. App. 189, 190, 79 S. W. 827; *Sayles' Civ. Stats.*, art. 326; *U. S. Comp. Stats.*, § 4386; *Ft. Worth, etc., R. Co. v. Daggett*, 87 Tex. 322, 329, 28 S. W. 525, reversing 27 S. W. 186; *International, etc., R. Co. v. McRea*, 82 Tex. 614, 615, 18 S. W. 672; *International, etc., R. Co. v. Lewis* (Civ. App.), 23 S. W. 323; *Texas, etc., R. Co. v. Byers* (Civ. App.), 73 S. W. 427; *Texas, etc., R. Co. v. Stribling* (Civ. App.), 34 S. W. 1002.

**Instruction Confining Negligence to One Station.**—An instruction can not be complained of by defendant because it confined the alleged negligence in feeding and watering the stock to one station, where the proof showed that the only attempt that was made, and the only opportunity given, to water the stock was at such station. *Galveston, etc., R. Co. v. Thompson* (Civ. App.), 23 S. W. 930.

**Injury by Giving Too Much Water.**—In an action against a railroad company for injuries to a shipment of horses by failure to feed and water, the admission of evidence that the stock were injured by drinking too much water at a certain station was

proper, there being other evidence that this was caused by failure to properly feed and water before arrival at this place. *Gulf, C. & S. F. Ry. Co. v. Dunn* (Civ. App.), 78 S. W. 1080.

**b. How Often Cattle Must Be Fed and Watered.**

With reference to statutory penalty for failure of carrier to feed and water stock en route, carrier is authorized to act on presumption that they were properly watered and fed by shipper before shipment, in absence of knowledge to contrary, and need not feed and water oftener than an ordinarily prudent man would feed and water his own stock. *Texas, etc., R. Co. v. Stribling* (Civ. App.), 34 S. W. 1002, 1004, 1005.

**c. Where Shipper Has Assumed Duty.**

**(1) In General.**

**Must Stop Train if Necessary to Give Shipper Opportunity.**—Where, by the contract of shipment, it is plaintiff's duty to feed and water his stock in transit, defendant company is bound to give him the opportunity of so doing, and, if necessary, to stop the train for that purpose. *Gulf, C. & S. F. Ry. Co. v. Gann*, 8 Tex. Civ. App. 620, 28 S. W. 349.

**Exclusion of Contract Not Error Where Carrier Afforded No Opportunity for Performance by Shipper.**—In an action against a railroad company for injuries to a shipment of horses by rough handling and failure to feed and water, the exclusion of a portion of the contract which required the shipper to feed and water the stock was not error, where the evidence showed that no opportunity was afforded him to do so. *Gulf, C. & S. F. Ry. Co. v. Dunn* (Civ. App.), 78 S. W. 1080.

**Right of Shipper to Refuse to Feed and Water on Delay in Transit.**—It is not negligence of carrier in permitting collision on road thereby delaying transit of stock shipment, but

amount of injury that might have resulted had shipper's agent used proper means to mitigate damages, should be looked to to determine whether, because of such delayed transit, shipper's agent had right to rescind contract and refuse to feed and water stock. *Fort Worth, etc., R. Co. v. Daggett*, 87 Tex. 322, 328, 28 S. W. 525, reversing 27 S. W. 186.

**Damages for Refusal to Allow Shipper to Feed and Water.**—Damages may be recovered for injuries to cattle from lack of water and food, where the carrier refused to permit the shipper to feed and water such cattle. *Missouri, K. & T. Ry. Co. of Texas v. Leibold* (Civ. App.), 55 S. W. 368.

**No Penalty for Refusal to Allow Shipper to Water.**—But *Sayles' Rev. Stat.* 1897, art. 326, providing for a penalty for failure to feed and water, nowhere provides that the shipper would be entitled to recover, if the railway company failed or refused to permit the shipper to feed and water; but it only provides for the penalty in the event the carrier fails to feed and water; and this duty and burden upon the carrier can be relieved of by a special contract. But it nowhere provides that if there is a special contract relieving the carrier of that duty, that it should become liable for the penalty in the event it refused or failed to furnish the plaintiff with an opportunity to feed and water. The law in this respect is evidently defective. It should embrace also a liability upon the part of the carrier where it refuses and fails to furnish the plaintiff with an opportunity to feed and water, when there is a contract to the effect that this shall be done by the shipper. *Houston, etc., R. Co. v. Brown*, 37 Tex. Civ. App. 595, 600, 85 S. W. 44.

**Duty Devolving upon Carrier—Delay in Shipment.**—The extent of the duty undertaken by the shipper to water and feed the cattle must be de-

terminated by the character of the correlative obligation of the carrier to transport without unreasonable delay; and where the delay was due to a wreck, the obligation of the carrier having been violated, that of the shipper ceased. *Lawson, Carr.*, p. 191. The shipper could not be reasonably held under obligation to water and feed the cattle, detained, at an intermediate point, by the negligence of the defendant, within two hours after the shipment began; otherwise, it would be necessary to hold him thus bound should similar detentions have subsequently arisen at intervals of two hours on the journey. *Ft. Worth, etc., R. Co. v. Daggett* (Civ. App.), 27 S. W. 186, 187, reversed in 87 Tex. 322.

Where the carrier did not, in an action against it for the penalty, plead the shipper's agreement to feed and water the cattle, but it was put in issue by a supplemental petition and was passed on by the jury, this was sufficient. *Texas, etc., R. Co. v. Peters*, 31 Tex. Civ. App. 6, 71 S. W. 70.

**(2) Shipper Must Be Informed in Reasonable Way and Time Where Facilities Exist.**

A stipulation in a contract between a carrier and shipper of live stock that the former agreed to stop its cars at any of its stations for watering and feeding, where it had facilities, whenever requested to do so in writing by the owner, in so far as it placed the initiative upon the company or owner to have the stock unloaded should be construed as meaning that the company must make known to the shipper in a reasonable way and time where such facilities are to be had, that he may unload his cattle at such places if he desires. (Civ. App.) *Pecos & N. T. Ry. Co. v. Evans-Snyder-Buel Co.*, 93 S. W. 1024, judgment affirmed *Same v. Evans-Snyder-Buel Co.*, 42 Tex. Civ. App. 60, 97 S. W. 466.

**(3) To Whom Notice of Desire to Feed and Water Should Be Given.**

Conductor of train is proper official to be notified of shipper's desire to feed and water his stock while in transitu. *Gulf, etc., R. Co. v. Gann*, 8 Tex. Civ. App. 620, 623, 28 S. W. 349. See, also, *Receivers v. Armstrong*, 4 Tex. Civ. App. 146, 23 S. W. 236.

In an action against a carrier for rough handling of a shipment of live stock, the admission of evidence that the conductor, after he had been informed that the shipper wanted the cattle watered and fed at a station, promised the shipper to feed and water the cattle there, was not prejudicial to the carrier, since it amounted only to a notification to the carrier that the shipper desired to have the cattle watered and fed there. *Gulf, C. & S. F. Ry. Co. v. Kimble*, 109 S. W. 234, 49 Tex. Civ. App. 622.

In an action against a carrier for damages to a shipment of stock for failure to feed and water the same, it is not error to permit plaintiff to testify that he stated to the conductor of the train that he wanted his stock fed at a place specified and that the conductor replied that his request was not made in time. *Gulf, Colorado & Sante Fe Ry. Co. v. Gann*, 8 Tex. Civ. App. 620, 28 S. W. 349.

**Brakeman Acting as Conductor.**—Evidence that on former trips made by plaintiff with stock, brakemen in the absence of the conductor "generally acted with a good deal of authority in what they said and did" was insufficient to show that the brakemen had authority while the train was stopping temporarily to tell plaintiff that the train would stop for a while and that he should look after his stock. *Receivers of International & G. N. Ry. Co. v. Armstrong*, 4 Tex. Civ. App. 146, 23 S. W. 236.

**(4) Effect of Stipulation That Request to Feed and Water Be in Writing.**

Under the law the carrier is re-



quired to provide facilities for feeding and watering said stock, and to give opportunity to the shipper to thus feed and water them, when requested. It can not limit its liability in this respect, by requiring that the request to do so by the shipper should be in writing; and, notwithstanding the fact that this stipulation appears in the contract, the stipulation is unreasonable and should not be enforced. A verbal request on the part of the shipper is sufficient and a failure to grant such request when made, damage being shown to have resulted therefrom, is sufficient upon which to predicate a cause of action. *Gulf, etc., R. Co. v. Kimbue*, 49 Tex. Civ. App. 622, 627, 109 S. W. 234.

**(5) Duty to Provide Suitable Places for Feeding and Watering.**

See ante, "Duty to Provide Stock Pens," III, B.

The failure of a railroad carrier to furnish reasonable facilities for feeding and watering stock shipped under a contract requiring the shipper to feed and water them renders the carrier liable for damage resulting from the failure to feed and water the cattle. *Ft. Worth & D. C. Ry. Co. v. Daggett*, 87 Tex. 322, 329, 28 S. W. 525; *Gulf, etc., R. Co. v. Gann*, 8 Tex. Civ. App. 620, 623, 28 S. W. 349; *Galveston, etc., R. Co. v. Ivey* (Civ. App.), 23 S. W. 321, 322; *Gulf, etc., R. Co. v. Simmons* (Civ. App.), 28 S. W. 825, 827, affirmed in 93 Tex. 662, no op.; *Texas, etc., R. Co. v. Byers Bros.* (Civ. App.), 84 S. W. 1087, 1088; *Missouri, etc., R. Co. v. Clark*, 35 Tex. Civ. App. 189, 79 S. W. 827.

A railroad company transporting live stock must afford proper facilities and reasonable opportunities for feeding, watering and resting the stock, but it is not required to supply food, water, and unload for rest on the mere request of the shipper, without regard to the reasonableness of the demand. *Missouri, K. & T. Ry.*

*Co. v. Clark*, 79 S. W. 827, 35 Tex. Civ. App. 189.

**Must Furnish Places Where Cattle Can Be Fed and Watered without Injury in Any Kind of Weather.**—Rev. St. art. 284, makes it the duty of a common carrier of live stock to feed and water the same during the time of conveyance, unless otherwise provided by special contract. Held that, if the stock is transported in cars which are not properly constructed for feeding and watering the stock, then it becomes the duty of the carrier to furnish places where the stock may be unloaded, watered, and fed, without injury, in any kind of weather. *International & G. N. Ry. Co. v. McRea*, 82 Tex. 614, 18 S. W. 672, 27 Am. St. Rep. 926.

**(6) Duty to Furnish Suitable Water.**

It is the duty of a carrier of live stock to furnish suitable water for the stock, and it is not relieved from liability by showing that unwholesome water furnished was the water afforded by that section, where water for the people at that place was hauled there so that it was not impossible by reasonable effort to have furnished wholesome water for the stock. *Chicago, R. I. & P. Ry. Co. v. Mitchell* (Civ. App.), 85 S. W. 286.

**Prima Facie Negligent to Give Cattle Alkaline Water.**—It is prima facie negligence for a carrier of live stock to give the stock alkaline water injurious in its effect, and it does not devolve on the shipper to show that the carrier did not know that the cattle were not accustomed to such water, where the carrier, from the contract of shipment, must have known that the stock came from a place outside of the alkaline region. *Chicago, R. I. & P. Ry. Co. v. Mitchell* (Civ. App.), 85 S. W. 286.

**(7) Inapplicable to Interstate Shipments.**

**Not Applicable to Interstate Shipments.**—Rev. Stat. 1879, art. 284,

passed after the federal statutes regulating the feeding and watering of cattle on interstate shipments, provides that the carriers shall feed and water the cattle "during the time of conveyance and until the same are delivered to the consignee, or disposed of as provided in this title," and imposes a penalty for failure to do so. Held, that article 284 applies only to shipments entirely within the state, and no action for the penalty can be brought upon an interstate shipment. *Gulf, etc., R. Co. v. Gray*, 87 Tex. 312, 28 S. W. 280, reversing 24 S. W. 837.

This is true, notwithstanding the facts of the case may show that the statute was violated in this state. *Gulf, etc., R. Co. v. Gann*, 8 Tex. Civ. App. 620, 622, 28 S. W. 349.

#### **(8) Action for Statutory Penalty.**

##### **(a) Evidence Must Clearly Establish Statutory Grounds for Penalty.**

Rev. St. art. 284, renders a carrier who shall fail to feed and water live stock sufficiently during transportation, and until delivery, liable for damages, and for a penalty to be recovered by the owner. The cattle were well fed at one of the two feeding stations, and the evidence did not show that they were not so fed at the other. Held insufficient to authorize the assessment of the penalty. The evidence should clearly establish the statutory grounds for the recovery of a penalty. *Good v. Galveston, H. & S. A. Ry. Co. (Sup.)*, 11 S. W. 854.

**Must Establish Grounds beyond Reasonable Doubt.**—When penalty for failure of railroad to feed animals during shipment is sued for, plaintiff must show facts justifying recovery, beyond reasonable doubt. *Texas, etc., R. Co. v. Barnhart*, 5 Tex. Civ. App. 601, 603, 23 S. W. 801, 24 S. W. 331.

**Statute Strictly Construed.**—*Sayles' Rev. Civ. St. 1897*, art. 326, imposing a penalty on carriers which fail to feed and water stock in transit, must

be strictly construed, and can not be extended to cases not clearly embraced in its language. *Houston & T. C. R. Co. v. Brown*, 85 S. W. 44, 37 Tex. Civ. 595.

##### **(b) Circumstances Exempting Carriers from Statutory Penalty.**

**Receiver in Charge of Road.**—A railway company is not liable for a penalty imposed by statutes for failure to feed animals shipped over its road, when the failure occurred while the road was in the hands of a receiver. *Texas, etc., R. Co. v. Barnhart*, 5 Tex. Civ. App. 601, 603, 23 S. W. 801, 24 S. W. 331.

**Diseased Cattle.**—The act of congress of May 29, 1884, relating to the exportation of diseased cattle and the suppression and extirpation of pleuropneumonia and other contagious diseases, does not relate to shipments of cattle made between different points in the same state, and is no defense to an action for the penalty for failure to feed and water where the cattle were delayed several days. *Davis v. Texas, etc., R. Co.*, 12 Tex. Civ. App. 427, 428, 34 S. W. 144.

**Even though a railroad's stock pens were crowded**, the railroad company, by reason of such rush of business, is not released of the duty to exercise proper care and diligence in seeing to the needs of animals on its train. The cattle should be released from the cars, even if it is necessary to hire persons to herd them, or to rent a pasture or pens in which to keep them. It should at least see that it made these efforts to take care of the cattle. *International, etc., R. Co. v. Lewis (Civ. App.)*, 23 S. W. 323, 324.

##### **(9) Validity of Statute.**

*Rev. Stat.*, art. 284, requiring a carrier to feed and water "sufficiently" live stock in transit, and enforcing penalty against carriers for insufficiently feeding and watering stock, is not too vague, indefinite and uncertain to enable court or jury to affix the penalty.

Gulf, etc., *R. Co. v. Gray* (Civ. App.), 24 S. W. 837, 838, reversed on another point in 87 Tex. 312.

**(10) Amount of Penalty.**

Under Sayles' Rev. Civ. St. 1897, art. 326, subjecting to a penalty of not less than \$5 nor more than \$500 carriers which fail to feed and water stock, suit may be brought for a sum less than the maximum penalty. *Houston & T. C. R. Co. v. Brown*, 85 S. W. 44, 37 Tex. Civ. 595.

**2. Under United States Statute.**

**Refusal of Connecting Carrier to Receive Does Not Relieve Carrier.**

The duty of a railroad company to feed and water cattle transported over its road every twenty-eight hours, in accordance with § 4386 of the Revised Statutes of the United States, does not cease upon a tender of the cars on which the cattle are carried to the next carrier, where the latter refuses to take them, although the shipper has a remedy against the connecting carrier for refusing to receive the cattle. *Texas, etc., R. Co. v. Berchfield*, 19 Tex. Civ. App. 228, 46 S. W. 900, affirmed in 93 Tex. 673, no op.

**Interstate Shipment—Instruction Following State Statute.**—An interstate shipment of cattle being governed by Rev. St. U. S., § 4386 [U. S. Comp. St. 1901, p. 2995], requiring cattle to be rested, fed, and watered every 28 hours, in an action for injury to cattle so shipped it is error to instruct that it is the carrier's duty to afford the shipper or persons in charge an opportunity to water, feed, and rest the cattle after demand therefor at reasonable and customary times, as provided by Rev. St. Tex. 1895, art. 326. *International & G. N. R. Co. v. Startz*, 82 S. W. 1071, 37 Tex. Civ. App. 51.

**Person in Charge Must Feed under Federal Statute.**—Section 4387 of the Revised Statutes of the United States imposes upon person in charge of interstate shipment of cattle, duty of

feeding and watering same, and where such person is agent of shipper, he can not divest himself of this duty, by attempted rescission of contract of shipment under which he accompanied cattle to feed and water them. *Ft. Worth, etc., R. Co. v. Daggett*, 87 Tex. 322, 328, 28 S. W. 525, reversing 27 S. W. 186. Bk. IV Tex. Notes, 675.

**Shipper's Agent Becoming Carrier's Agent as Relieving Shipper of Duty.**

—The agent in charge of a shipment of cattle, by abandoning his master's employment, and becoming the agent of the carrier, does not relieve the shipper of the duty to feed and water the cattle imposed by the federal statute or by a special shipment contract. *Ft. Worth & D. C. Ry. Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525.

**Statute Does Not Relieve Carrier for Confining for Twenty-Eight Hours Where Negligent to Do So.**—Article 4386, U. S. Rev. Stat., prohibiting carriers from confining live stock in cars for longer period than twenty-eight consecutive hours, etc., does not give carrier privilege of so confining them, whether it would be negligence to do so or not. *Missouri Pac. R. Co. v. Ivy*, 79 Tex. 444, 446, 15 S. W. 692, Bk. IV Tex. Notes, 313.

**IV. Special Contract for Transportation.**

**A. NECESSITY FOR BILL OF LADING.**

A parol contract by which a railway company agrees to receive cattle on its cars for transportation on a day certain, and which is violated by not having the cars as agreed on, may be made the basis of recovery against the company for all damages caused thereby. It can not claim that its liability did not attach until the signing of a bill of lading for the cattle, which were delivered at a subsequent day, and after the contract had

been violated. The liability of the company for damages was for a breach of contract, which made delivery of the cattle at the time specified impossible. *Texas P. R. Co. v. Nicholson*, 61 Tex. 491; *Texas, etc., R. Co. v. Hamm*, 2 App. Civ. Cases, § 491.

**Arts. 281, 282 and 283, Rev. Stat.**, do not provide that a railroad is not liable as a common carrier of cattle upon a parol agreement to furnish cars, and that its liability does not attach until the signing of the bill of lading. These sections merely provide that the carriers' common-law liability as such shall commence from the time the bill of lading is signed; and that previous thereto they shall be liable only as warehousemen for goods placed in their depots or warehouses to be thereafter transported. They do not in terms or in effect exempt the carrier from such liabilities as he is subject to in common with all persons, no matter what occupation they may pursue. *Texas P. R. Co. v. Nicholson*, 61 Tex. 491, 495.

A carrier may enter into a contract without a bill of lading, a part of which is to be performed before the goods are in a course of actual transportation by him, in so far as such contract would be binding upon other persons it will be binding upon him also. *Texas P. R. Co. v. Nicholson*, 61 Tex. 491, 495. See post, "In General," IV, C, 1.

## B. VALIDITY OF SPECIAL CONTRACTS.

### 1. In General.

Carriers are not bound to contract or carry beyond their own line of road, or within any particular time or in any special manner, but they have the power to enter into such a contract; and when such is the case, as said in *Gulf, etc., R. Co. v. Cole*, 8 Tex. Civ. App. 635, 28 S. W. 391, affirmed in 93 Tex. 684, no op., they are

as much bound as if the contract of carriage was limited to its own line. *Gulf, etc., R. Co. v. Jackson* (Civ. App.), 86 S. W. 47, 50, reversed, on another point, in 99 Tex. 343, 89 S. W. 968.

**Shipper Violating Interstate Commerce Act.**—A contract for the carriage of stock provided that the stock should be unloaded at an intermediate point, and the shipper had a contract with live stock dealers at this intermediate point to sell the stock there and substitute other stock in the same cars for transportation to the point of destination; the original shipper receiving compensation for the use of his cars. Held that, as the railroad company was not a party to this agreement, it did not, even if in violation of the interstate commerce act, render the railroad's contract for the carriage of the stock invalid. *Southern Kansas Ry. Co. of Texas v. Cox*, 95 S. W. 1124, 43 Tex. Civ. App. 791.

**Connecting Carrier Failing to Mark "With Feed Privileges" at Certain Point on Waybill.**—A traveling live-stock agent of defendant railroad company agreed to receive plaintiffs' stock from co-defendant company, and carry the same to market, and to allow them to be unloaded at M., an intermediate point, there to be fed and fattened, and then to receive and carry them on to said market. Co-defendant prepared a shipping contract to carry said cattle to said market, and signed plaintiffs' names thereto, and also prepared waybills to accompany said shipment, showing destination to be said market, but with the words, "With feed privileges at M.," written thereon, which, among railroad men, meant that the cattle were to be shipped and fattened at M., and afterwards were to be carried to market, for which privilege plaintiffs paid \$10 per car extra. The cattle, contract, and waybills were delivered

to defendant at W., and its agent, not seeing such words upon the waybills, prepared a shipping contract, fixing the destination of the cattle at said market, and directed plaintiffs' servant, who accompanied the shipment, to sign plaintiffs' names thereto, who objected, and stated that the cattle were to be fed and fattened at M. On being told by said agent that otherwise he could not accompany the cattle, he signed the contract. Held, that the contract signed by co-defendant's agent was not binding upon the plaintiffs, and there was no error in so instructing the jury; plaintiffs having pleaded non est factum. *Missouri, K. & T. Ry. Co. of Texas v. De Bord*, 53 S. W. 587, 21 Tex. Civ. App. 691.

**Shipment across Quarantine Line Not Presumed Invalid.**—A contract to carry cattle, which the carrier breached by failing to furnish facilities for loading, will not be presumed invalid, because providing for shipment across the quarantine line; the proclamation which established the line authorizing the shipment provided an inspection was made and a certificate obtained, to be presented to the carrier when the shipment was accepted; there being nothing to show that such certificate could not have been presented. *Texas Cent. R. Co. v. Pittman* (Civ. App.), 79 S. W. 847.

## 2. To Furnish Cars at Specified Time and Place.

There is no law prohibiting carrier from contracting with cattle owners to furnish stock cars at an agreed time and place for the use of such owners. *Cross v. McFaden*, 1 Tex. Civ. App. 461, 464, 465, 20 S. W. 846.

But to make a time contract, there must be mutuality of obligation and express stipulation. *International, etc., R. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 11, 27 S. W. 680, affirmed in 87 Tex. 311.

## Furnishing Cars on Another Line.

—Notwithstanding the fact that a place is not on a carrier's line of railway, but is on the line of another railway with which the road connected, and over which the cattle were shipped, it is competent for the carrier to bind itself by contract to furnish cars at that place. *Missouri, etc., R. Co. v. Kyser*, 38 Tex. Civ. App. 355, 358, 87 S. W. 389, affirmed in 101 Tex. 649, no op.

**Mutual promises**, by which a shipper agrees to load and ship cattle on a certain day, and the railroad agrees to have cars ready to receive them on that day, when taken in connection with the subsequent conduct of the shipper in having the cattle ready at the time agreed on for shipment, constitute a sufficient consideration for the contract of shipment. *Gulf, etc., R. Co. v. Combes* (Civ. App.), 80 S. W. 1045, 1046. See the title CONTRACTS.

## C. AUTHORITY OF AGENTS TO MAKE SPECIAL CONTRACTS.

### 1. In General.

Where it is not shown that the shipper knew that the agent had exceeded his authority in making the contract, and the acts done are within the scope of his apparent authority, they will bind the principal, although the agent acted beyond the limitation put upon his authority. *Atchison, etc., R. Co. v. Bryan* (Civ. App.), 37 S. W. 234, 235; *Merriman v. Fulton*, 29 Tex. 97, 98; *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915; *Gulf, etc., R. Co. v. Jackson* (Civ. App.), 86 S. W. 47, reversed on another point in 99 Tex. 343, 89 S. W. 968.

### Pleading Authority of Station Master to Make Verbal Contract.

—Where a station master of a railway company verbally agrees with a shipper to furnish an engine and cars at a given time, it is not necessary for the

shipper, in a suit against the company for damages resulting from a failure to so furnish the cars, to allege and prove that such station master has authority to make such verbal agreement. *Gulf, etc., R. Co. v. Wright*, 1 Tex. Civ. App. 402, 21 S. W. 80

**Live-Stock Agent Making Contract.**

—The testimony of the live-stock agent of a railroad company that he had authority to contract for cars to ship cattle was sufficient to show him a general agent who could bind the carrier by a contract to furnish cars. *Missouri, K. & T. Ry. Co. of Texas v. Kyser & Sutherland*, 87 S. W. 389, 38 Tex. Civ. 355.

Where damages were claimed for breach of a contract to furnish cars for shipment of stock, made by the general live-stock agent of a railroad within his apparent authority, it was not error to exclude testimony of instructions to such agent by the carrier, of which no knowledge was shown by the shipper. *International & G. N. R. Co. v. True*, 57 S. W. 977, 23 Tex. Civ. App. 523.

Where there was evidence that plaintiffs contracted with a live stock agent of defendant railway for the shipment of cattle, and the cattle were delivered at the station, and the station agent knew of the contract between plaintiffs and the live-stock agent, and the evidence was sufficient to create in him as great an authority as that apparently exercised by a station agent with whom the public must contract for shipment, and the plaintiffs had no knowledge of any limitations on his power, they were warranted in believing that he had authority equal to that which could be exercised by the station agent. (Civ. App.) *Gulf, C. & S. F. Ry. Co. v. Jackson & Edwards*, 86 S. W. 47, judgment reversed (Sup.) 89 S. W. 968.

**Carrier's Instructions to Agent Inadmissible.**—Hence, where shipping contract was within apparent authority

of general live-stock agent of carrier, who made it, carrier's instructions to such agent, unknown to shipper, are inadmissible. *International, etc., R. Co. v. True & Co.*, 23 Tex. Civ. 523, 527, 57 S. W. 977, affirmed in 94 Tex. 705, no op.

**Ratification of Unauthorized Verbal Agreement.**—An authorized agent of

a railroad, who receives cattle for shipment without objection under a parol agreement made by an unauthorized agent, binds the company by his authority, notwithstanding the want of authority of the agent who made the contract. *Gulf, C. & S. F. Ry. Co. v. Jackson & Edwards*, 89 S. W. 968, reversing judgment (Civ. App.), 86 S. W. 47; *Same v. Brown & Williamson*, 99 Tex. 349, 89 S. W. 971; *Same v. Zimmerman*, Id. reversing judgment (Civ. App.), 86 S. W. 54, 99 Tex. 343.

**Refusal of Instruction as to Agent's Authority to Make Verbal Contract.**—

Since an oral contract by a railroad station agent for the transportation of stock is binding unless the shipper has knowledge that the agent has no authority to make such contract, it was not error, in an action against a railroad on such a contract, to refuse to charge on defendant's plea setting up the agent's want of authority to enter an oral contract. *San Antonio, etc., R. Co. v. Williams* (Civ. App.), 57 S. W. 883.

**Shipper Knowing Previous Written Contracts Contained Negation of Agent's Authority to Make Verbal Contract.**—Where a shipper made an

oral contract with a carrier's agent to furnish cattle, cars on a specified date, the fact that the shipper knew that he would be required to sign a written contract before the cattle were shipped, and that similar written contracts previously signed contained a negation of the agent's power to agree to furnish cars to be loaded with live stock at any specified time, did not charge the shipper with notice that the agent had

no power to make the oral contract. *San Antonio & A. P. Ry. Co. v. Timon*, 99 S. W. 418, 45 Tex. Civ. App. 47.

**Shipment under Verbal Contract—Stipulation of Subsequent Written Contract Not Binding.**—Where the agent of a carrier verbally agreed with the shipper to furnish cars for the shipment of cattle at a certain time, and to deliver them at their destination in time for a particular market, a written contract signed by the shipper at the time the cattle were loaded and shipped, which provided that the carrier only undertook to deliver within a reasonable time, was not binding on the shipper, in the absence of anything to show that at the time he made the verbal contract he knew that he would be required to sign the written contract, or that he knew the contents of the writing. *Gulf, etc., R. Co. v. Funk*, 42 Tex. Civ. App. 490, 92 S. W. 1032.

## 2. To Furnish Cars at Specified Time and Place.

Where the shipper knew of no limitation upon the authority of the station agent, the contract of a local agent to furnish cars at a specified time and place is binding upon the carrier. *Gulf, etc., R. Co. v. Hume Bros.*, 6 Tex. Civ. App. 653, 24 S. W. 915, reversed on another point in 87 Tex. 211, 27 S. W. 110; *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 99 S. W. 418; *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 37, 15 S. W. 164; *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211, 219, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915; *Gulf, etc., R. Co. v. Jackson*, 99 Tex. 343, 89 S. W. 968; *Gulf, etc., R. Co. v. Irvine* (Civ. App.), 73 S. W. 540; *Easton v. Dudley*, 78 Tex. 236, 14 S. W. 583; *Austin, etc., R. Co. v. Slator*, 7 Tex. Civ. App. 344, 347, 26 S. W. 233; *Houston, etc., R. Co. v. Campbell*, 91 Tex. 551, 558, 45 S. W. 2, reversing 40 S. W. 431; *Allen v. Texas, etc., R. Co.*, 100 Tex. 525, 530, 101 S. W. 792, affirming 42 Tex. Civ. App. 331; *Cross*

*v. Graves*, 4 App. Civ. Cases, § 100, 16 S. W. 102; *St. Louis, etc., R. Co. v. Boshear* (Civ. App.), 108 S. W. 1032, affirmed (Sup.), 113 S. W. 6. See post, "For Carriage beyond Own Line," IV, C, 4.

Where one represents a railroad company as station agent, and makes all contracts for shipment of live stock, but is not authorized to agree to provide cars at specified times, and in fact has instructions forbidding him to do so, a contract for this purpose is nevertheless binding upon the company as within the apparent scope of his authority, unless the shipper knows of the limitation. *Receivers of Missouri, K. & T. Ry. Co. v. Graves*, 4 Willson, Civ. Cas. Ct. App. § 100, 16 S. W. 102.

## • Furnishing Cars at Another Station.

—But it has also been held that the local agent of a railroad company has no authority to contract for the furnishing of cars at a station other than his own nor to make any contract which will bind the company with reference to freight to be received at a different station. *Gulf, etc., R. Co. v. Jackson*, 99 Tex. 343, 347, 89 S. W. 968, reversing 86 S. W. 47; *Southern Kansas R. Co. v. Cox*, 47 Tex. Civ. App. 84, 86, 103 S. W. 1122; *Gulf, etc., R. Co. v. Dinwiddie*, 21 Tex. Civ. App. 344, 51 S. W. 353. See, also, *Missouri, etc., R. Co. v. Belcher*, 88 Tex. 549, 551, 32 S. W. 518; *Gulf, etc., R. Co. v. Jackson*, 99 Tex. 343, 89 S. W. 968, reversing 86 S. W. 47; *Gulf, etc., R. Co. v. Hodge*, 10 Tex. Civ. App. 543, 30 S. W. 829.

**Reason of Rule.**—These cases rest upon the well-recognized rule of law that by conferring upon an agent express power to do certain acts, the authority is implied to do whatever may be necessary to execute the express power. It is held in the cases referred to that authority to contract for the shipment implied the power to make the agreement to furnish cars at a

given time; it was necessary to enable the agent to properly perform his duties. *Gulf, etc., Ry. Co. v. Jackson*, 99 Tex. 343, 346, 89 S. W. 968, reversing 86 S. W. 47.

**Reasonable Time Not Necessary.—**

The local agent of a railway company has authority, presumptively, to make contracts for cars; and if he does make such a contract, and receives notice as to when the cars were desired, and agrees to furnish them on that date, the railroad company will be liable for a failure to do so, even though reasonable time was not given to have them on hand. *Galveston, etc., R. Co. v. Thompson (Civ. App.)*, 44 S. W. 8.

**Printed Rule on Contract as Notice.**

—The printing of the rule that the agent has no authority to make contracts for cars at a specified time on the contracts could not be notice to the shipper, for the reason that such contracts in the natural course of things would not be known to the shipper until after the contract for cars had been made. *Gulf, etc., R. Co. v. Hume Bros.*, 87 Tex. 211, 219, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915.

**3. For Special Train.**

A contract that cattle were to be shipped in solid trains without mixing other freight with them, and also that each train should be drawn by a single engine, is unauthorized and not binding upon the railroad company for the same reasons which deny to the local agent the authority to contract to furnish cars at another station. The character of the trains which are to be run in the transportation of cattle and the number of engines to be used are matters under the charge and control of entirely different departments from that in which the live-stock agent or the local agent of the railroad company is engaged. It is not necessary, to enable either of the agents to execute the power of receiving and shipping the cattle, that those cars should

be hauled in solid trains without other cars; nor is it necessary to the performance of this duty that the number of engines to be used should be restricted as was done by the contract. *Gulf, etc., R. Co. v. Jackson*, 99 Tex. 343, 347, 89 S. W. 968, reversing 86 S. W. 47.

**4. For Carriage beyond Own Line.**

**Carrying Freight beyond Own Line.**

—A local freight agent of a railroad ordinarily has no authority to bind the railroad to carry freight beyond its line, unless it is shown that the railroad has engaged in the business of carrying freight beyond its line. *Gulf, etc., R. Co. v. Jackson*, 99 Tex. 343, 347, 89 S. W. 968, reversing 86 S. W. 47, distinguished in *San Antonio, etc., R. Co. v. Timon (Civ. App.)*, 110 S. W. 82.

**Furnishing Cars for Shipment beyond Line.**

—But the rule is not the same in reference to a contract to furnish cars for the shipment of cattle when they are destined beyond its line. *Gulf, etc., Co. v. Jackson*, 99 Tex. 343, 89 S. W. 968, reversing 86 S. W. 47, does not declare that a local agent has no authority to contract to furnish cars for shipments destined beyond its own line, but it is understood as declaring that such power ostensibly exists in the station agent. Where the action is not on account of anything that happened to the cattle while being transported, but for something that happened to them before the transportation commenced, and the contract sued on was the agreement to furnish cars, and the damages alleged to have been sustained occurred pending the arrival of the cars, a matter with which the written contracts, and also the obligations of the defendant with reference to the transportation of the cattle after loading, had nothing to do, except in so far as the written contract undertook to discharge defendant from damages resulting from the failure to furnish the cars, a contract to furnish



cars for transportation beyond its own line is binding, as the matter of furnishing cars is a matter within the implied authority of the agent of the particular station, and the shipper having no notice to the contrary, could rely on the appearance of authority. *San Antonio, etc., R. Co. v. Timon* (Civ. App.), 110 S. W. 82. See ante, "To Furnish Cars at Specified Time and Place," IV, C 2.

#### 5. For Rates.

**Contracts as to Rates Binding.**—Station agents are presumed to have authority to make contracts for the transportation of cattle, and in the absence of any adequate notice to the public of any limitation upon their authority in that respect, the railway company will be bound thereby, both as to the rates and as to the expedition of transportation and delivery. *Wood's Railway Law*, p. 450. *Easton v. Dudley*, 78 Tex. 236, 14 S. W. 583.

### D. WHAT CONSTITUTES SPECIAL CONTRACT.

Where it was agreed that defendant should carry cattle through to destination at \$96.90 per car, with privilege of shipper to fatten the cattle at two designated points en route, and, when the cattle were ready for shipment from the feeding pens, defendant agreed that if plaintiff would ship in 10 car lots, which was contrary to plaintiff's intention, and less advantageous to him than a shipment of 5 car lots, defendant would carry the cattle through to destination in 33 hours, such subsequent agreement constituted a complete contract based on a sufficient consideration. *St. Louis Southwestern Ry. Co. of Texas v. Barnes* (Civ. App.), 72 S. W. 1041.

**Agent Informing Shipper of Time Necessary to Make Run Not Special Contract.**—Evidence, in suit for damages for delay in shipping sheep, that shipper told railroad agent that he wanted "quick run," and latter said it would take four days to get sheep

on Wednesday morning market, that he would give him quick run, and that he would send shipper's ten cars as special, does not show special contract to deliver in four days by special route. *International, etc., R. Co. v. Wentworth*, 87 Tex. 311, 312, 28 S. W. 277, affirming 8 Tex. Civ. App. 5, 27 S. W. 680.

**Agent Answering "All Right" to Shipper's Request for Cars.**—Where a shipper of cattle went to the carrier's agent and stated that the shipper wanted not less than 10 cars in which to ship cattle on a specified day, giving the number of cattle and the point of destination, and the agent answered "all right," there was a sufficient oral contract to furnish the cars on the date specified. *San Antonio & A. P. Ry. Co. v. Timon*, 99 S. W. 418, 45 Tex. Civ. App. 47.

**Through Bill of Lading as Through Contract.**—When a common carrier gives a through bill of lading by which goods are to be delivered at point beyond its line, the bill of lading is an express contract to deliver at that point. *Gulf, etc., R. Co. v. Vaughn*, 4 App. Civ. Cases, § 182, 16 S. W. 775.

**Agent Replying "Would Do His Best to Obtain Cars" at Certain Date.**—A railroad depot agent verbally agreed with a shipper, who desired a poultry car on a stated day, "that he thought he could get the car, and would do the best he could towards getting it, but did not make any absolute promise to get the car." The car was not furnished at the date asked by the shipper. Held, that the contract imposed on the carrier no liability to furnish a car absolutely, and, as the shipper's action was based on contract, there could be no recovery. *St. Louis Southwestern Ry. Co. of Texas v. Cannington* (Civ. App.), 110 S. W. 965.

**Instruction—Conditional Contract of Sale.**—In action for failure to furnish cars according to contract, plaintiff's contract with, another party to sell be-

ing shown to have been completed when defendant informed plaintiff he could have cars at time stated, a charge that plaintiff's contract for sale of the cattle was conditional on his being able to obtain cars, and that there was therefore no binding contract to sell, was properly refused. *Gulf, etc., R. Co. v. Martin* (Civ. App.), 28 S. W. 576, 577.

**Evidence to Show Contract.**—In an action against a carrier for failure to furnish cars for the transportation of cattle, evidence that cars were ordered at a station from the agent there, who stated that cars could be had through the agent at another place, was admissible, as showing that the carrier had contracted to furnish cars. *Gulf, C. & S. F. Ry. Co. v. House & Watkins*, 88 S. W. 1110, 40 Tex. Civ. App. 105.

**Promise to Furnish Cars at Certain Date "if Possible."**—Evidence that a railroad's agent, when applied to on October 30th to furnish cars, accepted the order, and said that he would have the cars ready by the 1st of November, if possible, but did not promise definitely to do so, was insufficient to establish a contract to furnish the cars on the 1st of November. *Texas, etc., R. Co. v. Arnett*, 40 Tex. Civ. App. 76, 88 S. W. 448.

## E. MODIFICATION OR MERGER.

See, generally, the title **MERGER**.

A written contract for the shipment of cattle, limiting the authority of the carrier's agent to make a verbal contract, does not merge a previous verbal contract made by the agent with the shipper, in which the agent agreed to furnish cars ready to receive the cattle on a certain day. *Gulf, etc., R. Co. v. Combes* (Civ. App.), 80 S. W. 1045.

But in the absence of any evidence of fraud, compulsion, or want of time to read the written contracts for the shipment of the live stock, they must be taken as merging all previous understandings between the parties.

Where the contracts sued on were duly executed by the shipper's direction in order to secure transportation for his helpers, it was binding upon the shipper. *San Antonio, etc., R. Co. v. Barnett*, 27 Tex. Civ. App. 498, 66 S. W. 474.

**Abandonment of Contract by Signing of New Contract at Intermediate Point.**—Instance of facts held sufficient to sustain finding against plea that a live stock shipping contract from Texas to Chicago had been abandoned by shipper signing another such contract upon leaving Kansas City for Chicago. *Gulf, etc., R. Co. v. Cole*, 8 Tex. Civ. App. 635, 645, 28 S. W. 391, affirmed in 93 Tex. 684, no op.

**Stipulation That Written Contract Merged All Verbal Agreements Inadmissible.**—In an action against carriers to recover for injuries to a shipment of cattle, under an allegation by defendants that the contract of shipment was reduced to writing, a portion of the written contract stating that all verbal contracts in reference to the shipment were merged in the written instrument is not admissible. *Texas & P. Ry. Co. v. Felker*, 99 S. W. 439, 44 Tex. Civ. App. 420.

**Waybill Describing Shipment as Through One.**—In an action against a railroad company for damages to cattle received during carriage over its own and a connecting line, that the waybill issued by defendant described the shipment as a through one, held not to change written contracts for the shipment. *San Antonio, etc., R. Co. v. Barnett*, 27 Tex. Civ. App. 498, 66 S. W. 474.

**Shipping Report Not Merging Contract.**—In an action against a railroad company for damages to cattle received during carriage over its own and a connecting line, the shipping report, signed by agent of plaintiff and the connecting lines, held not to change written contracts for shipment between plaintiff and defendant. *San Antonio, etc.,*

R. Co. v. Barnett, 27 Tex. Civ. App. 498, 66 S. W. 474.

## F. LIABILITY FOR BREACH.

### 1. In General.

In suit against carrier for injury to stock shipped under valid special contract, plaintiff could recover only upon the contract and could not avoid the contract on ground that he did not know its contents. I. & G. N. R. Co. v. Watt, 2 App. Civ. Cases, § 781.

A carrier is liable for its failure to furnish cars at the time promised for a breach of contract as an individual, and not as a common carrier. International, etc., R. Co. v. Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754.

**Statutory Penalty Does Not Prevent Action for Breach of Contract.**—An action for damages for breach of verbal contract to furnish live stock cars at specified time is maintainable, notwithstanding the existence of the statutory penalty for failure to furnish cars on written application. Cross v. Graves, 4 App. Civ. Cases, § 100, 16 S. W. 102.

**Shipper Need Not Arrange for Shipment over Defendant's Route for Portion of Distance.**—Where a carrier failed to perform a contract to furnish cars to transport certain cattle as agreed, the shipper was not bound to arrange with another railroad company to transport the cattle over defendant's route for a part of the distance in order to reduce the shipper's damages. Pecos River R. Co. v. Latham, 40 Tex. Civ. App. 78, 88 S. W. 392, affirmed in 101 Tex. 652, no op.

**Knowledge of Carrier's Agent as Notice to Carrier of Stipulations of Contract.**—The fact that the agreement giving the shippers a right to fatten the cattle at an intermediate point on defendant's line was made by defendant's agent, was notice to defendant; and it was its business to see that the employees routing the cattle had notice which would enable them to carry out such agreement. Missouri,

etc., R. Co. v. DeBord, 21 Tex. Civ. App. 691, 53 S. W. 587, affirmed in 93 Tex. 690, no op.

### 2. Where Cattle Are Held in Pens Awaiting Cars.

See ante, "Duty to Provide Stock Pens," III, B.

Where cattle were held in shipping pens for any period of time after a carrier had agreed that cars should be ready for their shipment, the carrier was liable. (Civ. App.) Southern Kansas Ry. Co. of Texas v. Morris, 99 S. W. 433, judgment affirmed (Sup.) 100 Tex. 611, 102 S. W. 396; Texas, etc., R. Co. v. W. Scott & Co. (Civ. App.), 86 S. W. 1065; San Antonio, etc., R. Co. v. Pratt (Civ. App.), 32 S. W. 705.

**Failure to Feed and Water.**—Where carrier agreed to ship cattle at certain time and failed to furnish cars, and, while delayed, cattle were so penned, without feed and water, as to lose weight, which shipper could not have prevented by ordinary care, carrier is liable for their injury. International, etc., R. Co. v. Startz (Civ. App.), 33 S. W. 575, 576.

A railroad company agreed to furnish plaintiff with cars at 10 a. m. of a certain day to transport his cattle. Plaintiff, at the set time, put his cattle in a pen provided by the company. Late in the afternoon, the company informed plaintiff that the cars would come the next morning. There being no grass and not sufficient water at that place, the cattle were injured by the delay. Held, that the company was liable therefor. International & G. N. R. Co. v. Ritchie (Civ. App.), 26 S. W. 840.

**Stampede of Cattle Through Carrier's Failure to Feed and Water.**—After plaintiff had held his herd of 500 cattle five days, awaiting shipment, under a contract with defendant railroad company, the herd stampeded because of thirst and hunger, and 15 escaped, and were lost.

Held, that defendant was liable for the value of the 15 head. *Galveston, H. & S. A. Ry. Co. v. Stovall*, 3 Willson, Civ. Cas. Ct. App. § 251.

**Shipper May Rely on Carrier's Representations That Cars Would Soon Be There.**—Where a shipper placed his cattle in pens for shipment, when he knew there were no cars there in which to ship them, and permitted them to remain in the pens and await the arrival of the cars without feeding and watering them, because relying on the carrier's representations that cars would soon be there, the carrier was liable for the injury resulting from such failure. *Gulf, C. & S. F. Ry. Co. v. House & Watkins*, 88 S. W. 1110, 40 Tex. Civ. App. 105.

**Actual Notice of Placing of Cattle in Pens Unnecessary.**—A carrier is not relieved from liability for injury to cattle placed in its pens awaiting transportation, under an agreement with its agents that they were to be placed therein on a certain day, by the mere fact that the carrier did not have actual notice of the cattle having been placed in the pens on the day agreed upon, where the cattle were put in the pens on that day, and injured therein because of negligence of the carrier. *Ft. Worth & D. C. Ry. Co. v. Waggoner Nat. Bank*, 81 S. W. 1050, 36 Tex. Civ. App. 293.

**Loss in Weight Through Not Having Sufficient Stock Pens.**—Where a railway company contracts to receive and ship cattle at a certain time and place, it is liable for their loss in weight through failure to provide necessary stock pens to enable shipper to load within a reasonable time. *Missouri, etc., R. Co. v. Woods* (Civ. App.), 31 S. W. 237, 238.

### 3. Excuses for Nonperformance.

#### a. In General.

**Impossibility of Performance Not an Excuse.**—Where carrier makes time contract for through shipment, he will be held to strict performance

regardless of even impossibility of performance. *International, etc., R. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 11, 27 S. W. 680, affirmed in 87 Tex. 311.

**Nothing but the act of God or other vis major could excuse the carrier** from a compliance with the terms of a contract entered into. The rule announced in *Texas, etc., R. Co. v. Nelson*, 38 Tex. Civ. App. 605, 86 S. W. 616, a case of negligent failure to furnish cars, has no application to a case of breach of contract to furnish cars at specified time. *Texas, etc., R. Co. v. Felker*, 40 Tex. Civ. App. 604, 609, 90 S. W. 530.

**Shipment to Be Carried over Connecting Line as Excuse.**—Where a contract was made by a carrier to furnish cars to transport cattle, the carrier was not exonerated from the consequences of its breach of the contract at the point of shipment by the fact that the cattle were to be carried over connecting lines. *Texas & P. Ry. Co. v. W. Scott & Co.* (Civ. App.), 86 S. W. 1065.

#### b. Heavy and Unprecedented Traffic.

Heavy and unprecedented traffic can not relieve the carrier of the consequences that resulted from a breach of contract that he has made to furnish cars at a certain time. *Gulf, etc., R. Co. v. Hume Bros.*, 6 Tex. Civ. App. 653, 658, 24 S. W. 915, reversed, on another point, in 87 Tex. 211, 27 S. W. 110; *Cross v. McFaden*, 1 Tex. Civ. App. 461, 20 S. W. 846; *Gulf, etc., R. Co. v. McCorquodale*, 71 Tex. 41, 9 S. W. 80; *Southern Kansas R. Co. v. Morris* (Civ. App.), 99 S. W. 433, affirmed in 100 Tex. 611, 102 S. W. 396; *Southern Kansas R. Co. v. Samples* (Civ. App.), 109 S. W. 417; *International, etc., R. Co. v. Anderson*, 3 Tex. Civ. App. 8, 11, 21 S. W. 691; *Texas, etc., R. Co. v. Felker*, 40 Tex. Civ. App. 604, 609, 90 S. W. 530.

**Might Justify Refusal to Accept Shipments but Not Excuse for Non-performance of Contract.**—The vol-

ume of business offered to or accepted by a common carrier can not avail to relieve it from the performance of a contract already entered into. An excess of business might, under some circumstances, justify a refusal to accept live stock for shipment, but it could not excuse a nonperformance of contract obligations. *International, etc., R. Co. v. Anderson*, 3 Tex. Civ. App. 8, 11, 21 S. W. 691.

**c. Lack of Equipment—Stable Cars.**

**Lack of Equipment as Excuse.—**

When a railway company agrees to furnish stable cars for shipment at a designated time and place, it can not avoid the consequences of a breach of its duty to do so, by showing that its road is not equipped with cars of that character. *International, etc., R. Co. v. True & Co.*, 23 Tex. Civ. App. 523, 526, 57 S. W. 977, affirmed in 94 Tex. 705, no op.

**d. Failure to Have Cattle Inspected.**

A complaint alleged breach of contract by defendant carrier, to receive and ship cattle promptly on a certain day. The answer alleged that the delay was caused by plaintiff's fault in not having the cattle inspected as required by law before they could be shipped. The replication alleged that they were ready to be inspected late on the evening of that day, but that defendant's agent informed plaintiff that they could not be shipped out that night, and that, therefore, inspection was delayed until the next morning. Held that, plaintiff's failure to have the cattle inspected being a sufficient excuse for defendant's failure to receive and ship them on that day, the agent informing him that they could not be shipped out that night, and the only issue, except the amount of damages, being whether he was so induced, it was error to submit the case to the jury with an instruction that, in the absence of an agreement to ship immediately, a carrier is still liable for unreasonable delay, and that

it was for them to say whether there was such delay; defendant thus being deprived of his defense of noninspection. *Galveston, H. & S. A. Ry. Co. v. Rutledge* (Civ. App.), 37 S. W. 176.

Where a carrier, after it has contracted to furnish cars at a certain time for the shipment of cattle, and after the shipper has prepared to deliver them, having them inspected as fast as they can be loaded, stops the loading, and gives the cars to another shipper, who has already had his cattle inspected, it is liable to the first shipper for the damages caused by the delay, and is not relieved from liability by Cr. Code, art. 784, making it a misdemeanor for a railroad agent to receive for shipment cattle that have not been inspected; nor by Rev. St. arts. 4628, 4630, 4651, requiring an inspection certificate and a bill of sale before the shipment of cattle. *Receivers of International & G. N. R. Co. v. Wright*, 2 Tex. Civ. App. 198, 21 S. W. 56.

**e. Breaking of Engine.**

A railroad corporation is liable for damages resulting from a breach of a contract to ship cattle, though the breaking of an engine rendered it unable to fulfill the contract. (Civ. App. 1899) *Texas & P. Ry. Co. v. Davis*, 54 S. W. 381, 93 Tex. 378, judgment reversed (1900) 55 S. W. 562, 93 Tex. 378.

**V. Delivery to Carrier.**

**A. NECESSITY FOR DELIVERY AND ACCEPTANCE.**

When a railway company announces through its agent that it will not make a shipment at a time previously contracted for, a tender of the articles to be shipped at the time previously agreed on is thereby waived and rendered unnecessary to fix the liability of the company for resulting damages. *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491.

## B. WHAT CONSTITUTES DELIVERY AND ACCEPTANCE.

A requested charge that before there would be a delivery of the cattle by the shipper to the railway company and an acceptance thereof by the company, the cattle must not only have been placed in the shipping pens, but the possession and control thereof must have been fixed on the railway company; and if the shippers, or those acting for them, undertook to retain the control, care and custody of the cattle through that night (while waiting to be loaded on the cars), there would not be a delivery of the cattle to nor an acceptance thereof by the company, was properly refused as being on the weight of evidence, it being for the jury to say whether the retention of the control of the cattle by the shipper to the extent shown by the evidence would exclude the conclusion of a delivery, and the question being one of the intention of the parties to the contract. *Ft. Worth, etc., R. Co. v. Waggoner Nat. Bank*, 36 Tex. Civ. App. 293, 81 S. W. 1050, affirmed in 98 Tex. 616, no op.

**Permission to Occupy Pens Not Receipt.**—A mere permission by the agent of a railroad company to an owner of cattle to place the cattle in the company's yards, where they are not received for shipment and no bill of lading is given, does not render the company liable for damages caused by the escape of the cattle. *Ft. Worth & D. C. Ry. Co. v. Riley*, 21 Tex. Civ. App. 454, 1 S. W. 446.

It is not necessary that the carrier should have actual notice of the delivery of cattle in the pens if the jury believed under the evidence to that effect that there was a prior agreement that the shipper should deliver the cattle by putting them in the pens at the time they were put there. *Ft. Worth, etc., R. Co. v. Waggoner Nat.*

*Bank*, 36 Tex. Civ. App. 293, 81 S. W. 1050, affirmed in 98 Tex. 616, no op.

## C. CARRIER AS WAREHOUSEMAN.

Where cattle have been placed in defendant's pen for immediate shipment over defendant's railroad, and part of them have actually been placed on the cars, the cattle are in the custody of defendant as a carrier, and not as a warehouseman. *Gulf, C. & S. F. Ry. Co. v. Trawick*, 80 Tex. 270, 15 S. W. 568.

## VI. Delivery by Carrier.

### A. TIME OF DELIVERY.

**Delivery Must Be within Reasonable Time.**—Where a written contract for the shipment of cattle does not specify any particular time for delivery at the point of destination, delivery must be made within a reasonable time. *Gulf, C. & S. F. Ry. Co. v. Baugh* (Civ. App.), 42 S. W. 245.

**Sufficiency of Delivery at 2:30 p. m. for Market of That Day.**—Delivery by a carrier of live stock at the stockyards at 2:20 p. m., is sufficiently early to permit the cattle being placed on the market at the yards before the close of the market at 3 p. m. *Chicago, R. I. & G. Ry. Co. v. Young & Ball* (Civ. App.), 107 S. W. 127.

**Tender Must Be within Reasonable Hours.**—The carrier is bound to tender the cattle within a reasonable time and within reasonable hours. *Houston, etc., R. Co. v. Trammell*, 28 Tex. Civ. App. 312, 315, 68 S. W. 716, affirmed in 95 Tex. 680, no op.; *Missouri Pac. R. Co. v. Haynes & Co.*, 72 Tex. 175, 10 S. W. 398; *Morgan v. Dibble*, 29 Tex. 107, 119; *Hutch. on Carr.*, § 340; 5 Am. and Eng. Enc. of Law, 2 Ed., 217, 225.

**Delivery at Midnight.**—Where defendant had transported cattle and tendered them to the consignee at 12 o'clock on a cold, wet night, demanding the freight, which was a consid-

erable sum, and the consignee had not the money with him at that time, and being a stranger in the city, knew not where to take the cattle, and declined to receive them, and defendant placed them in its stock pens, there was not such a tender at reasonable hours as exempted defendant from liability for the escape of the cattle from the pens that night. *Houston, etc., R. Co. v. Trammell*, 28 Tex. Civ. App. 312, 68 S. W. 716, affirmed in 95 Tex. 680, no op.

**Question of Fact.**—It is a question of fact whether the cattle were tendered within reasonable hours, and whether the consignee should, under the circumstances, have received them. *Houston, etc., R. Co. v. Trammell*, 28 Tex. Civ. App. 312, 315, 68 S. W. 716, affirmed in 95 Tex. 680, no op.

#### **B. WHERE MADE.**

Where a railroad could not comply with its contract to deliver a shipment of cattle to a connecting road for through transportation, except by a delivery at certain stockyards used jointly by both roads, the shipper could not insist on such delivery, and at the same time demand a delivery at the initial carrier's own stockyards. *Texas, etc., R. Co. v. Felker*, 40 Tex. Civ. App. 604, 90 S. W. 530.

In an action against carriers to recover for injuries to a shipment of cattle, the testimony of a person who accompanied the cattle that he did not authorize delivery at the stockyards where delivery was made is admissible, as tending to show that delivery was at a point selected by the initial carrier. *Texas & P. Ry. Co. v. Felker*, 99 S. W. 439, 44 Tex. Civ. App. 420.

**Shipper Need Not Accept at Intermediate Point.**—A shipper of stock is not required to receive it before arrival at the destination, on being notified that some of the animals are sick. *Houston & T. C. R. Co. v. Burns*, 90 S. W. 688, 41 Tex. Civ. App. 83.

**Custom as Affecting Place of De-**

**livery.**—In an action against a carrier for damages to cattle shipped to Ft. Worth, where the evidence indicated that the general custom of the carrier was to deliver cattle shipped to Ft. Worth, to the Ft. Worth stockyards, an instruction that it was the carrier's duty to deliver the stock in controversy at such place was proper. *Texas & P. Ry. Co. v. Coggin & Dunaway*, 99 S. W. 1052, 44 Tex. Civ. App. 423.

#### **C. TO WHOM MADE.**

Testimony of one of plaintiffs as to a custom of defendant of delivering stock to third persons at shipping stations, for the purpose of showing that plaintiffs were relieved from care of their horses when they arrived at their destination, was improperly admitted, in an action for injuries to horses shipped by plaintiff; it not being shown that the custom was uniform, reasonable, and notorious, or that witness was experienced in such transactions. *Missouri Pac. Ry. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75. See the title **USAGES AND CUSTOMS.**

**Escape of Cattle Delivered to Stock-Yard Company.**—When a railroad company delivers stock received for shipment to a stockyards company, in whose hands it escapes, the shipper is not bound to attempt to recover it, nor to receive it, after recovery by the stock-yards company, burdened with charges for feed, etc. *Gulf, C. & S. F. Ry. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161.

### **VII. Liability for Delay in Transportation or Delivery.**

#### **A. IN GENERAL.**

It is well settled that a carrier is liable for failure to transport cattle within a reasonable time. *Missouri Pac. R. Co. v. Nicholson*, 2 App. Civ. Cases, § 168; *St. Louis, etc., R. Co. v. Wilhelm*, 49 Tex. Civ. App. 639, 108 S. W. 1195; *Atchison, etc., R. Co.*

*v. Bryan* (Civ. App.), 37 S. W. 234, 235; *Gulf, etc., Ry. Co. v. Patterson* (Civ. App.), 23 S. W. 473; *Gulf, etc., R. Co. v. Porter*, 25 Tex. Civ. App. 491, 61 S. W. 343. See ante, "Duty to Carry and Deliver within Reasonable Time," III, E.

A carrier is usually only required to use ordinary care and diligence to avoid delay under all circumstances in transporting cattle to market. *Missouri, K. & T. Ry. Co. of Texas v. Kyser & Sutherland*, 95 S. W. 747, 43 Tex. Civ. App. 322.

**Unusual Delay Prima Facie Evidence of Negligence.**—But where the delay is an unusual one and it is not explained, it is held to be prima facie evidence of negligence., 4 Elliott on Railroads, § 1483. *Chicago, etc., R. Co. v. Gillett* (Civ. App.), 99 S. W. 712, 713.

A railroad company which unnecessarily delays the transportation of cattle, and needlessly confines them in cars at different stations along the road, and bruises them during transportation, is guilty of gross negligence, and is liable to the shipper therefor. *Good v. Galveston, H. & S. A. Ry. Co.* (Sup.), 11 S. W. 854.

**Need Not Be Transported for Particular Market.**—A carrier is not under obligation to transport for any specific market, in the absence of special contract. *Texas, etc., R. Co. v. Smissen*, 31 Tex. Civ. App. 549, 73 S. W. 42, affirmed in 97 Tex. 649, no op.

Where a railway company transports cattle within a reasonable time, it is not liable because the cattle did not reach their destination at the time designated by the shipper, unless, when it received the cattle, it was notified of the shipper's design. *Atchison, T. & S. F. Ry. Co. v. Bryan* (Civ. App.), 28 S. W. 98.

**Plaintiff May Recover for Negligent Delay Though No Special Contract.**—But because the stock were

not to be transported within any specified time, nor to be delivered at any particular day, nor in season for any particular market, does not prevent the plaintiff from showing negligent delay in shipping the cattle. *Texas, etc., R. Co. v. Stewart*, 43 Tex. Civ. App. 399, 400, 96 S. W. 106.

**Because shipper consented that cattle need not be fed and watered at first station does not estop them from recovering damages resulting from unusual delay in reaching next station where such delay is caused by carrier's negligence.** *St. Louis, etc., R. Co. v. Turner*, 1 Tex. Civ. App. 625, 632, 20 S. W. 1008, Bk. V. Tex. Notes, 929.

**Delay Not Affecting Price of Cattle.**—In an action against a railroad company for delay in the transportation of cattle, where it appears that, if the train had arrived on time, it would have been after the close of market hours for the day, and that the cattle would have been held over until the time when they were actually sold, the negligence of the company did not affect the price of the cattle with reference to the time of sale, and plaintiff can not recover. *Missouri Pac. Ry. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. 78.

**Market at Destination under Water.**—In action against carrier for delay in shipment of cattle, plaintiff can recover nothing where it is shown that market at destination being under water, he could not have sold them there had there been no delay. *San Antonio, etc., R. Co. v. Barnett* (Civ. App.), 27 S. W. 676, 678.

**Delay Need Not Be Both Unreasonable and Unnecessary.**—In an action for delay in the shipment of cattle, an instruction, holding the carrier liable only in case the delay was both unreasonable and unnecessary, was erroneous, since it would be liable if the delay was unreasonable, though rendered necessary by its negligence.



*Rogers v. Texas & P. Ry. Co.* (Civ. App.), 94 S. W. 158.

**A delay may be necessary and yet unreasonable.** If it is made necessary by the negligence of the party chargeable therewith, such delay is in legal contemplation unreasonable, however imperatively necessary it may have been. *Rogers v. Texas, etc., R. Co.* (Civ. App.), 94 S. W. 158, 162 (see 101 Tex. 654, no op.).

**"Negligent" and "Unreasonable" Delay Synonymous.**—It would seem from the text-writers that the terms "negligent delay" and "unreasonable delay" are used interchangeably and are of the same meaning. If by unreasonable delay goods have deteriorated or their market value has fallen, or they arrive too late for market, the owner may hold the carrier liable for damages. *Hutch, Cor., § 328.* And whatever excuses unusual delay, disproves its negligence or unreasonableness. *Chicago, etc., R. Co. v. Gillett* (Civ. App.), 99 S. W. 712, 713.

**Duty to Transport on Sunday.**—In an action against a railroad company for damages caused by negligence in failing to transport cattle delivered to it on Saturday within a reasonable time, an instruction that a railroad was not bound to run its trains on Sunday should have been qualified by a request charge submitting whether it was negligence in commencing the transportation on Saturday, where the evidence justified the submission of that question. *Belcher v. Missouri, K. & T. Ry. Co. of Texas*, 92 Tex. 593, 50 S. W. 559.

**Custom as Affecting Carrier's Liability.**—Custom can not require shipper of stock to hold railroad harmless against ordinary delays in taking up freight, since the matter is regulated by law. *Missouri Pac. R. R. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749. See the title USAGES AND CUSTOMS.

**Evidence as to Delay.**—In showing delay in transporting cattle, evidence

is admissible that cars containing local freights were attached to the train, which rendered it necessary for it to stop at the way stations on the road to discharge freight, whereby the transportation of the cattle was greatly prolonged. *Gulf, etc., R. Co. v. Ellison*, 70 Tex. 491, 492, 7 S. W. 785.

## B. WHAT CONSTITUTES REASONABLE TIME FOR TRANSPORTATION.

### 1. In General.

**Question of Fact for Jury.**—The question of the liability of an initial carrier for damages to cattle, caused by delay incident to feeding the cattle at the point of delivery to a connecting carrier, is one of fact for the jury, dependent upon the time of delivery of the cattle to and their acceptance by the connecting carrier. *Texas & P. Ry. Co. v. Scoggin & Brown*, 90 S. W. 521, 40 Tex. Civ. App. 526.

Although the circumstances of the delay were undisputed; the question whether these circumstances were such as to justify the delay is one upon which reasonable minds might differ, and is a question of fact for the jury. *St. Louis, etc., R. Co. v. Rainey*, 100 Tex. 48, 51, 94 S. W. 321.

**Instruction as to Reasonable Time.**—In an action for damages to cattle for delay, etc., in transportation, it was not error to refuse a charge instructing that, in determining the question of reasonableness of time, the jury should consider all the incidents of the service, probable breaking of machinery, etc., where the court had already charged that what would be an unreasonable delay in forwarding and transporting the cattle was a question for the jury's determination from all the facts and circumstances in evidence, and that the railway company was not obligated to transport the cattle in any specific time. *Texas, etc., Ry. Co. v. Smissen*, 31 Tex. Civ.

App. 549, 73 S. W. 42, affirmed in 97 Tex. 649, no op.

**Testimony as to Reasonable Time.**—Although it is the function of the jury to determine whether transportation was within a reasonable time, in so doing, evidence is necessary to guide them, and it is competent for witnesses having the requisite knowledge to state, as a matter of fact, what would constitute such reasonable time. *Texas, etc., R. Co. v. Ellerd*, 38 Tex. Civ. App. 596, 597, 87 S. W. 362, affirmed in 101 Tex. 663, no op. See the title EXPERT AND OPINION EVIDENCE.

**Carrier May Show Shipment by First Train after Receipt.**—It is for the jury to say whether under all of the circumstances the carrier was negligent in failing to at once forward cattle after their receipt, and the carrier has the right to show, if it could, that the cattle in question were shipped on the first freight train on its road going out, after the cattle had been received, and that the transportation began as soon as the road was clear and open to the train. *Chicago, etc., R. Co. v. Kapp*, 37 Tex. Civ. App. 203, 204, 83 S. W. 233.

**Bad Condition of Track Admissible.**—In suit for damages to cattle in transitu, under allegation that the delay was caused by carrier's negligence, evidence showing bad condition of track at point where delay occurred is admissible. *St. Louis, etc., R. Co. v. Turner*, 1 Tex. Civ. App. 625, 631, 20 S. W. 1008.

**Law Does Not Presume Schedule Time Fixed by Carrier Is Reasonable.**—*Sayles' Ann. Civ. St.* 1897, art. 4484, providing that railway companies shall have the right to regulate the time and manner in which passengers and property shall be transported, does not justify an instruction in an action against a carrier for delay in delivering stock that the carrier had a right to regulate the time to be occupied by

its trains in the transportation of cattle between two points, and that the law presumes that the time fixed by the carrier was reasonable. *Texas & P. Ry. Co. v. Currie*, 76 S. W. 810, 33 Tex. Civ. App. 277.

## 2. Illustrative Cases.

**A delay of 10 hours in a shipment of nine carloads of cattle, for no other reason than that the regular train had left when the shipment was received from the initial carrier, was unreasonable, in the absence of a showing that the carrier had no other facilities for forwarding the shipment sooner.** *Rogers v. Texas, etc., R. Co.* (Civ. App.), 94 S. W. 158 (see 101 Tex. 654, no op.).

**A delay of 13 hours in a shipment of cattle, caused by an unexplained breaking down of the carrier's passenger engine, followed by the freezing of water in its tanks, where water could have been procured from a distance of nine miles on the carrier's road, was unreasonable.** *Rogers v. Texas & P. Ry. Co.* (Civ. App.), 94 S. W. 158.

**Thirty-Six Hours as Unreasonable Delay.**—Where the run between two points could be reasonably made in 36 hours, there was an unreasonable delay where it took 62 hours for the run. *St. Louis, I. M. & S. Ry. Co. v. Gunter*, 99 S. W. 152, 44 Tex. Civ. App. 480.

**Sufficiency of Evidence to Justify Submission of Negligent Delay.**—In an action against railroad companies for injuries to a shipment of cattle, evidence held to justify submission to the jury of the issue whether defendants had negligently left the cars containing plaintiff's cattle stationary upon the tracks, side tracks, and other places. *Houston & T. C. R. Co. v. Gray*, 85 S. W. 838, 38 Tex. Civ. App. 249.

## C. EXCUSES FOR DELAY.

### 1. In General.

Where the property is actually

transported and delivered, but the time of delivery was delayed, such delay, if resulting from causes beyond the control of the carrier, may be excused. If under such circumstances the carrier exercises due care for the protection and preservation of the property, he will not be liable. *International, etc., Ry. Co. v. Hynes*, 3 Tex. Civ. App. 20, 21, 21 S. W. 622; *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, 13 S. W. 191.

**Regular Trains Not Connecting in Time to Avoid Delay.**—A railroad company receiving cattle for shipment is bound to transport them to their destination in a reasonable time, and can not excuse delays in transportation on the ground that its regular trains did not connect in time to avoid delay. *Gulf, C. & S. F. Ry. Co. v. Porter*, 61 S. W. 343, 25 Tex. Civ. App. 491.

**Unreasonable Delay Waiting for Next Regular Train.**—Where the proof shows that 14 car loads of cattle in shipment were unreasonably delayed over five hours for feed and rest, and the excuse offered was that there was no regular train going out, and that the cattle were kept waiting for a train, an instruction that any delay in the transportation on account of the carrier's regular train for an unreasonable time without some reasonable explanation would not be justifiable was proper. *St. Louis, I. M. & S. Ry. Co. v. Gunter*, 99 S. W. 152, 44 Tex. Civ. App. 480.

## 2. Act of God.

See post, "In General," VII, C, 6, a. And see the title CARRIERS OF GOODS.

**Engine Tanks Freezing.**—To excuse the carrier on the ground that the extreme cold weather causing the water in the engine tanks to freeze was the act of God, and its attended effects caused the delay, such act must have been the proximate cause of the delay and free from any concurring negligence on the carrier's part.

*Rogers v. Texas, etc., R. Co.* (Civ. App.), 94 S. W. 158, 162 (see 101 Tex. 654, no op.).

**Washout on Line.**—Railroad company is liable for damages resulting from delay of cattle shipped, where it had another route around washout on main line, which it might have used. *Receivers v. Olive* (Civ. App.), 23 S. W. 526, 527.

**Act of God Occurring after Breach.**—In an action against a railway company for damages, for failure to furnish cars, and to receive and to transport cattle, the contract being that the cattle should be received on May 19, 1884, and delay was made until May 23, and a break caused in the track on May 21, by a violent rain storm, the break being at a place which would have been passed had the cattle been shipped at any time before the morning of the twenty-first of May, held, that the break in the track on May 21, after the breach of contract, was no defense to the action; and that the railway company was liable for all damages caused by its breach. *Gulf, etc., R. Co. v. McCorquodale*, 71 Tex. 41, 9 S. W. 80.

**Snow Storm—December.**—Where a railroad company transporting cattle from Texas to Illinois unnecessarily delayed them on the route so that they were exposed to severe cold and snow in Missouri, such weather in December was not an "act of God" which excused the carrier from liability. *Texas & P. Ry. Co. v. Smissen*, 73 S. W. 42, 31 Tex. Civ. App. 549.

**Cold Weather and Rain—December.**—Where, through the negligence of a carrier of live stock the cattle were so delayed that they had to be held over one day in December for a market, and in the meantime they sustained injuries by reason of cold and rain, the carrier was liable for the injuries so caused, since cold weather in that month was not an act of God which would excuse the carrier. *Texas & P. Ry. Co.*

*v. Coggin & Dunaway*, 99 S. W. 1052, 44 Tex. Civ. App. 423.

**Atmospheric Influences.**—If the failure to receive orders for the movement of the train, on which were shipped a number of horses injured by delay in the shipment, is caused by atmospheric or other influences beyond the carrier's control, rendering unavailable the telegraph wires, such delay would be excused, and it is immaterial whether such unavoidable failure of the telegraph wires be attributed to the act of God or not. If the delay was induced by causes beyond the carrier's control, it is excused, regardless of the agency producing such failure or delay. *International, etc., Ry. Co. v. Hynes*, 3 Tex. Civ. App. 20, 21 S. W. 622.

Where there was testimony tending to show that delay in the shipment of the horses was caused by atmospheric influences, it was error to refuse to charge the jury upon such issue. To render such delay excusable the carrier must have exercised due care to protect the property against injury pending the delay. *International, etc., R. Co. v. Hynes*, 3 Tex. Civ. App. 20, 21 S. W. 622.

### 3. Mobs and Strikes.

The existence of a strike among railway employees, obstructing the operation of the road and the carrying of freight, will excuse delay in the carrying of cattle caused by such strike. *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. 913.

**Carrier Liable Only for Failure to Exercise Reasonable Diligence.**—A carrier is liable for injury to cattle by delay in transit where the delay is caused by interference of strikers in the movement of trains only when it fails to exercise reasonable diligence to expedite the shipment. *Sterling v. St. Louis, I. M. & S. Ry. Co.*, 86 S. W. 655, 38 Tex. Civ. App. 451.

A carrier is not required to use all available means to forward cattle de-

layed by mobs or strikers, and call upon the civil and military authorities, to control the train carrying the cattle, and to quell the strike and control the influence of the mob, in order to expedite the shipment of the cattle. Such a burden is more onerous than is exacted by the law. Reasonable diligence, under the circumstances, is what the law requires. *Sterling v. St. Louis, etc., R. Co.*, 38 Tex. Civ. App. 451, 459, 86 S. W. 655, affirmed in 101 Tex. 661, no op.

If the carrier can prove that "striking firemen and many of their friends and sympathizers conspired and acted together and by divers violent and unlawful means prevented the carrier from employing other persons as firemen on its trains, or from moving same or transacting its business as a common carrier," and defendant was "wholly unable to transport," the live stock by reason of such strike, it would not be liable for delay in accepting the freight for shipment. If the railroad company was "wholly unable," as alleged, to transport the calves, that inability involved not only the exercise of ordinary care, but it went further, and was an allegation of the utter impossibility of carrying the freight. *Galveston, etc., R. Co. v. Karrer* (Civ. App.), 109 S. W. 440, 441.

**Strike on Connecting Road.**—In suit against carrier for delay in transporting sheep, defendant may show in defense that it could not deliver the sheep in shorter time owing to strike of employees upon next succeeding line, over which it had no control. *Southern Pac. R. Co. v. Johnson*, 4 App. Civ. Cases, § 45, 15 S. W. 121.

**Superintendent's Notification Not to Deliver Because of Strike Admissible.**—Notification to defendant from the superintendent of terminals at the destination of the shipment not to undertake to deliver to the terminals because of a strike of its employees

was admissible on the issue whether the defendant was negligent in detaining the cattle. *Sterling v. St. Louis, I. M. & S. Ry. Co.*, 86 S. W. 655, 38 Tex. Civ. App. 451.

**4. Inherent Vice—Delay Contributing to Damage.**

A carrier is responsible for damages to a shipment of horses resulting from a negligent delay on a switch, though the inherent propensities of the horses may have contributed to the result. *Galveston, H. & S. A. Ry. Co. v. Her-ring (Civ. App.)*, 36 S. W. 129.

**5. Stops for Feed and Water.**

In an action against a railroad company for damages for delay in transporting a car load of cattle, it appeared that the car had been hauled part of the way in a special train, and then set out and unloaded to allow the cattle rest and feeding; that the car was taken on by the first regular freight train, 12 hours later. It did not appear that there was opportunity in the car for the cattle to rest, but it was shown that they were supplied with food and water. Held, that under Rev. St. U. S. §§ 4386, 4388, forbidding railroad companies transporting cattle from confining them in cars longer than 28 consecutive hours without unloading them for rest for at least five hours, unless carried in a car in which they can and do have opportunity to rest, the delay was justified, and defendant can not be held liable therefor. *Galveston, H. & S. A. R. Co. v. Warn-ken*, 12 Tex. Civ. App. 645, 35 S. W. 72.

In an action for injuries to beef cattle from delay in transportation the time necessarily lost in stopping the cattle for food and rest under a federal statute should not be included in the jury's computation of negligent delay. *St. Louis, I. M. & S. Ry. Co. v. Carlisle*, 78 S. W. 553, 34 Tex. Civ. App. 268.

**Delay for More than Statute Re-quires.**—An instruction that it was the duty of a carrier not to keep cattle

confined in cars for more than 28 consecutive hours without unloading for rest and watering and feeding for at least five consecutive hours but that if the carrier delayed the transportation beyond that time, and the delay over that period was unreasonable under the circumstances, the delay would not be justifiable, was not objectionable as holding as a matter of law that the company should not permit the cattle to remain in the pens when unloaded more than five hours. *St. Louis, I. M. & S. Ry. Co. v. Gunter*, 99 S. W. 152, 44 Tex. Civ. App. 480.

**6. Unusual Rush of Business or Lack of Facilities.**

**a. In General.**

A carrier who receives live stock for shipment can not escape liability for injuries by delay in their transportation, on the ground that there was an unusual rush of business on its road. (1893) *International & G. N. R. Co. v. Anderson*, 3 Tex. Civ. App. 8, 21 S. W. 691; (1894) *Gulf, C. & S. F. Ry. Co. v. McAulay (Civ. App.)*, 26 S. W. 475; *Gulf, etc., R. Co. v. McCor-quodale*, 71 Tex. 41, 9 S. W. 80; *Cross v. McFaden*, 1 Tex. Civ. App. 461, 20 S. W. 846; *International, etc., R. Co. v. Lewis (Civ. App.)*, 23 S. W. 323; *Gulf, etc., R. Co. v. Hume*, 6 Tex. Civ. App. 653, 24 S. W. 915, reversed in 87 Tex. 211; *Texas, etc., R. Co. v. Felker*, 40 Tex. Civ. App. 604, 90 S. W. 530.

**Only Act of God or Other Vis Major Excuses.**—A rush of business is no defense for failure of a carrier to transport freight or cattle with reasonable care and diligence, such failure being excused only by the act of God or other vis major. *Texas & P. Ry. Co. v. Felker*, 90 S. W. 530, 40 Tex. Civ. App. 604. See ante, "Act of God," VII, C, 2.

**Carrier Must Show It Exhausted Its Resources.**—In an action against a railroad company for damages to cattle in transit on defendant's road by delaying them at certain places, the

fact that defendant had a great rush of business at such points will not relieve it of liability, unless it also shows that it exhausted its resources for providing for the cattle. *International & G. N. R. Co. v. Lewis* (Civ. App.), 23 S. W. 323.

**b. Failure to Furnish Cars.**

**Where No Special Contract Exists.**

—It seems that in suit for damages to live stock because of failure to furnish cars to ship, in absence of contract to furnish cars at specified time, an unusual and extra press of business including shipment of cattle will excuse prompt furnishing of cars on demand therefor. *Texas, etc., R. Co. v. Jones*, 23 Tex. Civ. App. 551, 553, 58 S. W. 174; *Cross v. McFaden*, 1 Tex. Civ. App. 461, 464, 465, 20 S. W. 846.

As to rule where special contract exists, see ante, "Heavy and Unprecedented Traffic," IV, F, 3, b.

In an action based upon negligence and not upon the statute, ordinarily the rush of business and scarcity of cars may be considered by the jury in determining whether or not cars were furnished within a reasonable time after demand, and it is only where reasonable minds can not differ upon the conclusion to be drawn from the evidence that the court is authorized to withdraw the consideration of this issue from the jury. *Texas, etc., R. Co. v. Nelson*, 38 Tex. Civ. App. 605, 607, 86 S. W. 616. See, also, *Texas, etc., R. Co. v. Felker*, 40 Tex. Civ. App. 604, 90 S. W. 530; *Houston, etc., R. Co. v. Smith*, 63 Tex. 322; *Davis v. Texas, etc., R. Co.*, 91 Tex. 505, 44 S. W. 822, reversing 42 S. W. 1008; *Texas, etc., R. Co. v. Allen*, 42 Tex. Civ. App. 331, 332, 98 S. W. 450, affirmed in 100 Tex. 525. See ante, "Under Texas Statute," III, A, 5.

**Congested Condition Not Excuse.**

Evidence which merely showed a congested condition of transportation facilities about the time of plaintiff's order for cars did not show a suffi-

cient excuse for the carrier's failure to furnish the cars within a reasonable time. *Texas, etc., R. Co. v. Smith*, 34 Tex. Civ. App. 571, 79 S. W. 614, affirmed in 98 Tex. 635, no op.

**Under Statute for Failure to Furnish Cars within Reasonable Time.**

Under Rev. Stat., arts. 4494, 4496, a carrier must furnish cars as soon as a reasonable time has elapsed; it is error to charge that the carrier would be excused in law, if it was prevented from furnishing cars, etc., by then having an unusually large number of cattle shipments upon its road. *Davis v. Texas, etc., R. Co.*, 91 Tex. 505, 44 S. W. 822, reversing 42 S. W. 1008.

In an action against a railroad company for damages for failure to furnish stock cars within 20 days after they were ordered, an answer alleging merely that defendant owned and controlled a sufficient number of cars for the use of defendant's road, but that when plaintiff ordered cars it could not furnish them sooner, because they were in the hands of connecting carriers, and that there was a general scarcity or famine of stock cars in the region, stated no defense. *Texas & P. Ry. Co. v. Barrow* (Civ. App.), 94 S. W. 176.

**c. Lack of Facilities.**

Where damages to stock were claimed through failure to supply suitable cars for shipment, under the contract with the live-stock agent of a railroad, and the evidence tended to show that stable cars were the only suitable cars used, and that no attempt was made to furnish any other kind of cars, it was not error to exclude testimony of inability to obtain a sufficient number of stable cars, since such inability was not admissible to show that the contract was not made, nor did it relieve the carrier from duty to furnish suitable cars within reasonable time after notice of shipment. *International & G. N. R.*

Co. v. True, 57 S. W. 977, 23 Tex. Civ. App. 523.

#### 7. Failure to Have Cattle Inspected.

It is not required of a shipper of cattle to have his entire herd inspected under the inspection laws before the delivery of such cattle to the railway agent for shipment; nor would the agent be an offender for receiving a herd of cattle for shipment before the full compliance with the inspection laws. This ruling is made where a part of the herd had been inspected, and the remainder could have been inspected without causing any delay in loading them into the cars for shipment. *Receivers v. Wright*, 2 Tex. Civ. App. 198, 21 S. W. 56. See ante, "Failure to Have Cattle Inspected," IV, F, 3, d.

### D. DAMAGES.

#### 1. Proximate Cause.

The damages the shipper is entitled to recover, if any, from unreasonable delay or unusual rough handling, are such as in fact proximately resulted from the negligence alleged and shown, and not such as "might have resulted from unreasonable delay or unusual rough handling." *Ft. Worth, etc., R. Co. v. James*, 39 Tex. Civ. App. 408, 409, 87 S. W. 730.

#### 2. Measure of Damages.

##### a. Delay in Transportation or Delivery.

###### (1) In General.

**Contract Price Not Measure of Damages.**—The measure of damages for the depreciation in value of live stock shipped to a purchaser, by reason of the carrier's unreasonable delay in transportation and delivery, does not depend on the contract price. *Missouri, etc., R. Co. v. Webb & Co.*, 20 Tex. Civ. App. 431, 49 S. W. 526. See post, "Where Shipment Made to Fill Contract," VII, D, 2, a, (4).

**Difference in Market Value at Destination as Criterion.**—In an action against a railroad company for failure

to deliver live stock according to the schedule time, the measure of damages was the difference in market value of the cattle at the place of destination, in the condition and weight at the time of delivery to the consignee, and their market value in the condition and weight at the time they should have been delivered, if transported at schedule time and with reasonable dispatch. *Chicago, R. I. & G. Ry. Co. v. Young & Ball* (Civ. App.), 107 S. W. 127; *Gulf, etc., R. Co. v. Wilm*, 9 Tex. Civ. App. 161, 28 S. W. 925; *Gulf, etc., R. Co. v. Hughes* (Civ. App.), 31 S. W. 411, 412; *Texas, etc., R. Co. v. Truesdell*, 21 Tex. Civ. App. 125, 127, 51 S. W. 272, affirmed in 93 Tex. 125, no op.; *Chicago, etc., R. Co. v. Hallsell* (Civ. App.), 81 S. W. 1241, affirmed in 98 Tex. 244; *Gulf, etc., R. Co. v. Ware*, 34 Tex. Civ. App. 455, 78 S. W. 961; *Gulf, etc., R. Co. v. McCarty*, 62 Tex. 608, 18 S. W. 716; *Reeves v. Texas, etc., R. Co.*, 11 Tex. Civ. App. 514, 32 S. W. 920; *International, etc., R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186, 23 S. W. 754; *Ft. Worth & D. C. Ry. Co. v. Richards* (Civ. App.), 105 S. W. 236; *Missouri, Pac. R. Co. v. Nicholson*, 2 App. Civ. Cases, § 168; *Missouri, etc., R. Co. v. Webb & Co.*, 20 Tex. Civ. App. 431, 439, 49 S. W. 526; *Missouri, etc., R. Co. of Texas v. Cobb* (Civ. App.), 36 S. W. 500; *Atchison, etc., R. Co. v. Bryan* (Civ. App.), 37 S. W. 234, 235; *Mexican Nat. R. Co. v. Garcia* (Civ. App.), 26 S. W. 780; *St. Louis, etc., Railway v. Burns* (Civ. App.), 80 S. W. 104; *Gulf, etc., R. Co. v. McAulay* (Civ. App.), 26 S. W. 475; *Galveston, etc., R. Co. v. Botts* (Civ. App.), 70 S. W. 113; *Gulf, etc., R. Co. v. Beattie* (Civ. App.), 88 S. W. 367.

In an action against a railroad for delay in delivering cattle, it was not error to refuse to charge that the measure of damage for the delay is the difference between the market price of cattle on the day the cattle should have been put on the market

and the day they could have been marketed, where a prior charge stated that the measure was the difference between the price of cattle at the time they were delivered and could have been placed on the market, and at the time when they should have arrived and been placed on the market, and the damage by depreciation in weight caused by the delay. *Texas & P. Ry. Co. v. Boggs* (Tex. Civ. App.), 40 S. W. 20.

In an action for delay in transporting a shipment of cattle, the court instructed that plaintiff could recover the difference in the market price of the cattle at destination at the time they should have arrived in the ordinary course of business, and the time when the cattle actually arrived. Held, that the instruction was not prejudicial to defendant on the ground that the correct measure of damages was the difference in the market value of the cattle at the time when they should have arrived by the use of ordinary care, and the time when they did arrive; the court having given a special instruction conceding defendant's duty to be to transport plaintiff's cattle within the usual time necessary for that purpose, but which sought to avoid liability for failure to perform such duty on account of the wet and soft condition of defendant's track. *Missouri, K. & T. Ry. Co. of Texas v. Kyser & Sutherland*, 95 S. W. 747, 43 Tex. Civ. App. 322.

**Other Deterioration as Element.**—If there is other deterioration due to the delay of the carrier, that must also be taken into consideration in estimating damage. *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491.

**Holding Cattle at Destination for Several Days.**—A charge which makes the measure of the damages the difference between value at the time and in the condition they were sold and that when they reached there, where they were sold three days after ar-

rival, is erroneous. *Gulf, etc., R. Co. v. Ware*, 34 Tex. Civ. App., 455, 78 S. W. 961.

**Legal Holiday Following Day of Arrival.**—Plaintiff alleged that, by reason of defendant's delay in transporting his cattle, they arrived on a legal holiday, on which there was no market; that plaintiff was compelled to hold them over until the following day, and suffered damages by reason of a decline in the market. Held, that the measure of damages was the difference between their market value on the day they should have arrived, and their value on the opening of the market after their arrival. *Southern Kansas Ry. Co. of Texas v. Crump*, 74 S. W. 335, 32 Tex. Civ. App. 222.

**Advance in Market Matter of Defense.**—In an action against a carrier for shrinkage in the weight of cattle due to delay and rough handling in transit, the shipper may take the market on the day the cattle were sold as his basis of calculation, showing the amount they would have brought on that day had they been transported in a reasonable time and with reasonable care and the amount they actually sold for, and, if there was an advance in the market from the day the cattle should have arrived up to the time of sale, such advance is a matter of defense to be shown by the carrier. *Ft. Worth & D. C. Ry. Co. v. Richards* (Civ. App.), 105 S. W. 236.

**Judgment Measured in United States Money on Shipment to Mexico.**—In action for detention in shipment of cattle from Laredo, Texas, to city of Mexico, judgment for plaintiff should be measured in United States money, as its value was at time of damage. *Mexican Nat. R. Co. v. Garcia* (Civ. App.), 26 S. W. 780.

**Instruction Authorizing Recovery for Items Included in General Measure.**—In an action for damages to cattle in shipment where the general measure of damages is stated as the



difference in the market value of the cattle between the time they reached their destination and the time they would have reached it if the delay complained of had not occurred, it is error to so frame the instruction as to authorize an additional recovery for particular items of damages which are included in the general measure of damages. *International & G. N. R. Co. v. Startz*, 82 S. W. 1071, 37 Tex. Civ. App. 51.

**Instruction Authorizing Recovery Whether Result of Negligence or Not.**

—An instruction that "the measure of damages \* \* \* is the difference, if any, in the market value of the cattle at the time they arrived at the point of destination in the condition they were then in, and the market value of such cattle at said point of destination in the condition they would have been in, at the time they should have arrived, had they been transported within a reasonable time and in an uninjured condition; \* \* \* and should you, as hereinbefore instructed, conclude from the evidence that any of the cattle were lost by any of the defendants, you will then determine as to what the market value of said cattle would have been at the point of destination, had they been transported within a reasonable time and without injury by reason of rough handling, and find for plaintiff for the value of the same as thus ascertained," is erroneous, as it authorizes the jury to charge the appellant with all injuries inflicted upon the cattle, whether the same were the result of negligence or not. *St. Louis, etc., R. Co. v. Smith*, 33 Tex. Civ. App. 520, 77 S. W. 28; *Missouri, etc., R. Co. v. Garrett*, 39 Tex. Civ. App. 246, 248, 87 S. W. 172.

**(2) Where Shipment to Another Market Necessary.**

Plaintiff shipped cattle to St. Louis, and, by delay of the railroad company, the cattle did not arrive in time for the market on a certain day, and plain-

tiff then shipped to Chicago. Held that, if the shipment to Chicago was justified, the measure of damages was the difference between the market price of the cattle when sold in Chicago and the market price in St. Louis on the day they should have arrived there. *St. Louis, I. M. & S. Ry. Co. v. Gunter*, 86 S. W. 938, 39 Tex. Civ. App. 129.

In an action against a railroad for damages resulting from delay, rough handling, etc., in transporting calves shipped by plaintiff to East St. Louis, the evidence showed that there was no market for the calves there in the condition in which they arrived, and that they were in consequence shipped to Chicago and sold, plaintiff's measure of damages was the difference in the value of the calves on the East St. Louis market, in the condition and at the time they should have reached that market by the exercise of ordinary care by defendants, and what they sold for in Chicago, after deducting the necessary expense of transportation to the latter market. *Texas & P. Ry. Co. v. Coggin*, 90 S. W. 523, 40 Tex. Civ. App. 583.

**Initial Carrier Not Liable for Delay of Connecting Carrier.**—Where cattle were negligently delayed, and it became necessary to ship the cattle to another market, the carrier was liable for loss of weight from their being held and reshipped to the other market, but it was not liable for the negligent delay of the connecting carrier in transporting them to such other market. *St. Louis, etc., R. Co. v. Gunter*, 39 Tex. Civ. App. 129, 136, 86 S. W. 938. See the title CONNECTING CARRIERS.

**Shipment of Part to Another Destination.**—Where the complaint in an action against a carrier for delay in transportation of cattle alleges that defendant contracted to take the cattle to S., for sale on the market there, but delayed so long in their transportation

that on their arrival at S. plaintiff, because of the delay, determined to and did ship part of them to C., and sell them on the market there, it is error to charge that the measure of damages is the difference between their market value at the time they reached their "place of destination" and their market value at the same place had they arrived when they should, as the jury may infer that C. was the "place of destination" as to the cattle sent there, and the carrier is not responsible for the market value of the cattle at that place. *Missouri, K. & T. Ry. Co. of Texas v. Quinn* (Civ. App.), 29 S. W. 404.

**Optional Contract to Ship to Another Market.**—Where plaintiff shipped cattle over defendant railroad's line to Ft. Worth, Tex., with the privilege of shipping them, if not disposed of there, to Kansas City, Mo., on a through freight rate, it was error, in an action to recover damages for loss of weight and depreciation in market value of the cattle, alleged to have resulted from defendant's delay in transporting them and from improper handling en route, to charge as to the cattle shipped through to Kansas City, and there sold, that the measure of damages was the difference between the market value of the cattle in the condition and at the time they arrived at Ft. Worth and the condition and at the time they should have arrived there. *Texas & P. Ry. Co. v. Nelson*, 86 S. W. 616, 38 Tex. Civ. App. 605.

**Destination Should Be Explained Where Shipment Made to Another Point.**—In action for delay in shipment of cattle a charge that measure of damages is difference between their value at "destination" and what it would have been at "destination" without delay, is erroneous in not defining "destination," where cattle had been billed to one point, and, because of delay, shipper deemed it best to ship to a point beyond, and did so. *Missouri,*

*etc., Ry. Co. v. Quinn* (Civ. App.), 29 S. W. 404.

**Where Destination Changed during Transit Because of Quarantine Laws.**

—Where a contract for the shipment of cattle was made to G., but the destination was changed to W., while the cattle were en route because of the quarantine law, the proper measure of damages for injuries to the cattle through delay was the difference between the market value of the cattle at G., and not at W., in the condition in which they were delivered at that point and in the condition in which they would have arrived and been delivered if they had been transported with ordinary care and promptitude. *Texas, etc., R. Co. v. Tracy*, 38 Tex. Civ. App. 327, 328, 85 S. W. 833, affirmed in 101 Tex. 663, no op.

**(3) Where Contract Fixes Specified Time for Delivery.**

The measure of damages where the contract fixed a day certain for delivery is the same as in other cases of delay, i. e., the difference between the market value at destination on day when carrier agreed to deliver and that on day when actually delivered. *San Antonio, etc., R. Co. v. Pratt*, 89 Tex. 310, 311, 312, 34 S. W. 445; *International, etc., R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186, 190, 23 S. W. 754; *Gulf, etc., R. Co. v. McAulay* (Civ. App.), 26 S. W. 475, 476; *Gulf, etc., R. Co. v. Hughes* (Civ. App.), 31 S. W. 411, 412; *Missouri, etc., R. Co. v. Cobb* (Civ. App.), 36 S. W. 500, 501; *Chicago, etc., R. Co. v. Halsell* (Civ. App.), 81 S. W. 1241, 1243, affirmed in 98 Tex. 244; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834.

**(4) Where Shipment Made to Fill Contract.**

See post, "Special Damages," VII, D, 3, i.

**Difference between Contract Price and Market Value.**—Measure of damages for breach of contract to furnish

cars, made with reference to plaintiff's contract to sell the cattle, is the difference between the market value of cattle at time when and place whence they were to be shipped as they would have been under herd, and contract selling price. *Gulf, etc., R. Co. v. Martin* (Civ. App.), 28 S. W. 576, 577, 578.

Where defendant had notice of plaintiff's contract to deliver cattle at their destination on a certain day, and failed to furnish cars for the transportation thereof as agreed, and the cattle depreciated in value by reason of the delay, the measure of damages is the difference between the contract price at their destination and their market value in their damaged condition at the point of shipment, less the freight. *International & G. N. R. Co. v. Startz* (Civ. App.), 33 S. W. 575.

**Loss of Sale for Season.**—The measure of damages for breach of a contract for furnishing cars for the shipment of cattle, which compelled plaintiff to cancel a contract for their sale, whereby he lost the opportunity of putting them on the market for that season, is the difference between the reasonable value of the cattle, when under herd at the contemplated time and place of shipment, and the amount stipulated in the contract of sale. *Gulf, C. & S. F. Ry. Co. v. Martin* (Civ. App.), 28 S. W. 576.

**Where Carrier Has No Notice of Contract.**—But in absence of notice of the contract of sale of cattle and complaint that special damages were suffered with reference thereto, the contract of sale made before shipment not having been pleaded, the sale price and the contract price could not properly furnish the measure of damages for a failure on the part of the railway to promptly furnish cars for shipment. *St. Louis, etc., R. Co. v. Musick*, 35 Tex. Civ. App. 591, 80 S. W. 673; *International, etc., R. Co. v. Startz* (Civ. App.), 33 S. W. 575.

**Instruction as to General Measure of Damages Erroneous.**—In an action

against a carrier for special damages for delay in transporting horses whereby plaintiff was prevented from consummating a sale of the horses and whereby he was obliged to sell them at the market value, an instruction that the measure of damages was the difference in the market value of the horses at their destination delivered at the time and in the condition in which they were and their market value at their destination delivered at the time and in the condition in which they should have been, was erroneous. *Texas & P. Ry. Co. v. Stewart*, 96 S. W. 106, 43 Tex. Civ. App. 399.

**Where Shipped to Another Market.**—Plaintiff sued to recover damages on a shipment of horses to be delivered at a certain date at M., and alleged that the stock did not reach M. within the proper time, whereby he was prevented from complying with his contract in relation to them, and that the stock was shipped by the railroad to T., and that in consequence thereof he was forced to sell to another party at a less sum per head, to be delivered at T., and that by reason of the carrier's further negligence, he was prevented from consummating this sale, and was forced to sell the stock at T. for their market value in their then condition. Held, that on evidence of defendant's negligence the jury should be instructed to find for plaintiff the difference between the contract price of the horses at M. and the sum which they subsequently brought at the second sale, and, if both sales were missed through the negligence of the carrier, then the measure of damages would be the difference between the contract price at M. and the market value of the stock in the condition and at the time they arrived at T. *Texas & P. Ry. Co. v. Stewart*, 86 S. W. 631, 38 Tex. Civ. App. 595.

Plaintiff shipped horses to M. in order to consummate a sale at M. conditioned on their arrival on a certain

day, but the shipment failed to reach M. in time to consummate the sale, and the horses were shipped pursuant to another contract of sale to T., but, owing to delays in transportation, were not delivered in time to consummate the contract at T., and plaintiff was forced to sell at T. at the market value. Held that, if the carrier was liable for the loss of the first sale only, the measure of damages was the difference between the contract price of the horses at M. and the sum brought on the second sale. *Texas & P. Ry. Co. v. Stewart*, 96 S. W. 106, 43 Tex. Civ. App. 399.

**b. For Breach of Agreement to Furnish Cars.**

In an action against a carrier for breach of a contract to receive and transport cattle on a day certain, the measure of damages is the difference between their value at their destination when due there, if shipped on such day, and the value when they did arrive, together with any other deterioration due to the carrier's delay. *Texas P. R. Co. v. Nicholson*, 61 Tex. 491; *San Antonio, etc., R. Co. v. Pratt* (Civ. App.), 32 S. W. 705, 706; *Missouri, etc., R. Co. v. Darlington* (Civ. App.), 30 S. W. 251; *Galveston, etc., R. Co. v. Karrer* (Civ. App.), 109 S. W. 440, 442; *Inman & Co. v. St. Louis, etc., R. Co.*, 14 Tex. Civ. App. 39, 37 S. W. 37, affirmed in 93 Tex. 643, no op.; *Missouri Pac. R. Co. v. Nicholson*, 2 App. Civ. Cases, § 168; *Galveston, etc., R. Co. v. Karrer* (Civ. App.), 109 S. W. 440.

But where it is shown that the freight money had not been paid, or that there were other means of transporting the stock to the destination intended, of which the shippers could have availed themselves, the rule of damages would be modified. *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491, 497.

**Shipment for Pasturage Only.**—The proper measure of damages for failure

to comply with a special contract to furnish transportation for cattle which were being shipped to the Indian Territory, to be held in pastures until in condition to be placed on the market, was the difference in value between the cattle when placed in the pens at the point from which they were to be shipped, and at the time when they were actually shipped, together with any additional cost for food and hire of hands necessitated by the delay in shipment. *Galveston, H. & S. A. Ry. Co. v. Thompson* (Civ. App.), 44 S. W. 8.

**Carrier Having No Notice of Special Contract.**—Where carrier agreed to ship cattle and had no notice of shipper's contract for their sale, measure of damages for failure to furnish cars and consequent loss in their weight, is the difference between market value at destination and market value at shipping point, in damaged condition, less freight. *International, etc., R. Co. v. Startz* (Civ. App.) 33 S. W. 575, 576.

**Shipment for Pasturage Only.**—Measure of damages for delay in shipment of cattle by railroad company is not affected by fact that they were to be shipped to pasture and not to market, but should cover actual impairment in value as well as excess of cost of keeping at station over amount that would have been required at place of destination. *Gulf, etc., R. Co. v. Hume Bros.*, 87 Tex. 211, 221, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915. See post, "Cattle Not Intended for Immediate Sale," VIII, E, 2, b, (2).

In cases where the cattle were to be shipped to market for immediate sale, courts have held that the decline in the market value or the decrease in value for other reasons caused by the negligence of the carrier, is a proper measure of damages; but this does not prove that the same rule does not apply in other cases. Compensation for

the injury sustained is the object of the law in giving damages. There is no fixed rule, but having this fundamental principle in view, courts apply it to the particular case so as to ascertain with the greatest certainty what the injury is, and thus to make whole the damage done. If plaintiff intended to pasture his cattle, he was entitled to have the full benefit of their condition as it was when they should have been shipped, and it is not necessary that property should be upon the market for sale in order to entitle the owner to have its impaired value restored by the person causing the injury. The rule, that counsel for plaintiff in error claims, would require the owner to wait until his cattle had been pastured or fed sufficiently to restore their value as it was, before he could sue, or to make the uncertain and speculative matter of future cost of feed and care with its uncertain results a rule to, ascertain the amount to be paid, whereas the plaintiff was entitled to have the railroad company make them whole at once, and without delay. *Gulf, etc., R. Co. v. Hume Bros.*, 87 Tex. 211, 221, 27 S. W. 110, reversing, 6 Tex. Civ. App. 653, 24 S. W. 915.

**Where shipper declined to ship cattle because by carrier's delay they would arrive too late to fill a contract, and shipper took charge of them himself, or could have done so, and they lost weight after such refusal, in estimating damages their market value at shipping point should be based on their undamaged condition.** *International, etc., R. Co. v. Startz* (Civ. App.), 33 S. W. 575, 576.

**Charge Authorizing Double Damages.**—The only damage shown being the deterioration in the weight and condition of the cattle, an instruction that the measure of damages would be the difference between the market value when the cattle should have arrived and when they did arrive, and

such damage as they might have sustained by the negligent delay in furnishing the cars, was erroneous, as authorizing double damages. *St. Louis Southwestern Ry. Co. of Texas v. Musick*, 80 S. W. 673, 35 Tex. Civ. App. 591.

### c. Evidence as to Value or Damage.

#### (1) In General.

"In order to establish the market value at the place of delivery it was necessary that the evidence should show that cattle of like quality had been bought and sold at that place during the season in sufficient quantity and often enough to show a market value." *Gulf, etc., R. Co. v. Jackson*, 99 Tex. 343, 348, 89 S. W. 968, reversing 86 S. W. 47.

#### **Evidence of Market Value at Destination a Day before Due Inadmissible.**

—In an action against a carrier for loss occasioned by delay in the transportation of live stock, evidence as to the market value of the stock at the point of destination a day earlier than the stock would have reached there, if there had been no delay, is inadmissible. *Gulf, C. & S. F. Ry. Co. v. Hughes* (Civ. App.), 31 S. W. 411.

**Where it is shown that carrier's agent knew cattle were being shipped to certain point for immediate sale, testimony is admissible to show state of market there at time they should have been delivered.** *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 109, 17 S. W. 834.

#### (2) Market Value at Destination Controls.

In a suit for damages for injury to cattle caused by delay in shipping, market value at place of destination, and not at place of shipment, governs as to difference in values. *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 611, 18 S. W. 716; *Reeves v. Texas, etc., R. Co.*, 11 Tex. Civ. App. 514, 32 S. W. 920; *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 12 S. W. 815; *Missouri Pac. R. Co. v. Fagan*, 72 Tex.

127, 129, 9 S. W. 749; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Gulf, etc., R. Co. v. Butler*, 26 Tex. Civ. App. 494, 63 S. W. 650; *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491; *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 44, 33 S. W. 109, affirming 29 S. W. 806.

**Where Goods Are Transported over Several Lines—Market Price at Ultimate Destination Controls.**—"If goods are marked and known to the carrier to be destined beyond the terminus of his route and he becomes liable for a loss of them, or for damages for a negligent delay, there is some diversity as to whether the damages should be estimated with reference to the market value at the end of his route or at the ultimate destination. On principle, the value at the latter place should be the criterion. The value in one place and depreciation in the other, according to the market at the ultimate destination, less the cost of transportation, is the actual loss to the owner; and it is as direct and proximate where there are several carriers as where the whole transportation is let to one. The immediate carrier who is liable has undertaken the carriage of the goods with a knowledge of their intended destination; therefore the benefit to the shipper of their delivery at that place, and the disadvantage to him of a failure to so deliver them, are within the contemplation of both parties. The damages recoverable from such carrier should be estimated on the basis of the net value at the place where he knows the owner of the goods intends them to go, for the same reason that in other cases damages are recoverable with reference to the value for any special use which was known to both parties at the time of making the contract. In this view it is immaterial whether the through transportation is undertaken by one carrier, or the goods will be carried by several in a

connected line, or by several not connected." *Missouri, etc., R. Co. v. Webb & Co.*, 20 Tex. Civ. App. 431, 439, 49 S. W. 526; *Texas, etc., R. Co. v. White*, 35 Tex. Civ. App. 521, 522, 80 S. W. 641, affirmed in 98 Tex. 635, no op.; *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806; *Reeves v. Texas, etc., Co.*, 11 Tex. Civ. App. 514, 32 S. W. 920; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749; *Galveston, etc., R. Co. v. Borden* (Civ. App.), 29 S. W. 1100, 1101.

**Sale at Intermediate Point.**—On a trial for damages against a carrier for delay in transportation of cattle causing a sale thereof before the place of destination was reached, held: a charge that the measure of damages would be the difference between the market value of the cattle at the intermediate point when sold, and their market value at the place of destination, was harmless to defendant, it appearing that the place of sale was a better market than the place of destination. *Texas, etc., R. Co. v. Scharbauer* (Civ. App.), 52 S. W. 590, 591, affirmed in 93 Tex. 675, no op.

Where a contract for the shipment of horses declared their destination to be T., and they were in fact unloaded and sold at W., in an action against the carrier for damages from delay in furnishing cars, values at T. should control on the question as to damages, rather than values at W. *Texas & P. R. Co. v. Shipman* (Civ. App.), 98 S. W. 449.

### (3) Cost as Evidence of Value.

Evidence of the price which the shipper paid for horses was properly excluded in an action against the carrier for injury to the horses by delay en route. *Galveston, H. & S. A. R. Co. v. Tuckett* (Civ. App.), 25 S. W. 150.

In a suit against a carrier for delay in a shipment, a written statement of a merchant at a point of destination as

to what he paid for the stock, and of extra expenses incurred by the plaintiff, were inadmissible. *Texas, etc., R. Co. v. Scrivener*, 2 App. Civ. Cases, § 328.

### 3. Element of Damages.

#### a. Depreciation Necessarily Resulting from Transportation Disregarded.

Any depreciation necessarily resulting from transportation is to be disregarded. *Galveston, etc., R. Co. v. Botts* (Civ. App.), 70 S. W. 113; *International, etc., R. Co. v. Young* (Civ. App.), 72 S. W. 68. See post, "Damages Necessarily Arising in Transportation," VIII, E, 4, a.

**Instruction—Not Objectionable as Allowing Recovery for Natural Shrinkage.**—An instruction that the measure of damages for delay in transportation of cattle was the difference in market value of the cattle at their destination at the time and in the condition in which they arrived, and what their market value would have been at the same point in the condition in which they would have been, and at the time they would have arrived but for the negligence of the connecting carriers, was not erroneous as authorizing a recovery for loss due to natural shrinkage in the absence of negligence. *Texas & P. R. Co. v. Currie*, 76 S. W. 810, 33 Tex. Civ. App. 277.

**Erroneous Instruction—Recovery Allowed for Natural Shrinkage.**—In an action for injuries to cattle during transportation owing to negligent delay on the part of the carrier, there was evidence to show that some injury or depreciation in live stock is necessarily caused by long shipments, irrespective of the care exercised by the carrier, and the court instructed that in case of a verdict for plaintiff the measure of damages was the difference between the market value at destination when the shipment should have reached there, without reference to any injury, and the value at the time it did arrive. Held, that the in-

struction was erroneous as requiring an assessment against defendant irrespective of negligence. *St. Louis, I. M. & S. R. Co. v. Moon*, 103 S. W. 1176, 47 Tex. Civ. App. 209.

#### b. Fall in Market.

A fall in the market is a proper element of damages from delay in shipment. *G. H. & S. A. R. Co. v. Stovall*, 3 App. Civ. Cases, § 251; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *St. Louis, etc., R. Co. v. Wilhelm*, 49 Tex. Civ. App. 639, 641, 108 S. W. 1195; *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491, 496; *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 99 S. W. 418; *Texas Cent. R. Co. v. Miller* (Civ. App.), 88 S. W. 499; *Missouri, etc., R. Co. v. Storey* (Civ. App.), 75 S. W. 847. See ante, "In General," VII, D, 2, a, (1).

Where a carrier accepted live stock for shipment to a point where there was a market, with notice that they had been contracted for delivery within a specified time, and the purchaser refused to accept the shipment because of a negligent delay in transportation, the carrier was liable for the shipper's expense in holding the cattle until a purchaser could be secured, for their loss of flesh, and for a decline in the market price. *Texas & P. R. Co. v. Arnett* (Civ. App.), 101 S. W. 834.

**When Evidence of Fall in Market Inadmissible.**—Where the petition in an action for delay in shipment of cattle did not ask for any damages for loss resulting from fall in market, admission of evidence thereof is reversible error. *Gulf, etc., R. Co. v. McAulay* (Civ. App.), 26 S. W. 475, 476.

**Instruction Giving General Measure of Damages—Another Instruction Allowing Recovery for Depreciation in Market Value.**—In an action against a railroad for injury to plaintiff's cattle while in transit, a charge fixing as the measure of damages the difference

between the market value of the cattle in the condition they would have been at the time they should have arrived, but for defendant's negligence, and their market value in their injured condition at the time they did arrive, covered the whole damage, and a further instruction authorizing recovery for the depreciation in market value, if any, of the cattle between the time they should have arrived and the time they did arrive, was erroneous as authorizing the jury to add additional damages to full compensation. *St. Louis & S. F. R. Co. v. Lane*, 110 S. W. 530, 49 Tex. Civ. App. 541.

#### c. Shrinkage in Weight.

The shrinkage in weight traceable as the results of delay, is a proper charge against a carrier as damages, the value of this loss of weight to be ascertained by reference to the market when the cattle ought to have arrived there. *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 111, 17 S. W. 834; *San Antonio, etc., R. Co. v. Timon*, 45 Tex. Civ. App. 47, 99 S. W. 418; *Texas Cent. R. Co. v. Miller* (Civ. App.), 88 S. W. 499; *G. H. & S. A. R. Co. v. Stovall*, 3 App. Civ. Cases, § 251; *Gulf, etc., R. Co. v. Hume*, 6 Tex. Civ. App. 653, 24 S. W. 915, reversed in 87 Tex. 211.

In an action for damages caused by railroad's failure to provide stock pens for cattle which lost weight in consequence of delay, a charge that plaintiff could not recover for loss of weight from any other cause, is sufficiently favorable to defendant. *Missouri, etc., R. Co. v. Woods* (Civ. App.), 31 S. W. 237, 238.

**Failure to Furnish Cars for Shipment.**—Where a railroad failed to furnish cars for shipment of cattle as it had agreed, the measure of damages is the deterioration in value of cattle from shrinkage and loss of weight that resulted from holding them awaiting the arrival of cars, and that was the result of a breach of contract to furnish cars.

*Gulf, etc., R. Co. v. Hume*, 6 Tex. Civ. App. 653, 658, 24 S. W. 915, reversed, on another point, in 87 Tex. 211, 27 S. W. 110.

**Cattle Held for Several Days for Market.**—Where on account of unreasonable delay in transportation, sheep did not reach their destination at a time when there was a market for them, and it became necessary to hold them there for three days, in order to sell them, their condition, weight, etc., at that time and the price for which they sold, were factors proper to be considered in arriving at a correct measure of damages. *St. Louis, etc., R. Co. v. Wilhelm*, 49 Tex. Civ. App. 639, 641, 108 S. W. 1195.

**Instruction—Decline in Market and Shrinkage in Weight.**—In an action for delay in shipment of cattle, the court charged that the measure of the plaintiff's damages was any difference between the market price of the cattle at the time they were delivered, and such price at the time when they should have arrived, "and in addition, if any, the market value by reason of loss in weight sustained, if any, during the time elapsing between the time that they did reach their destination and the time that they should have reached it if transported and delivered with reasonable dispatch." Held: though not clear, the instruction was not misleading, the court evidently intending in the first clause to submit the item of damages based on a decline in the market price, and in the second the damages on account of shrinkage, and it appearing that the jury did not assess double damages. *Missouri, K. & T. R. Co. of Texas v. Storey* (Civ. App.), 75 S. W. 847.

#### d. Interest.

Interest is recoverable in an action for damages resulting from negligent delay, etc., in the transportation of cattle. *Texas, etc., R. Co. v. Smissen*, 31 Tex. Civ. App. 549, 73 S. W. 42, af-



firmed in 97 Tex. 649, no op.; Texas, etc., R. Co. v. Truesdell, 21 Tex. Civ. App. 125, 127, 51 S. W. 272, affirmed in 93 Tex. 125, no op.; Missouri, etc., R. Co. v. Webb & Co., 20 Tex. Civ. 431, 440, 49 S. W. 526; Mexican Nat. R. Co. v. Garcia (Civ. App.), 26 S. W. 780; Southern Pac. R. Co. v. Anderson, 26 Tex. Civ. App. 518, 63 S. W. 1023, affirmed in 95 Tex. 686, no op.; Texas, etc., R. Co. v. Murtishaw, 34 Tex. Civ. App. 447, 78 S. W. 953; Gulf, etc., R. Co. v. Batte (Civ. App.), 81 S. W. 813; International, etc., R. Co. v. Lewis (Civ. App.), 23 S. W. 323.

**e. Cost of Keeping at Destination—Restoration to Condition.**

In an action for delay in shipping cattle, a charge allowing recovery for expenses in keeping them at destination was error, where plaintiff only claimed damages for delay. Galveston, etc., R. Co. v. Warnken, 12 Tex. Civ. App. 645, 647, 35 S. W. 72.

**Expense of Restoration to Former Condition Not Proper Measure.**—In an action against a railroad company for delay in the shipment of cattle, the necessary expense of restoring the cattle to the condition they were in before their shrinkage in weight is not the proper measure of damages. Gulf, C. & S. F. R. Co. v. Hume Bros., 6 Tex. Civ. App. 653, 24 S. W. 915, reversed in 87 Tex. 211, 27 S. W. 110.

**f. Expenses Incurred While Awaiting Shipment.**

Where a railroad company fails to furnish stock cars within a reasonable time after being ordered, it is liable to the shipper for the expense of holding the cattle while waiting for cars. Texas & P. R. Co. v. Smith & White, 79 S. W. 614, 34 Tex. Civ. App. 571. See ante, "For Breach of Agreement to Furnish Cars," VII, D, 2, b.

**Expenses Reasonably Necessary Recoverable.**—In an action for damages to cattle by defendant railway

company's negligent failure to furnish cars in a reasonable time after they were ordered, because of which plaintiff was compelled to pasture the cattle while waiting for the cars, plaintiff was entitled to recover for feeding, pasturage, and care of the cattle only such expenses for these items as were reasonably necessary, and hence a charge authorizing a recovery of the amount he expended was erroneous. Texas & P. R. Co. v. Powell, 79 S. W. 86, 34 Tex. Civ. App. 575.

**Recovery for Wages of Men Employed to Care for Cattle.**—Where a carrier agreed to furnish cars on a certain day for the shipment of cattle, and negligently failed so to do, and the cattle had to be kept at the place of shipment, to their injury, until the carrier furnished the cars, about two weeks after the appointed time, and the owner of the cattle during the delay was compelled to pay pasturage and to employ men to look after the cattle, and to supply feed for the horses used for that purpose, he could recover from the carrier for the damages sustained. Southern Kansas R. Co. of Texas v. Samples (Civ. App.), 109 S. W. 417.

**Recovery of Wages of Men Caring for Cattle Not Special Damages.**—In a suit against a carrier for failure to furnish cars in which to ship cattle, where it was alleged that because of such failure the plaintiff, while awaiting the cars, was compelled to pasture the cattle, for which he paid a certain sum, the value of the pasture for the time, that he was compelled to employ four men to care for the cattle, and that he was compelled to feed four horses used in caring for the cattle, and to pay for the feed a certain amount, a recovery therefor was not defeated on the ground that the items were of special damages, and that it nowhere appeared that they were necessarily and reasonably expended on account of defendant's negligence. Southern Kansas R. Co. of Texas v.

Samples (Civ. App.), 109 S. W. 417.

**Wrongful Refusal to Receive.**—

Where a common carrier refused to accept a shipment of cattle tendered, the owner or the person offering it for transportation must use reasonable care to prevent injury to the cattle during the delay, but, if the shipment is wrongfully refused, he will be entitled to recover for the reasonable expenses in caring for the property, as well as other damages. *Galveston, H. & S. A. R. Co. v. Karrer* (Civ. App.), 109 S. W. 440.

**Feed for Cattle.**—A carrier is not liable to a shipper of cattle for expenditure for feed made necessary by unprecedented weather, which could not reasonably have been anticipated, while the shipper was holding his cattle waiting for cars, which he had demanded for their transportation; the carrier not being liable as an insurer, but only for negligence. *Wallace v. Pecos & N. T. R. Co.*, 50 Tex. Civ. App. 296, 110 S. W. 162.

**g. Expenses in Making Shipment to Another Market.**

See ante, "Where Shipment to Another Market Necessary," VII, D, 2, a, (2).

If the delay of defendant railroad company in shipping plaintiff's cattle to St. Louis caused plaintiff to lose the benefit of the week's market there, and justified a shipment from there to Chicago, defendant was liable for the extra expense in transporting the cattle to Chicago, except such expense as might have been occasioned by delay in the second shipment, and such expense would include additional charges and additional expense for feeding the cattle. *St. Louis, I. M. & S. R. Co. v. Gunter*, 86 S. W. 938, 39 Tex. Civ. App. 129.

**Instruction Authorizing Delay Though Delay Not Reasonable.**—Where plaintiff shipped cattle over defendant's road to St. Louis, and, on

account of alleged delay, was too late for market there, and then shipped them to Chicago, an instruction that if defendant exercised ordinary care in the shipment of the cattle to St. Louis to avoid unreasonable delay, or if plaintiff sold his cattle for as much as he would have sold them if there had been no delay, the jury should find for the defendant, except as to the extra expense incurred by plaintiff in shipping the cattle from St. Louis to Chicago, was erroneous, as it inferentially instructed that, although there may have been no unreasonable delay upon the part of the appellant, it might be held responsible for the expense incurred in the shipment to Chicago. *St. Louis, I. M. & S. R. Co. v. Gunter*, 86 S. W. 938, 39 Tex. Civ. App. 129.

**h. Freight.**

A carrier is liable for the additional freights paid by the shipper in transporting his cattle to destination over other railroads after the failure to furnish cars agreed to be supplied. *Pecos River Co. v. Latham*, 40 Tex. Civ. App. 78, 80, 88 S. W. 392, affirmed in 101 Tex. 652, no op.

**i. Special Damages.**

**(1) What Constitutes—Loss of Sale.**

Damages for loss of sale are special and must be specially pleaded. *International, etc., R. Co. v. Hatchell*, 22 Tex. Civ. App. 498, 500, 55 S. W. 186; *Houston, etc., R. Co. v. Brown*, 33 Tex. Civ. App. 237, 76 S. W. 580.

**(2) Necessity for Notice of Special Circumstances.**

To recover special damages from carrier for delay in transporting cattle, shipper must show that carrier had notice of special condition, rendering such damages natural and probable result of breach. *Missouri, etc., R. Co. v. Belcher*, 89 Tex. 428, 429, 35 S. W. 6; *Missouri, etc., R. Co. v. Webb & Co.*, 20 Tex. Civ. App. 431, 441, 49 S. W. 526; *International, etc., R. Co. v. Hatchell*, 22 Tex. Civ. App. 498, 55

S. W. 186; *Houston, etc., R. Co. v. Brown*, 33 Tex. Civ. App. 237, 76 S. W. 580; *St. Louis, etc., R. Co. v. Musick*, 35 Tex. Civ. App. 591, 80 S. W. 673.

**Error to Admit Evidence as to Contract Price Where Carrier Had No Notice of Contract.**—In an action against a carrier for damages to live stock in transportation, it was error to permit defendant to prove the price at which plaintiff had contracted to sell the cattle, where defendant had no notice of the contract. *Ft. Worth & D. C. Ry. Co. v. Hamm* (Civ. App.), 93 S. W. 215.

**Knowledge of Carrier's Agent as Knowledge of Carrier.**—In an action against a carrier by a shipper of cattle for delay in carrying them to a certain market, proof that the carrier's agent knew at the time of shipment that the cattle were being shipped to such market for immediate sale shows knowledge of the carrier. *Ft. Worth & D. C. Ry. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834.

**(3) Pleadings and Evidence Must Show Special Damages Were Contemplated.**

Where a consignee has sold live stock at a specified price per pound, to be paid on delivery, the damages which he sustains in reduced profits under the contract by reason of shrinkage owing to delay in transportation are special in character, and can not be recovered unless the pleadings and evidence show that such damages were contemplated by the carrier when it received the live stock for shipment. *Houston & T. C. R. Co. v. Brown*, 76 S. W. 580, 33 Tex. Civ. App. 237; *St. Louis, etc., Ry. Co. v. Musick*, 35 Tex. Civ. App. 591, 80 S. W. 673; *International, etc., R. Co. v. Hatchell*, 22 Tex. Civ. App. 498, 500, 55 S. W. 186.

**Shipper Must Allege Knowledge That Shipment Was Made to Fill Contract.**—In a suit against a rail-

way company for damages to cattle shipped over its line, alleged to have resulted from the unnecessary delay in transportation, whereby the cattle were reduced and emaciated so that plaintiff could not sell them for the price he had contracted for, but had to take a less price, there can be no recovery for such difference in price, in the absence of any allegation that defendant was informed that the cattle were being shipped to fill a contract, or that it was important to have them at their destination at any given time. *Gulf, C. & S. F. R. Co. v. Cole*, 4 Willson, Civ. Cas. Ct. App. § 97, 16 S. W. 176.

**Improper to Admit Evidence of Special Damage Where Not Pleaded.**—In an action for damages to live stock, caused by delay in transit, evidence that plaintiff told defendant's agent that he wanted to enter the stock at a fair as soon as possible was improper where the petition did not seek special damages for delay in entering the horses at the fair. *Texas & P. Ry. Co. v. Ellerd*, 87 S. W. 362, 38 Tex. Civ. App. 596.

In an action to recover damages for delay in delivery of cattle shipped under a written contract which specified no particular time of delivery, evidence that the carrier's agent who made the contract promised to deliver the cattle at a certain time was inadmissible, even for the purpose of ascertaining what knowledge if any, the carrier had of the particular market day with reference to which shipment was made. *Gulf, C. & S. F. Ry. Co. v. Baugh* (Civ. App.), 42 S. W. 245.

**4. Mitigation of Damages.**

**Part of Shipment Bringing More by Reason of Delay.**—In an action against a carrier for loss occasioned by delay in transporting live stock, the fact that part of the shipment brought more at the destination on account of the delay in their arrival should be considered in reduction of the loss sustained on the

others as a result of the delay. *Gulf, C. & S. F. Ry. Co. v. Hughes* (Civ. App.), 31 S. W. 411.

### 5. Inadequate or Excessive Damages.

See the title **NEW TRIALS**.

Verdict for \$3,818.51 damages for railroad's failure to ship and deliver cattle within time agreed, whereby they sold for less than they would have brought if delivered in time, held not excessive. *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491, 498.

In an action against a carrier for delay in delivering cattle shipped, evidence that the cattle sold for \$5,527.55, and that, had they been delivered in proper time and in proper condition, they would have sold for from 25 to 35 per cent. more, warrants a verdict for \$745. *Missouri Pac. Ry. Co. v. Russell* (Sup.), 18 S. W. 594.

### Verdict for Full Amount of Damages against One Connecting Carrier.

—Where two connecting carriers were sued for injuries to cattle carried over both roads, and a verdict for the full amount of damages demanded was rendered against one road, the verdict is excessive, the evidence tending to show both roads negligent. *Gulf, C. & S. F. Ry. Co. v. Lee* (Civ. App.), 65 S. W. 54.

### Damage Awarded Not Above Amount Estimated by Witnesses.

—Where several witnesses are permitted without objection to estimate the damage caused to the cattle by the unusual delay, and the amount allowed did not reach the limit testified to, the damage found was not excessive. *St. Louis, A. & T. Ry. Co. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. 1008.

**Verdict for \$2,000 Where Whole Train Load Injured.**—Evidence that a train load of cattle, after having been 20 hours on the road, were delayed 5 hours on side tracks, without rest, food, or water, when a delay of only 30 minutes or an hour was necessary to transfer to a connecting carrier's line; that while thus delayed they

hooked, horned, and bruised each other, and shrunk in weight, and were in bad condition upon reaching their destination, 5 hours later,—is sufficient to sustain a verdict of \$2,000 damages. *Texas & P. Ry. Co. v. Truesdell*, 51 S. W. 272, 21 Tex. Civ. App. 125.

**Excessive Recovery for Loss in Market Value.**—In an action against a railroad company for delay in delivering cattle shipped, it appeared that there was a delay of 26 hours in delivering the cattle, during which time the market fell 25 cents on the 100 pounds, which, after deducting the ordinary loss of weight, would have amounted to \$769.25. There was a verdict for \$865. On account of the delay, and because the cattle had not been properly fed and watered, they were in such poor condition that they could not be put on the market on their arrival, but had to be held until the next day, when there was a further decline of 10 cents on the 100 pounds. The cattle sold for above the average price. Out of 31 lots sold on the same day, 26 sold for less and only 4 for more. Held, that the evidence was too unsatisfactory to sustain a judgment for the amount of the verdict. *Missouri Pac. Ry. Co. v. Russell* (Sup.), 15 S. W. 206.

### 6. Waiver of Damages.

See post, "Necessity for Consideration," X, A, 2.

In an action against a carrier for damages caused by its delay in transporting cattle, there is no error in the court's failure to instruct the jury that the plaintiffs, by making the written contract of transportation, waived all damages for breach of the parol contracts to furnish the cars at a stated time, where there was no consideration for the waiver. *Gulf, C. & S. F. Ry. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716.

**Waiver Void Where No Consideration.**—Where an oral contract binding a carrier to furnish cars for a

shipment of cattle at a specified time was breached before a written contract was signed, the carrier's liability for the breach of the oral contract for failure to furnish cars at specified time could not be avoided by the written contract, unless there was a consideration inuring to the shipper as compensation for the damages resulting from the breach when the contract was signed. *Gulf, etc., R. Co. v. House*, 40 Tex. Civ. App. 105, 88 S. W. 1110; *Pecos, etc., R. Co. v. Evans-Snyder-Buel Co.*, 42 Tex. Civ. App. 60, 63, 93 S. W. 1024, affirmed in 100 Tex. 190.

In an action for delay in shipping stock, defendant put in evidence a special contract releasing it from damages due to delay, but the reduced rate relied upon as a consideration for such waiver was shown to have been merely consideration for an agreement that the cattle should be shipped "at the owner's risk." Held, that the waiver, being without consideration, was not a bar to a recovery. *San Antonio & A. P. Ry. Co. v. Barnett*, 12 Tex. Civ. App. 321, 34 S. W. 139.

**Failure of Shipper to Read Written Contract.**—After plaintiff's cattle had been delayed at the point of shipment for several days, because of delay in furnishing cars, he was required to sign a written contract which was presented to him for the first time late at night after the stock was loaded and the train ready to depart. He signed it without an opportunity to read it, and no consideration was received for doing so. The contract contained a provision discharging the carrier from damages resulting from the delay in furnishing the cars, of which provision plaintiff had no knowledge. Held, that plaintiff by signing the contract did not waive his right to damages for the delay. *San Antonio & A. P. Ry. Co. v. Timon* (Civ. App.), 110 S. W. 82.

**Provision Waiving Damages Unreasonable.**—A provision in a contract for interstate live stock shipment re-

leasing carrier from damages to shipper sustained under prior verbal contract for failure to furnish cars at specified time, is unreasonable and oppressive. *Cross v. Graves*, 4 App. Civ. Cases, § 100, 16 S. W. 102.

## VIII. Liability for Loss or Injury.

### A. IN GENERAL.

"Under the statute of Texas, a railway company after receiving cattle for shipment, becomes an insurer of them, as in the case of other property which it is bound to transport, against loss from any cause, except the act of God or of the public enemy, the act of the owner, vicious propensities or inherent character, or, as it is sometimes called, the 'proper vice' of the animals. This is the liability imposed upon the common carrier by the common law, and the statute declares that the liabilities of carriers in this state shall be the same as prescribed by the common law." *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 317, 4 S. W. 567; *Texas, etc., R. Co. v. Turner* (Civ. App.), 37 S. W. 643, 644; *International, etc., R. Co. v. Nowaski*, 48 Tex. Civ. App. 144, 106 S. W. 437; *Texas, etc., R. Co. v. Hunter & Co.*, 47 Tex. Civ. App. 190, 104 S. W. 1075; *Missouri, etc., R. Co. v. Russell*, 40 Tex. Civ. App. 114, 117, 88 S. W. 379, affirmed in 101 Tex. 649, no op.; *International, etc., R. Co. v. Hynes*, 3 Tex. Civ. App. 20, 21, 21 S. W. 622; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 169, 2 S. W. 574; *International, etc., R. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 11, 27 S. W. 680, affirmed in 87 Tex. 311.

**Express language will be required to impose upon a party the responsibility of an insurer beyond his legal obligation, or to prevent the operation of the customary rule in cases where the act of God or inevitable accident excuses the nonperformance of a contract.** *Hutch. on Carr.*, 2 Ed., §§ 171, 172. *International, etc., R. Co. v.*

Wentworth, 8 Tex. Civ. App. 5, 14, 27 S. W. 680, affirmed in 87 Tex. 311.

**Protruding Log Injuring Horses.**—Carrier is liable for negligently loading a log so as to protrude and strike car in which horses were loaded, though injury occurred after car had passed to another line. Galveston, etc., R. Co. v. Herring (Civ. App.), 36 S. W. 129, 130.

**"Rough handling,"** without a further finding that such rough handling was negligently done, will not entitle the owner to damages. A negligent handling and a rough handling are not necessarily synonymous. A certain degree of rough handling may have occurred even though the care of an ordinarily prudent person may have been exercised on the part of the carrier's agents and employees engaged in the transportation. Ft. Worth, etc., R. Co. v. James, 39 Tex. Civ. App. 408, 409, 87 S. W. 730.

An instruction in an action for injury to a live-stock shipment that the shipper was entitled to damages for "rough handling" is not cured by a recovery being elsewhere made to depend on a finding of negligence, rough handling not necessarily being negligent handling. Ft. Worth & D. C. Ry. Co. v. James, 87 S. W. 730, 39 Tex. Civ. App. 408.

**Meaning of Rough Handling.**—The clauses of the charge in an action for injury to a shipment of cattle, in which the right to recover was submitted, having explicitly made such right to depend on a finding that the delays and rough handling alleged constituted negligence, and in another clause the jury being instructed that they could not allow anything for such shrinkage or damage as would be ordinary and reasonable in a shipment of cattle over such route, but in estimating the damages, if any, they would take into consideration only such as may have been sustained by the cattle by reason of unreasonable delays and rough hand-

ling, "rough handling" in such clause, as well as in one in which it was charged that if defendants transported said cattle with reasonable dispatch, and did not handle them roughly, plaintiff could not recover, is to be treated as meaning such unreasonable and negligent handling as was beyond the natural and usual way of handling such shipments. Southern Kansas Ry. Co. of Texas v. Yarbrough, 109 S. W. 390, 49 Tex. Civ. App. 407.

## B. WHEN LIABILITY ARISES.

At common law the liability of a railway company as a common carrier attaches when property is delivered to and accepted by it for immediate transportation. International, etc., R. Co. v. Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 188, 23 S. W. 754; Galveston, etc., R. Co. v. Jackson (Civ. App.), 37 S. W. 255; Gulf, etc., R. Co. v. Trawick, 80 Tex. 270, 274, 15 S. W. 568, 18 S. W. 948.

**Liability Does Not Attach until Shipper Has Done All Required of Him for Shipment.**—The liability of a railway company as a common carrier attaches whenever the shipper has done all that is required of him to prepare his property for shipment, and has delivered the same to the railway company and it has been accepted. In other words, whenever all the arrangements for transportation have been made by the would-be shipper, and there is nothing to do but to transport the property to its destination, then the liability of the railway company attaches as a carrier. So long as anything further is to be done or orders to be given by the owner to enable the company to perform its duty, it would be a bailee of a different character than as carrier, and the question of ordinary care on the part of the company might become a prime factor in the determination of the suit. In the latter case the depository or warehouseman would only be liable for

negligence or want of ordinary care of the property, and the burden of proof would be on the plaintiff as to negligence. In the other case, the onus probandi as to due care would be upon the defendant whenever the damage is proved. 2 Rorer on Rys., 1279, 1280; Gulf, etc., R. Co. v. McCarty, 82 Tex. 608, 18 S. W. 716; International, etc., R. Co. v. Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 188, 23 S. W. 754.

**Art. 283, Rev. Stats., Has Not Changed Common-Law Rule.**—Article 283 of the Revised Statutes of Texas, providing that the trip or voyage shall be considered as having commenced from the time of the signing of the bill of lading, and the liability of the common carrier shall attach as at common law from after such signing, has not changed the common-law rule. E. L. & R. R. Co. v. Hall, 64 Tex. 615; International, etc., R. Co. v. Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754; Gulf, etc., R. Co. v. Trawick, 80 Tex. 270, 274, 15 S. W. 568, 18 S. W. 948. Where cattle were turned over to and accepted by the carrier for immediate shipment, it was liable for damages to them as a carrier from the time of delivery. There is an apparent conflict between the authorities above quoted and the cases of Texas, etc., R. Co. v. Nicholson, 61 Tex. 491, 495, and the Gulf, etc., R. Co. v. McCorkquodale, 71 Tex. 41, 46, 9 S. W. 80, but in those two cases the railway had contracted to receive and ship the cattle at certain dates, but refused to receive them when presented for shipment, and it was held that the railways were responsible as mere individuals for breach of their contract. But where there is an actual delivery to and acceptance by the railway company, its liability as a common carrier as under the common law begins at that time. International, etc., R. Co. v. Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 188, 23 S. W. 754.

## C. LOSS IN PARTICULAR CASES.

### 1. Loss on Connecting Line.

See the title **CONNECTING CARRIERS**.

A common carrier can not be held liable for damages resulting to goods beyond its own line, in the absence of a contract assuming such liability. Ft. Worth & D. C. Ry. Co. v. McAnulty, 7 Tex. Civ. App. 321, 26 S. W. 414; Galveston, etc., R. Co. v. Noelke (Civ. App.), 110 S. W. 82.

### 2. Loss by Fire.

See post, "Limiting Liability for Negligence," X, B, 2.

### 3. Loss by Deviation.

See ante, "Duty to Ship by Particular Route," III, F.

**Initial Carrier Becomes Insurer by Deviating from Route.**—It is elementary law that if a carrier deviates from the route fixed by his contract, he becomes responsible for all loss, which occurs either on his own or his connecting lines. By the deviation he becomes an insurer of the goods. It is also settled that when goods are delivered to a carrier for transportation to a designated point, it is his duty, as a general rule, to transport them by the safest and most direct route. If instructed as to the route, he selects a different one, he becomes responsible for any loss that may occur in transit. If a carrier becomes liable for all losses by a mere deviation from the route contracted for, for a stronger reason he should be held liable for all losses, when shipped over a route contrary to the express instruction of the shipper. Texas, etc., R. Co. v. Eastin, 100 Tex. 556, 561, 102 S. W. 105; Gulf, etc., R. Co. v. Irvine (Civ. App.), 73 S. W. 540.

**Where a carrier deviates without necessity** from the regular and usual course, he is held responsible for any loss which may occur, whether by the act of God or from any other cause. Hutch. on Carr., § 190. Inter-

national, etc., Ry. Co. v. Wentworth, 8 Tex. Civ. App. 5, 12, 27 S. W. 680.

But in another case it is stated that the contracting carrier is liable for injuries to a shipment diverted from the route contemplated by the contract, and this though the diversion was compelled by necessity. *Missouri, K. & T. Ry. Co. of Texas v. Leibold* (Civ. App.), 55 S. W. 368.

**When Carrier Not Liable.**—But where the deviation from the usual or stipulated route was caused by unprecedented floods, which rendered it absolutely necessary for the sheep to be carried over another route to prevent their loss, or at least a much greater delay than actually occurred, it is not liable. *International, etc., Ry. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 12, 27 S. W. 680.

**Unlawful Intention of Shipper No Defense.**—That the shipper through an arrangement with a company of horse and mule buyers at an intermediate point had made arrangements to unload there and would have received from it a rebate for the use of the cars from that place to the destination stated in the shipping contract, would not be a defense to the carrier. The carrier was in no manner connected with this agreement for a rebate, and whether such an arrangement between the horse company and the shipper was lawful, and therefore one which the carrier was bound to respect, or not, can not affect the undoubted right of the shipper to have his stock billed as requested with privilege of unloading and feeding at the intermediate point, upon paying the company's customary rates from point of origin to destination. That his secret intention was to unload and sell at the intermediate point, and to allow the purchaser to complete the transportation under this contract, can not in the least affect the legality of his contract with carrier. *Southern Kansas Ry. Co. v. Cox*, 43 Tex. Civ. App. 79,

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83, 95 S. W. 1124, affirmed in 101 Tex. 659, no op.

**Initial Carrier Recovering Over against Connecting Carrier for Loss.**—Where an initial carrier shipped cattle over certain connecting lines contrary to the express directions of plaintiffs, thereby becoming an insurer of the cattle, it was entitled to recover against a connecting carrier for negligence of the latter for which it was adjudged liable, and to be subrogated to the right of plaintiff. *Texas, etc., R. Co. v. Eastin*, 100 Tex. 556, 102 S. W. 105. See, generally, the title SUBROGATION.

**Agent Liable for Misfeasance.**—Where a railroad agent shipped cattle over a certain route contrary to the express directions of the shippers, he was guilty of misfeasance, and liable for loss occurring by reason of the shipment over the route selected by him. *Texas & P. Ry. Co. v. Eastin & Knox*, 102 S. W. 105, 100 Tex. 556.

**Shipping by Another Route Where Arrangements Had Been Made for Sale at Intermediate Point.**—Where a contract for the shipment of stock provided that it was to be unloaded at a point intermediate between the point of shipment and of destination, and the agent who made the contract knew that the shipper intended to sell the stock at this intermediate point, the carrier on failure to ship the stock to the intermediate point, was liable for all damages resulting; and evidence that the shipper had made arrangements with a certain company for the handling of the stock at the intermediate point, that this company would have paid him a rebate for the use of his cars from that point to the place of destination, that the animals contracted a disease at the place to which they were erroneously shipped, and that the shipper incurred certain expenses in reshipping them to intermediate point, was properly admitted. *Southern Kansas Ry. Co. of Texas v. Cox*, 95 S. W. 1124, 43 Tex. Civ. App. 791.



**4. Loss after Delivery to Consignee.**

See ante, "In General," VIII, A.

A carrier of live stock is not liable for damages occurring to the stock after delivery to the shipper or consignee. *Chicago, R. I. & G. Ry. Co. v. Young & Ball* (Civ. App.), 107 S. W. 127.

But the fact alone that the cattle died after their delivery at the point of destination would not relieve the carrier of liability. The true test of its liability in this connection depends upon whether the death of such cattle was the result solely of injuries received by reason of the carrier's negligence while transporting them. The damage is not too remote because the cattle died after delivery. *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 310, 14 S. W. 607.

**Carrier Liable Though Injury Becomes Apparent after Delivery.—**

Where horses shipped received injuries by a carrier's negligence, the carrier was liable for the death or permanent effects of such injuries, whether such death or permanent injuries became known before or after the horses left its line, and this, though the carrier limited its liability to such injuries as occurred on its own line. *Texas, etc., R. Co. v. Stephens* (Civ. App.), 86 S. W. 933.

**D. CIRCUMSTANCES EXEMPTING FROM LIABILITY AS INSURER.****1. Loss Arising from Act of God.****(a) In General.**

See ante, "In General," VIII, A.

**Unprecedented Climatic Conditions.**

—It has been more than once held that a carrier is not liable for loss or injury to live stock caused by unprecedented climatic conditions, where the provisions for the protection of stock are sufficient for conditions ordinarily prevailing. *Ft. Worth, etc., R. Co. v. Galton*, 45 Tex. Civ. App. 67, 100 S. W. 166.

Where a carrier received for shipment a mule in good condition, the carrier was liable for its safe delivery, and could be excused only on the ground that an act of God, the public enemy, the inherent vice of the animal, or some conduct of plaintiff was the cause of its death. *International & G. N. R. Co. v. Nowaski*, 106 S. W. 437, 48 Tex. Civ. App. 144.

**(b) Negligence of Carrier Concurring with Act of God.**

The rule is well settled that if the negligence of a common carrier concurs with the act of God in causing damage to the property entrusted to it for transportation, it is liable for the damage caused by such concurring negligence, although it may have been contributed to by the vis major. *Atchison, etc., R. Co. v. Nation* (Civ. App.), 92 S. W. 823, 827, affirmed in 101 Tex. 628, no op.

Where the negligence of a carrier, intrusted with a shipment of cattle, exposes the cattle to inclement weather, the carrier is liable for the resulting damage, although the weather also contributed to such damage. *Atchison, T. & S. F. Ry. Co. v. Nation & Slavens* (Civ. App.), 92 S. W. 823.

**2. Loss Occasioned by Act of Shipper.**

See ante, "In General," VIII, A.

The carrier is not liable for the death of cattle caused by the acts of the shipper. *International, etc., R. Co. v. Nowaski*, 48 Tex. Civ. App. 144, 106 S. W. 437.

**3. Inherent Vice of Animals.****(a) In General.**

See ante, "In General," VIII, A.

While a common carrier of goods, who also transports live stock, is, as to the latter property, a common carrier, he is exempt from liability for loss or injury caused by the nature and propensities of the animals, and which can not be prevented by foresight, vigilance and care. (*Tex. Civ. App. 1903*) *International & G. N. R. Co. v. Young* (Civ. App.), 72 S. W. 68; *Texas,*

etc., *R. Co. v. Hunter & Co.*, 47 Tex. Civ. App. 190, 104 S. W. 1075; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 169, 2 S. W. 574; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 317, 4 S. W. 567; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 169, 2 S. W. 574; *Texas, etc., R. Co. v. Snyder (Civ. App.)*, 86 S. W. 1041; *Gulf, etc., R. Co. v. Staton (Civ. App.)*, 49 S. W. 277, 278; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749; *Missouri, etc., R. Co. v. Russell*, 40 Tex. Civ. App. 114, 117, 88 S. W. 379, affirmed in 101 Tex. 649, no op.; *International, etc., R. Co. v. Young (Civ. App.)*, 72 S. W. 68; *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611, 8 S. W. 312; *Gulf, etc., R. Co. v. Baird*, 75 Tex. 256, 266, 12 S. W. 530; *St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1131.

This is so, notwithstanding the fact that the "ordinary of its kind" may have the same inherent natural propensity or habit. *Texas, etc., R. Co. v. Hunter & Co.*, 47 Tex. Civ. App. 190, 193, 104 S. W. 1075; *Ft. Worth, etc., R. Co. v. Cage Cattle Co. (Civ. App.)*, 95 S. W. 705; *Texas, etc., R. Co. v. Sator (Civ. App.)*, 102 S. W. 156.

**Defining Inherent Vice.**—Where the court defines inherent vice as a fault not possessed by the ordinary of its kind, it is too restrictive. *Texas, etc., R. Co. v. Hunter & Co.*, 47 Tex. Civ. App. 190, 193, 104 S. W. 1075.

**Mare with Foal—Liable Where Carrier Negligent.**—Where the carrier carries the animals without any negligence on its part, there can be no liability for injuries where the vicious propensities or inherent bad condition of animals give rise to the damage in transit, without any fault of the carrier, but where there is evidence to show that cattle were subjected to great delay, and not properly treated en route, and even those not mares suffered injury therefrom, the carrier can not say that it is relieved from certain damages in respect to the mares be-

cause they were predisposed to injury from its negligence. Nor can it claim that the injuries to such mares were not such as could have been reasonably anticipated as the effect of negligent treatment. *Gulf, etc., R. Co. v. Staton (Civ. App.)*, 49 S. W. 277, 278.

**Charge Erroneous Which Does Not Recognize Carrier's Exemption.**—A charge holding one of connecting lines of carriers of live stock liable for all injuries to cattle received on its line, is erroneous where it does not recognize the carrier's exemption from damage by ordinary shrinkage or the inherent weakness or vice of the cattle. *Gulf, etc., R. Co. v. Butler*, 31 Tex. Civ. App. 576, 73 S. W. 84.

**Sufficiency of Evidence to Support Finding That Injury Was Due to Inherent Vice.**—Evidence in an action against a carrier for the death of a dog during transportation examined, and held to support a finding that the death of the dog was due to the heat and inherent vices, thereby overcoming the prima facie case made by the shipper proving a delivery of the dog to the carrier in good condition and a failure to deliver it alive. *Thomas v. Wells-Fargo Express Co. (Civ. App.)*, 95 S. W. 723.

**Charge That Carrier Is Not Liable for Inherent Vice of Cattle Should Be Given.**—In an action for injury to stock in shipment, a charge should be given relieving defendant from liability if the injuries were occasioned by the inherent viciousness of the stock. *International, etc., R. Co. v. Young (Civ. App.)*, 72 S. W. 68.

Where, in an action for injury to cattle during shipment, defendant pleaded that the injury was due to the weak and impoverished condition of the cattle, and there was evidence tending to sustain such plea, it was error for the court to refuse defendant's request for a charge affirmatively presenting such defense, although it was submitted in a negative form in the charge given.

Texas, etc., *R. Co. v. Dawson*, 34 Tex. Civ. App. 240, 78 S. W. 235.

**Instruction—Not Open to Objection of Imposing Absolute Duty to Carry Safely.**—An instruction in an action against carriers for injuries to a shipment of live stock that if the injuries to the cattle were the result of weakness of the cattle, or their condition was such that they were unable to make the journey without injury, the verdict should be for defendants, presents only another contingency on which the verdict should be for defendants, and does not impose on defendants the absolute duty to safely carry the cattle if they were not able to make such a journey. *Texas & P. Ry. Co. v. Felker*, 99 S. W. 439, 44 Tex. Civ. App. 420.

**Instruction—Breaking Gates of Stock Pens.**—A charge that if the cattle were injured by getting together and breaking out of the stock pens, and they did not do so from the defects in the gates and fastenings thereof, but from their inherent viciousness, to find for the defendant, sufficiently exempted the carrier from liability if the injuries occurred on account of plaintiff's having confined vicious and unruly bulls in the pens. *Ft. Worth, etc., R. Co. v. Waggoner Nat. Bank*, 36 Tex. Civ. App. 293, 81 S. W. 1050, affirmed in 98 Tex. 616, no op.

**Defendant's Pleadings Need Not Raise Issue.**—Where, in an action for damages to cattle shipped, the case as made by plaintiff shows that the damages were due to an inherent vice of the cattle, he can not recover, though defendant's pleadings did not raise the issue of inherent vice. *Missouri Pac. Ry. Co. v. Fagan* (Civ. App.), 29 S. W. 1110.

**No Instructions Where Issue Not Raised by Pleading or Evidence.**—In an action against a carrier for injury to cattle by reason of a wreck due to its negligence, an instruction that defendant is not liable for injuries done

to the cattle by each other by reason of their inherent viciousness is properly refused, if defendant has not raised such issue by pleading and proof, and no evidence of such injuries is brought out by plaintiff. *Ft. Worth & D. C. Ry. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834.

**(b) Carrier's Negligence Concurring with Cattle's Condition.**

Where a carrier accepts for transportation cattle which are weak and thin, but able to be transported, and its negligence proximately causes injury or concurs with the condition of the cattle in producing injury to them, the carrier, it seems, may be held liable for the full extent of the injury. *Ft. Worth, etc., R. Co. v. Alexander*, 36 Tex. Civ. App. 297, 81 S. W. 1015, affirmed in 98 Tex. 616, no op.

**Weak Condition.**—In an action for injury to cattle during shipment, the court properly refused to charge that if their weak and impoverished condition "contributed to their death or injury," such demand so occasioned should be excluded. The defendant carrier having received the cattle for shipment, was bound to exercise ordinary care to transport them with reasonable dispatch, and was liable for negligence and unreasonable delay proximately resulting in injury, although the results were more disastrous than they would have been had the cattle been in good condition. *Texas, etc., R. Co. v. Dawson*, 34 Tex. Civ. App. 240, 78 S. W. 235.

**Weak Condition of Cattle "Aiding, Assisting or Contributing" to Damage.**

—In an action for breach of contract to furnish cars for the shipment of cattle, a requested instruction that if plaintiff's cattle were damaged, and were poor and weak, and their poor and weak condition, independent of any other causes, "aided, assisted, or contributed to the damage," then defendants were not liable for any dam-

age that might have been occasioned by the condition of the cattle, was properly refused as misleading. It is difficult to see how a condition, independent of any other causes, could aid, assist, or contribute to the damage. *Pecos River R. Co. v. Latham*, 40 Tex. Civ. App., 78, 88 S. W. 392, affirmed in 101 Tex. 652, no op.

#### 4. Contributory Negligence.

##### a. In General.

See, generally, the title NEGLIGENCE.

Habitual negligence of the carrier in transporting cattle resulting in injury to them is no defense, nor is negligence on the part of the shipper as to their condition unless it proximately contributed to the injury. *Ft. Worth, etc., R. Co. v. Alexander*, 36 Tex. Civ. App. 297, 81 S. W. 1015, affirmed in 98 Tex. 616, no op.

##### Carrier Relieved Notwithstanding Its Negligence Where Shipper Negligent.

—In an action against a railroad company for damages from the death of part of a shipment of calves, an instruction that, if plaintiff was guilty of negligence proximately contributing to the death of the calves, he could not recover, should have been supplemented by a statement that this would be true, regardless of defendant's negligence. *Houston & T. C. R. Co. v. Burns*, 90 S. W. 688, 41 Tex. Civ. App. 83.

**When Contributory Negligence No Bar—Intermixing Grades.**—In action for damage to cattle during transit through negligence of carrier, contributory negligence of the plaintiff is not complete bar to recovery where, independent of it, defendant's negligence in intermixing grades and in delaying shipment, caused damage to cattle. *Ft. Worth, etc., R. Co. v. Daggett*, 87 Tex. 322, 329, 28 S. W. 525, reversing 27 S. W. 186.

**Overloading Car.**—Where it is the fault of the shipper, in whole or in part, that too many horses are

crowded into a car, he can not recover for injury resulting therefrom, irrespective of whether or not he had by contract assumed the duty of loading. *Texas, etc., R. Co. v. Edins*, 36 Tex. Civ. App. 639, 640, 83 S. W. 253. See *Texas Cent. R. Co. v. O'Laughlin* (Civ. App.), 72 S. W. 610.

##### Shipper Requesting Reloading.

—Plaintiff shipped cattle over defendant's road, under a contract requiring plaintiff to load, unload, and reload the stock. A car was overloaded, and plaintiff requested that the stock be reloaded before the car started, and he made a similar request several times while the stock was in transit, which was refused by the defendant, and several of the cattle were killed and injured in consequence thereof. Held, that the defendant was liable, since the injury was caused by a failure to furnish proper cars, and not from negligence in loading. *International & G. N. R. Co. v. Pool*, 59 S. W. 911, 24 Tex. Civ. App. 575.

A carrier is liable for injuries to shipment of live stock caused by overloading a car, when it had been notified that the car was overcrowded, and requested to place stock in another car. *Missouri Pac. R. Co. v. Graves*, 2 App. Civ. Cases, § 676.

##### Evidence Admissible to Show that Shipper Overloaded.

—In an action against a carrier for injuries to live stock, evidence is admissible that plaintiff overloaded the car, though it was not as large as the one he had ordered from the company. *Texas & P. Ry. Co. v. Klepper* (Civ. App.), 24 S. W. 567.

##### Failure to See Cattle Were Properly Routed.

—Where an action was brought against a carrier for failure to note on the waybill and shipping contract of a shipment of mules that the mules were to be unloaded and fed at an immediate point en route, and the carrier pleaded contributory negligence and delay to take steps

to have the mules properly routed, after the discovery of the carrier's dereliction in this respect, evidence that the shipper at a certain station en route had a conversation with the person whom he took to be the carrier agent concerning the omission, was admissible whether the person spoken to was the agent of the carrier or not, as it was relevant to the issue as to whether the shipper took other steps to have the mistake of the company corrected. *Southern Kansas R. Co. v. Cox*, 43 Tex. Civ. App. 79, 81, 95 S. W. 1124, affirmed in 101 Tex. 659, no op.

**Evidence Showing Carrier Did Loading Does Not Support Charge on Theory Shipper Overloaded.**—In an action against a carrier for injury to stock in transit, evidence showing that the carrier did the loading, watering, etc., at all points and that one car was overloaded, does not support a charge on the theory that plaintiff overloaded the car. *Missouri Pac. R. Co. v. Kingsbury* (Civ. App.), 25 S. W. 322, 323.

**Verdict Should Be Set Aside Where Evidence Shows Plaintiff Had Notice He Was Overloading Cars.**—Where the evidence showed that the plaintiff, while loading cattle in defendant's cars, had notice that the cars were being overloaded, it was error for the trial court not to set aside a verdict for damages arising from such overloading. *Ft. Worth & D. C. Ry. Co. v. Word* (Civ. App.), 32 S. W. 14.

#### b. What Constitutes.

##### (1) Failure to Feed and Water.

It is not contributory negligence on the part of a shipper of cattle to put them in pens of the carrier at its request and allow them to await the arrival of cars, without feed or water, when the carrier's agent informs the shipper that the cars are expected soon. *Missouri, K. & T. Ry. Co. of Texas v. Kyser & Southerland*, 95 S. W. 747, 43 Tex. Civ. App. 322; Gulf,

etc., *R. Co. v. House*, 40 Tex. Civ. App. 103, 88 S. W. 1110, 1112.

##### (2) Improper Loading and Unloading.

See ante, "In General," VIII, D, 4, a.

**Unloading on Unsafe Platform.**—The fact that plaintiff, in loading his horse on defendant's cars, took it upon a platform which he knew to be unsafe and dangerous, does not, as a matter of law, render him guilty of contributory negligence, such question being always for the jury. *Gulf, C. & S. F. Ry. Co. v. Wood* (Civ. App.), 30 S. W. 715.

**Promiscuous Loading.**—Where there is evidence that, on reaching their destination, plaintiffs' cattle had the appearance of having been trampled on, and were much bruised, and that this was caused by the fact that plaintiffs had loaded the cattle promiscuously, without reference to their age, sex, condition, or size, it is error to refuse an instruction that plaintiffs are not entitled to recover for injuries resulting from the promiscuous intermingling of the cattle, and this error is not cured by an instruction that defendant is not liable for injuries resulting from "overloading" the cars. *Missouri Pac. Ry. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607.

**Overloading Car.**—In an action against a carrier for damage to cattle in transit by their falling in the cars in consequence of having got wet and slippery in a mudhole in defendant's stock pen, it appeared that the cattle were loaded and cared for in transit by plaintiff's employees, who were given free transportation; that the cattle were loaded 50 head to the car, when the capacity of the cars was but 45; and that plaintiff's employees abandoned the cattle before the destination was reached and while many of them were down in the cars. Held, that a finding of absence of contributory negligence should

be set aside. *Missouri, K. & T. Ry. Co. of Texas v. Belcher* (Civ. App.), 41 S. W. 706.

The fact that plaintiff's contract with defendant called for 34-foot cars, and that defendant represented the cars supplied to be that size, will not justify plaintiff in loading the number of cattle usually carried in 34-foot cars after he discovers it could not properly be done. *Ft. Worth & D. C. Ry. Co. v. Word* (Civ. App.), 32 S. W. 14.

**Instructions as to Carrier's Refusal to Unload at Intermediate Point.**—In an action for injury to cattle in shipment where the evidence showed that through shipper's mistake in size of car, it was overloaded, a charge from which jury might understand that carrier's refusal to unload at an intermediate station would render it liable for damages previously caused, was erroneous. *Gulf, etc., R. Co. v. Kemp* (Civ. App.), 30 S. W. 714, 715.

**Charge—Shipper Assuming Risks from Overloading.**—Where, in an action against a carrier for injury to live stock shipped under a contract by the terms of which plaintiff, the shipper, assumed the risks of danger from overloading, the defendant pleaded that the cars were overloaded, no pleading on the part of the plaintiff was necessary to rebut that defense and to warrant a charge submitting that issue. *Texas, etc., R. Co. v. White*, 35 Tex. Civ. App. 521, 80 S. W. 641, affirmed in 98 Tex. 635, no op.

**(3) Failure to Lock Stock Pen Gates.**

**Shipper Not Locking Gates.**—Where the shipper provided stock pens with a chain and lock, which lock was attached to the chain and hung on the gate, the key of the lock being kept in the drawer of the agent in his office, and the shipper placed his cattle in the stock pen and with his employees fastened the gate with a piece of barbed wire, and neither the shipper nor any one of his employees inquired of the agent for the key or demanded

of him that he see that the cattle were more securely fastened, and the cattle became frightened and broke out of the pens, it was held the carrier was not negligent as the only cause of the failure of the shipper to secure his cattle by lock and key was his neglect to inquire of the proper person for the key. *Gulf, etc., R. Co. v. Taliaferro*, 40 Tex. Civ. App. 388, 390, 89 S. W. 1120, affirmed in 101 Tex. 640, no op.

## E. DAMAGES.

### 1. Proximate Cause.

**Permitting Stock Pen Gate to Remain Out of Repair.**—The negligence of a carrier in permitting the gate of a stock pen to remain out of repair is the proximate cause of injuries to cattle escaping through the gate and being frightened by a passing train. *Texas & P. Ry. Co. v. Bigham*, 90 Tex. 223, reversing 36 S. W. 1111.

**Instructions Allowing Recovery for Damages Which "Might Have" Resulted, Erroneous.**—An instruction, in an action for injury to a live-stock shipment, that a shipper was entitled to recover from the carrier such damages as "might have" resulted from unreasonable delay or unusually rough handling instead of such damages as proximately resulted therefrom, is erroneous. *Ft. Worth, etc., R. Co. v. James*, 39 Tex. Civ. App. 408, 87 S. W. 730.

To submit an issue of negligence which is clearly not even a remote cause of an injury, and then leave it to the jury to determine whether or not it was the proximate cause, does not relieve the instructions from the objection of having been without any testimony to support it. The mere fact that the court submits an issue or question of fact to a jury, and leaves it to them to decide whether or not the fact exists, and, if found, then whether or not it was the proximate cause of the injury, is calculated to

induce the jury to believe that, in the mind of the court, there is not only testimony upon which they can base a finding that the fact does exist, but that there is also testimony tending to show that that fact was in reality the direct and proximate cause of the injuries complained of. *St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 651, 105 S. W. 1131.

**Leaking Car—Cattle Contracting Disease.**—Where it is shown that horses were shipped by rail during cold weather, and that while in cars they were wet by water leaking from water tanks on cars, and that some of them became sick with pneumonia and others with catarrhal fever, there can be no recovery of damages for negligence in allowing tanks to leak unless sickness is shown to have been caused thereby. *Weed v. International, etc., R. Co.*, 21 Tex. Civ. App. 689, 690, 53 S. W. 356.

**Ignoring Defense of Proximate Cause.**—Where, in an action against a carrier for injuries to cattle, defendant claimed that the cattle were weak from want of proper care prior to transportation, a requested instruction failing to require that plaintiff's prior treatment of the cattle must have proximately caused, or contributed to cause, the injuries complained of, in order to preclude a recovery, was properly refused. *Ft. Worth & D. C. Ry. Co. v. Alexander*, 81 S. W. 1015, 36 Tex. Civ. App. 297.

## 2. Measure of Damages.

### a. Where Loss Is Total.

In an action against a carrier for the death of horses intrusted to it for transportation the measure of damages is the market value of the horses at the place and time of delivery, had they arrived alive and uninjured by any negligence of the carrier. *Texas & P. Ry. Co. v. Snyder* (Civ. App.), 86 S. W. 1041; *Missouri, etc., R. Co. v. Cook*, 8 Tex. Civ. App. 376, 27 S. W.

769, affirmed in 93 Tex. 690, no op.; *Gulf, etc., R. Co. v. Butler*, 31 Tex. Civ. App. 576, 73 S. W. 84; *St. Louis, etc., Railway v. Burns* (Civ. App.), 80 S. W. 104; *Houston, etc., R. Co. v. Williams* (Civ. App.), 31 S. W. 556; *Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. 286, affirmed in 93 Tex. 699, no op.; *Gulf, etc., R. Co. v. Simmons* (Civ. App.), 28 S. W. 825, affirmed in 93 Tex. 662, no op.; *Texas, etc., R. Co. v. Sims* (Civ. App.), 26 S. W. 634; *Texas, etc., R. Co. v. Klepper* (Civ. App.), 24 S. W. 567.

**Freight Deducted.**—In case of total loss, during transportation, of mares shipped with foal, there being what is called inherent defect in such freight, the measure of damages is price at destination if delivered in reasonable time in best condition possible if carrier exercised due care, less freight. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 133, 9 S. W. 749.

### b. Where Loss Is Partial.

#### (1) In General.

The measure of damages to a shipment of cattle resulting from negligence of the carrier in transportation is the difference in their market value at the place of destination in the condition in which they should have been delivered, and the condition in which they were delivered. *Gulf, C. & S. F. Ry. Co. v. Butler*, 63 S. W. 650, 26 Tex. Civ. App. 494; *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 44, 33 S. W. 109, affirming 29 S. W. 805; *Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 682, 26 S. W. 286, affirmed in 93 Tex. 699, no op.; *Galveston, etc., R. Co. v. Williams* (Civ. App.), 25 S. W. 311, 312; *Texas, etc., R. Co. v. Barber* (Civ. App.), 30 S. W. 500; *Gulf, etc., R. Co. v. Houghton* (Civ. App.), 68 S. W. 718, affirmed in 97 Tex. 634, no op.; *Gulf, etc., R. Co. v. Godair*, 3 Tex. Civ. App. 514, 22 S. W. 777; *Galveston, etc., R. Co. v. Silegman* (Civ. App.), 23 S. W. 298; *Missouri Pac. R. Co. v. Nicholson*, 2 App. Civ.

Cases, § 168; San Antonio, etc., R. Co. v. Wright, 20 Tex. Civ. App. 136, 49 S. W. 147; Texas, etc., R. Co. v. Arnold, 16 Tex. Civ. App. 74, 40 S. W. 829; Texas, etc., R. Co. v. Reeves, 15 Tex. Civ. App. 157, 39 S. W. 135; Galveston, etc., R. Co. v. Johnson (Civ. App.), 29 S. W. 428, 431; Gulf, etc., R. Co. v. Simmons (Civ. App.), 28 S. W. 825, 826, affirmed in 93 Tex. 662, no op.; Texas, etc., R. Co. v. Avery (Civ. App.), 33 S. W. 704; Texas, etc., R. Co. v. Berchfield, 12 Tex. Civ. App. 145, 33 S. W. 1022; St. Louis, etc., R. Co. v. Berry, 42 Tex. Civ. App. 470, 93 S. W. 1107; Missouri, etc., R. Co. v. Allen, 39 Tex. Civ. App. 236, 87 S. W. 168; Texas, etc., R. Co. v. Murtishaw, 34 Tex. Civ. App. 447, 78 S. W. 953; Gulf, etc., R. Co. v. Batte (Civ. App.), 94 S. W. 345, 347; Houston, etc., R. Co. v. Williams (Civ. App.), 31 S. W. 556; San Antonio, etc., R. Co. v. Dolan (Civ. App.), 85 S. W. 302; Gulf, etc., R. Co. v. Staton (Civ. App.), 49 S. W. 277; Texas, etc., R. Co. v. Sherrod (Civ. App.), 87 S. W. 363, affirmed in 99 Tex. 382, 89 S. W. 956; Texas, etc., R. Co. v. Stephens (Civ. App.), 86 S. W. 933; Galveston, etc., R. Co. v. Johnson (Sup.), 19 S. W. 867; Texas, etc., R. Co. v. Klepper (Civ. App.), 24 S. W. 567; Gulf, etc., R. Co. v. Wilm, 9 Tex. Civ. App. 161, 28 S. W. 925; Reeves v. Texas, etc., R. Co., 11 Tex. Civ. App. 514, 32 S. W. 920; Gulf, etc., R. Co. v. Wright (Civ. App.), 87 S. W. 191, 192; St. Louis, etc., R. Co. v. Smith, 11 Tex. Civ. App. 550, 32 S. W. 828; International, etc., R. Co. v. Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754.

**Freight Deducted.**—In a case of partial loss, during transportation, of a mare shipped with foal, the measure of damages is the difference between the price at destination if delivered in reasonable a time in best condition possible if carrier exercised due care, and price as received, less freight. Missouri Pac. R. Co. v. Fagan, 72 Tex. 127, 132, 9 S. W. 749.

**Instruction as to Measure of Damages.**—Though the measure of damages for injuries to live stock by a carrier is the difference in value in the condition it was delivered at its destination, and its value had it been transported without negligence, a jury most probably so understood an instruction that the measure of damages was the difference in value in the condition the stock was delivered at its destination, and what it would have been worth had it been properly delivered. Texas Cent. R. Co. v. G. W. Hunter & Co., 104 S. W. 1075, 47 Tex. Civ. App. 190.

**Instructions—Holding Cattle for Two Months at Destination.**—Where stock in good condition and of certain market value were so injured in shipment as to necessitate holding them at point of destination nearly two months before they were of any value, held sufficient to warrant charge submitting as measure of damages their value in good and bad condition. Texas, etc., R. Co. v. Reeves, 15 Tex. Civ. App. 157, 158, 39 S. W. 135, affirmed in 93 Tex. 675, no op.

**Charge Giving One Element as Value of Cattle on Arrival There "in Good Condition."**—In an action for injuries to live stock during transportation, it is misleading to charge that the measure of damages is the difference between the market value at the place of destination and what the value of the stock would have been had it arrived there "in good condition." Galveston, H. & S. A. Ry. Co. v. Johnson (Civ. App.), 29 S. W. 428.

**Instruction Not Making Initial Carrier Liable for Injury on Connecting Line.**—The court charged that plaintiff could not recover unless defendant failed to transport the cattle within a reasonable time, or failed to use ordinary care in handling and transporting them, and that defendant would be liable only for injuries occasioned by its negligence, and while in its pos-



session on its own line. Held, that the contention that an instruction that the measure of damages for cattle injured in transportation was the difference between their market value at the time and place of destination, in the condition in which they would have arrived if "properly handled and transported," and their market value in the condition in which they did arrive, was objectionable, as making defendant liable for injuries sustained on a connecting line, was without merit, when taken in connection with the other instructions. *Missouri, K. & T. Ry. Co. of Texas v. Chittim*, 60 S. W. 284, 24 Tex. Civ. App. 599.

**Court Stating Measure Was Difference in "Value" Instead of "Market Value."**—An instruction that the measure of damages to a shipment of cattle is the difference between their value at destination, in the condition they arrived, and what it would have been had they not been injured, is not misleading, because not confining the recovery to the difference in "market value," where all the evidence was directed to the question of such difference in market value. *Gulf, C. & S. F. Ry. Co. v. Terry & McAfee* (Civ. App.), 89 S. W. 792.

**Keeping in Unsanitary Pens at Destination.**—In an action against a carrier for damages to cattle owing to the carrier having kept the cattle in unsuitable pens after arrival at destination, and while the shipper was procuring money to pay extra freight charge, there being no market price at the place of destination, the true measure of damages was the difference, if any, between the actual value of the cattle in their condition at the time they were delivered to plaintiff and what their actual value would have been when so delivered to plaintiff had they been held with ordinary care. *Atchison, T. & S. F. Ry. Co. v. A. S. Veale & Co.*, 87 S. W. 202, 39 Tex. Civ. App. 37.

**Measure Not Difference in Net Value before and after Injury.**—The measure of damages for cattle injured and crippled through the negligence of a carrier is the difference in their market value at the place of destination, in the condition in which they should have been delivered, and in the condition in which they were delivered, and not necessarily the difference in net value at destination immediately before and after the injury. *St. Louis, I. M. & S. Ry. Co. v. Burns* (Civ. App.), 80 S. W. 104.

**Damages Not Estimated from Actual Selling Price but from Market Value.**—In an action against a carrier for delay in transportation of cattle, the damages were not to be determined from what the cattle actually sold for at the place of destination at the time they were sold, but from their market value in their then condition. *San Antonio & A. P. Ry. Co. v. Turner*, 94 S. W. 214, 42 Tex. Civ. App. 532.

**Confused and Indefinite Instruction.**—In an action for damages to plaintiff's cattle occasioned by defendant's negligence and delay in shipping, an instruction that the measure of damages was the difference in the weight and condition, and from these their market value, of said cattle at the place and time they were delivered in their injured condition, and their weight and condition, and from these their market value, at said place of delivery or destination, when they were delivered, had they been carried and delivered in such reasonable good condition, weight, and market value as, by proper care on defendant's part and its servants in the shipment of said cattle, they should have been delivered had defendant, acting by its servants or agents in charge of such shipment, exercised such care in their shipment as a prudent person would have exercised in the care of a shipment of its own property, was confused and indefinite. *Gulf, C. & S. F. Ry. Co. v.*

Miller, 59 S. W. 550, 24 Tex. Civ. App. 430.

**Charge Assuming Carrier Did Not Transport with Ordinary Care.**—An instruction, in an action against a carrier for injuries to horses intrusted to it for transportation, that the measure of damages is the difference in the market value of the horses in the condition in which they arrived at the place of destination and the condition in which they should have been delivered if transported with ordinary care, is not objectionable as assuming that the horses were not transported with ordinary care where another charge authorized a verdict for plaintiff, if the carrier failed to exercise ordinary care, for the amount of damages sustained through its negligence. Texas, etc., R. Co. v. Snyder (Civ. App.), 86 S. W. 1041.

**(3) Cattle Not Intended for Immediate Sale.**

Although cattle were not shipped for immediate sale, but it was intended to pasture them for a number of months after reaching their destination, their deterioration in market value at the place of destination, or so much thereof, as was caused by the carrier's negligence, is the correct measure of damages. Gulf, etc., R. Co. v. Hume, 6 Tex. Civ. App. 653, 657, 24 S. W. 915, affirmed, on this point, by the supreme court, in 87 Tex. 219, 27 S. W. 110, but reversed on another point; Gulf, etc., R. Co. v. Stanley (Civ. App.), 29 S. W. 806, 807, affirmed in 89 Tex. 42, 33 S. W. 109; Missouri, etc., R. Co. v. Kyser, 38 Tex. Civ. App. 355, 87 S. W. 389, affirmed in 101 Tex. 649, no op.

**Shipper Holding Cattle at Destination Until Recovery.**—But the general rule, that the measure of damages for injury occasioned in the shipment of cattle is the difference between their market value on arrival at their destination, and what would have been such market value there but for the

injury, is not applicable where the cattle are not destined for market, and are not sold on arrival at their destination, but are kept by the owner until they recover from the injury. In such case the correct measure of damages is the actual damage caused by the improper treatment, and any extra expense which the owner may have incurred by reason thereof in attending to the cattle. Gulf, etc., R. Co. v. Godair, 3 Tex. Civ. App. 514, 22 S. W. 777; Texas, etc., R. Co. v. Avery (Civ. App.), 33 S. W. 704, 705.

Where cattle are damaged while in transit, by the negligence of a railroad company, and the owner retains them after they reach their destination until the damage is ascertained, he should be restricted, in his recovery against the company, to the actual loss he sustained, and not be allowed to recover what erroneously appeared to be the damage when the cattle first reached such destination. Gulf, C. & S. F. Ry. Co. v. Godair, 3 Tex. Civ. App. 514, 22 S. W. 77.

**(3) Where Animals Have No Market Value at Destination.**

Where cattle injured in transportation such as those for damage to which plaintiff sued, had no market value, the measure of damages for such injuries was the difference in their actual value before and after shipment. (Tex. Civ. App. 1897) Missouri, K. & T. Ry. Co. v. Chittim (Civ. App.), 40 S. W. 23; (1900) Texas & P. Ry. Co. v. Fambraugh (Civ. App.), 55 S. W. 188.

**3. Evidence as to Value or Damage.**

**a. Market Value at Destination Controls.**

**(1) In General.**

See ante, "Evidence as to Value or Damage," VII, D, 2, c.

The market value of cattle, incurred by setting of a car on fire, is the market value at the place of destination and not at the point where the injury oc-

curred. *Texas, etc., R. Co. v. Dishman*, 38 Tex. Civ. App. 277, 378, 85 S. W. 319, affirmed in 101 Tex. 663, no op., distinguished in *Texas, etc., R. Co. v. Arnold*, 16 Tex. Civ. App. 74, 40 S. W. 829.

In the absence of a special contract, damage to horses from a railroad company's negligence in loading them on cars must be estimated on their value at the place of destination. *Galveston, H. & S. A. Ry. Co. v. Herring* (Civ. App.), 28 S. W. 580.

**Stipulation of Contract Does Not Alter Rule.**—The measure of damages for injuries to live stock is based on the value at the place of destination, where the shipper prepaid the freight, notwithstanding a contract that the value at the place of shipment should be considered, as Rev. St. 1895, art. 230, prohibits common carriers from limiting their common-law liability. *International & G. N. R. Co. v. Parish*, 43 S. W. 1066, 18 Tex. Civ. App. 130.

**Delivery to Connecting Line—Market Value at Time of Delivery Governs.**—Where the contract of shipment of stock recites that it is from the place of shipment to that of final destination, and limits the liability of the railroad until delivery to a connecting line at an intermediate point, the stock being shipped for sale at the point of final destination, the measure of damages for injuries before delivery to the connecting line is the market value of the stock at the point of final destination. *Gulf, C. & S. F. Ry. Co. v. Edkins*, 7 Tex. Civ. App. 116, 26 S. W. 161.

**Evidence of Market Value Admissible.**—Where an action is brought against a railroad company for damages to cattle resulting from its negligence and delay in executing its contract of carriage, evidence of the market value of the cattle is admissible on the question of damages. *Missouri, K. & T. Ry. Co. of Texas v. Wells*, 58 S. W. 842, 24 Tex. Civ. App. 304.

**Witness Not Showing Market Value at Destination.**—But the evidence of a witness testifying as to the market value of cattle is properly excluded, where the witness knew the market value of the cattle at the initial point of carriage and not at the destination. *Texas, etc., R. Co. v. Sherrod*, 99 Tex. 382, 384, 89 S. W. 956, affirming 87 S. W. 363.

**Evidence as to Market Value at Other Places Inadmissible.**—In action for damage to hogs in shipment to certain place, evidence as to their market value at other places than destination was inadmissible. *Terry v. Gulf, etc., R. Co.*, 14 Tex. Civ. App. 451, 452, 37 S. W. 234; *Texas, etc., R. Co. v. Sherrod* (Civ. App.), 87 S. W. 363, affirmed in 99 Tex. 382, 89 S. W. 956; *International, etc., R. Co. v. Young* (Civ. App.), 72 S. W. 68; *Texas, etc., R. Co. v. Stephens* (Civ. App.), 86 S. W. 933; *Texas, etc., R. Co. v. Barber* (Civ. App.), 30 S. W. 500.

**Market Value in January Not Admissible to Prove Market Value in September.**—In an action against a carrier for injury to horses being carried on its road, evidence of a market value in January, though incompetent as to value in September, is harmless, where the verdict is for much less than is warranted by all the competent evidence. *Galveston, H. & S. A. Ry. Co. v. Williams* (Civ. App.), 25 S. W. 1019, reversing (Civ. App. 1894), 25 S. W. 311.

**Evidence as to Damage Per Head—No Evidence of Value.**—In an action for injuries to live stock in transportation, admission of testimony of a witness that, when the animals arrived at their destination, they were damaged to a certain amount per head, was reversible error, where there was no evidence as to their value. *Gulf, etc., R. Co. v. Staton* (Civ. App.), 49 S. W. 277.

**Testimony as to Value if Transported Properly.**—Though the measure

of damages to live stock in course of shipment is the difference between the value of the animals as delivered and their value as they should have been delivered, it was not error to permit plaintiff to testify with reference to what the value would have been at the destination if they were delivered in the same condition as they were in at the point from which they were shipped. *Gulf, C. & S. F. Ry. Co. v. Mathews*, 76 S. W. 607, 33 Tex. Civ. App. 285.

**(3) Where Animals Have No Market Value at Destination.**

**Market Value at Nearest Point May Be Shown.**—Where there was no market value for cattle shipped at their place of destination, in estimating the amount of damages for injuries to them while in transit evidence is admissible for their market value at the nearest market. *Houston & T. C. Ry. Co. v. Williams* (Civ. App.), 31 S. W. 556.

**Berkshire Hog.**—In suit against carrier for death of a Berkshire hog while in transit, when there was no market value at place of destination, evidence of hog's value in Berkshire market of Texas would be sufficient in absence of other to sustain a verdict, but was not so conclusive as to exclude other competent evidence—such as to the cost of the hog. *Pacific Exp. Co. v. Lothrop*, 20 Tex. Civ. App. 339, 341, 49 S. W. 898.

**Actual Price Received as Corroborative of Market Value at Destination.**—In action against railroad for damages to horses during shipment, evidence of price actually received for horses at destination is admissible to corroborate testimony as to their value at that place. *Reeves v. Texas, etc. R. Co.*, 11 Tex. Civ. App. 514, 515, 32 S. W. 920.

**Evidence of Pedigree Admissible.**—In suit against carrier for negligent death of a Berkshire hog, which had

no market value at place of destination, evidence of its pedigree was admissible in determining its value. *Pacific Express Co. v. Lothrop*, 20 Tex. Civ. App. 339, 342, 49 S. W. 898.

**Actual Sales.**—In suit against a carrier for negligent death of a hog in transit, which had no market value at place of destination, it was competent to show actual sales of similar hogs and the value thereof at other times near date of sale of the hog killed. *Pacific Express Co. v. Lothrop*, 20 Tex. Civ. App. 339, 341, 49 S. W. 898.

**Evidence of Value of Unborn Colt Inadmissible.**—In suit against carrier for injuries to mare resulting in death of unborn colt, evidence of value of unborn colt was improperly admitted, but increased value of mare, because in foal, could have been proven. *Texas, etc., R. Co. v. Randle*, 18 Tex. Civ. App. 348, 352, 44 S. W. 603.

**Evidence Not Showing Absence of Market Value.**—In an action for damages to race horses caused by delay in transit, evidence that there had been a few individual sales of race horses at the destination of the horses in question, when accompanied by an express statement of the witness that there was no market for such horses at their destination, did not show that the horses had a market value at their destination in such sense as to preclude a recovery for depreciation in actual value. *Texas & P. Ry. Co. v. Ellerd*, 67 S. W. 362, 38 Tex. Civ. App. 596.

**When Actual Value Admissible.**—But where there is evidence, tending to show that there was no market at either destination for race horses such as were involved in the shipment, in similar cases it has been frequently held that competent evidence showing the actual value is admissible, and in such cases also, the fact that a market value is not alleged, will not deprive the plaintiff of the right of tendering proper proof of such actual value. *Texas, etc., Ry. Co.*

*v. Ellerd*, 38 Tex. Civ. App. 596, 598, 87 S. W. 362, affirmed in 101 Tex. 663, no op.; Texas, etc., *R. Co. v. Dishman*, 41 Tex. Civ. App. 250, 251, 91 S. W. 828, affirmed in 101 Tex. 663, no op.; Missouri, etc., *R. Co. v. Chittim* (Civ. App.), 40 S. W. 23; Texas, etc., *R. Co. v. Fambrough* (Civ. App.), 55 S. W. 188; *Hutchison on Carriers*, § 770b; 1 *Sedgwick on Damages*, § 244.

Where the existence of a market value for the cattle at their destination was controverted, it is error to give an instruction which stated that the measure of damages was the difference between the market value of the cattle when they arrived in their injured condition at their destination and their market value at that place had they been transported with reasonable dispatch and safety, as it assumes that there was a market value at such place. *San Antonio, etc., R. Co. v. Fisher* (Civ. App.), 99 S. W. 1042.

### (3) Cost or Value as Evidence.

Where, in an action for injuries to cattle shipped, the cattle were shown to have had a market value at destination, evidence as to what plaintiff paid for the cattle was immaterial. *Missouri, etc., R. Co. v. Garrett* (Civ. App.), 96 S. W. 53, affirmed in 101 Tex. 648, no op.; Texas, etc., *R. Co. v. Dishman*, 41 Tex. Civ. App. 250, 91 S. W. 828, affirmed in 101 Tex. 663, no op.; Missouri, etc., *R. Co. v. Dilworth*, 95 Tex. 327, 67 S. W. 88, affirming 65 S. W. 502; *Galveston, etc., R. Co. v. Tuckett* (Civ. App.), 25 S. W. 150. See ante, "Where Animals Have No Market Value at Destination," VIII, E, 2, b, (3).

Proof of the intrinsic value of cattle is admissible in an action against a carrier for failure to deliver them, where they have no market value at their destination. *Missouri, etc., R. Co. v. Chittim* (Civ. App.), 40 S. W. 23. See ante, "Where Animals Have No Market Value at Destination," VIII, E, 3, a, (2).

### b. Offers as Evidence.

**Offers at Point of Shipment.**—In action for injury to horses in shipment to market, evidence as to their cost, as to offers made for them at places other than destination is inadmissible to prove damages. Texas, etc., *R. Co. v. Barber* (Civ. App.), 30 S. W. 500.

In action for injury to cattle in shipment testimony that a man had told witness some time before shipment that he would give seventeen dollars a head for the cattle, is not evidence of value and inadmissible. *Galveston, etc., R. Co. v. Silegman* (Civ. App.), 23 S. W. 298, 300.

**Previous Unaccepted Offer as Evidence of Value.**—In suit against carrier for injury to mare resulting in death of unborn colt, evidence of previous unaccepted offer to purchase colt when born was inadmissible even as evidence of colt's value. Texas, etc., *R. Co. v. Randle*, 18 Tex. Civ. App. 348, 352, 44 S. W. 603.

In an action for damages to cattle shipped over defendant's railroad, testimony that a person told witness before the shipment that he would give a certain amount for the cattle is no evidence of their value, and is inadmissible. *Galveston, H. & S. A. Ry. Co. v. Silegman* (Civ. App.), 23 S. W. 298.

## 4. Elements of Damages.

### a. Damages Necessarily Arising in Transportation.

Some injury or depreciation in live stock is naturally and necessarily caused by long shipments, even when the carriers exercise due care and diligence in the transportation. For such injury or damages not occasioned by the carrier's negligence, no recovery can be had. *St. Louis, etc., R. Co. v. Moon*, 47 Tex. Civ. App. 209, 210, 103 S. W. 1176; *St. Louis, etc., R. Co. v. Smith*, 33 Tex. Civ. App. 520, 77 S. W. 28; Texas, etc., *R. Co. v. Hunter & Co.*, 47 Tex. Civ. App. 190, 193, 104 S. W. 1075. See ante, "Depreciation

Necessarily Resulting from Transportation Disregarded," VII, D, 3, a.

A charge in an action against a carrier for negligent injury to live stock which authorized the jury to assess damages for injuries necessarily received by the stock in transit, irrespective of the carrier's negligence, is erroneous. *St. Louis Southwestern Ry. Co. v. Smith*, 77 S. W. 28, 33 Tex. Civ. App. 520.

**b. Interest.**

In addition to the damages found, the jury may allow interest at the legal rate from the date of the delivery of the cattle at the point of destination. *Southern Pac. Co. v. Anderson*, 26 Tex. Civ. App. 518, 521, 63 S. W. 1023, affirmed in 95 Tex. 686, no op.; *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209; *H. C. & S. F. R. Co. v. Holliday*, 65 Tex. 512, 521; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 611, 18 S. W. 716; *Texas, etc., R. Co. v. Truesdell*, 21 Tex. Civ. App. 125, 128, 51 S. W. 272, affirmed in 93 Tex. 125, no op.; *International, etc., R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 166, 191, 23 S. W. 754; *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209, 212; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Gulf, etc., R. Co. v. Batte (Civ. App.)*, 81 S. W. 813; *Mexican Nat. R. Co. v. Garcia (Civ. App.)*, 26 S. W. 780; *Gulf, etc., R. Co. v. Lee (Civ. App.)*, 65 S. W. 54; *Heidenheimer v. Johnson & Co.*, 76 Tex. 200, 206, 13 S. W. 46; *Galveston, etc., R. Co. v. Johnson (Sup.)*, 19 S. W. 867.

In an action against a carrier for damages to a shipment of cattle, the interest allowed is allowed as damages, and not as interest. *St. Louis, etc., R. Co. v. Dolan (Civ. App.)*, 84 S. W. 393.

**Must Be Claimed in Pleadings.**—To permit a recovery of interest as a part of the damages in an action for injuries to a shipment of cattle, the petition should allege and set forth such

item. *Gulf, C. & S. F. Ry. Co. v. Lee (Civ. App.)*, 65 S. W. 54; *Texas, etc., R. Co. v. Murtishaw*, 34 Tex. Civ. App. 447, 78 S. W. 953; *Gulf, etc., R. Co. v. Batte (Civ. App.)*, 94 S. W. 345.

Though it has been held that in an action for damages caused by delay in the shipment of cattle, interest may be allowed on the amount of damages sustained, though it is not asked for in the pleading. *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834.

**c. Shrinkage in Weight.**

**Damages Need Not Be Permanent.**

—In an action against a railroad company to recover for cattle injured and killed while in transit, it is error to instruct that the injury must be permanent before it can be made the subject of recovery, and that, though the cattle were reduced in flesh, plaintiff can not recover if the damages were but temporary. *Gulf, C. & S. F. Ry. Co. v. Simmons (Civ. App.)*, 28 S. W. 825.

**Shipper Placing Cattle in Pens Several Hours before Time Agreed on.**

—A shipper who places cattle in the pens some hours before the time agreed upon with the carrier for their departure can not recover from the carrier for their shrinkage in weight owing to heat and loss of food and water during that time. *International & G. N. R. Co. v. Earnest & Bost (Civ. App.)*, 77 S. W. 29.

**Shrinkage Due to Shipper's Fault.**

—In an action against a railroad company for damage to cattle shipped, alleged to have been due to the cattle being stampeded through the negligence of defendant before being loaded, where defendant alleges that the shrinkage in weight was partly due to the fact that plaintiff watered the cattle a short time before they were penned for shipment, and introduces evidence to that effect, it is error to refuse to specially instruct that defendant would not be liable for any

shrinkage due to such cause. *Gulf, C. & S. F. Ry. Co. v. Wilm*, 9 Tex. Civ. App. 161, 28 S. W. 925.

**d. Freight.**

Where a shipper in action for damages to horses recovers full value of horses killed or missing, he can not recover amount of freight paid on them. *Galveston, etc., R. Co. v. Kelley* (Civ. App.), 26 S. W. 470, 471; *Gulf, etc., R. Co. v. Kemp* (Civ. App.), 30 S. W. 714. See ante, "Where Loss Is Total," VIII, E, 2, a.

**e. Expenses of Restoring Cattle to Condition.**

Where the complaint for injuries to horses in transit alleged that their condition, on reaching their destination, was such that plaintiff had to keep them for a long time to render them salable, the expense was a proper element of damage. *Galveston, H. & S. A. Ry. Co. v. Tuckett* (Civ. App.), 23 S. W. 150.

**Reasonable and Necessary Expenses Allowed.**—Where live stock is injured in transportation by a carrier, the owner, after performing labor and incurring expense in treating the animals, can only recover the difference between the value of the animals in the condition in which they should have arrived at their destination and their value after such labor had been performed and expense incurred, with the value of reasonable and necessary expenses added. *St. Louis & S. W. Ry. Co. of Texas v. Foster* (Civ. App.), 89 S. W. 450.

**Medicine and Time as Damages.**—It is the consignee's duty, under the law, after delivery of the cattle in an injured condition to him at destination, to exercise reasonable care and prudence to avoid further loss or enhancement of damages, and hence he should recover the reasonable value of the time and medicine devoted to that purpose, should the jury believe that, in so doing, he acted as a man of reasonable prudence. (2 Sedg. on Dam-

ages, 8th Ed., §§ 435, 437; *Waco, etc., Water Co. v. Cauble*, 19 Tex. Civ. App. 417, 47 S. W. 538; *Westfall v. Perry* (Civ. App.), 23 S. W. 740; *Missouri, etc., R. Co. v. Allen*, 39 Tex. Civ. App. 236, 239, 87 S. W. 168.

Where, in an action against a carrier for damages to live stock in transportation, the court instructed that the measure of damages was the difference in the market value at the place of destination in the condition in which they were delivered and their market value had the carrier exercised ordinary care, it was improper to also instruct that plaintiff was entitled to recover all reasonable veterinary bills and bills of medicine incurred by plaintiff and his time in caring for and treating the horses after they arrived at their destination. *St. Louis & S. W. Ry. Co. of Texas v. Foster* (Civ. App.), 89 S. W. 450.

**f. Expenses Incurred in Search for Lost Cattle.**

In an action against a railroad company to recover damages to cattle occasioned by reason of insufficient pens, it appeared that the cattle were so crowded into small pens that they were trampling each other to death, when plaintiff turned them out. Held, that he was entitled to recover the value of the cattle lost and killed, the money expended in searching for lost cattle, and for time lost in the search. *Gulf, C. & S. F. Ry. Co. v. York*, 2 Willson, Civ. Cas. Ct. App. § 813.

**g. Charges for Feed—Carrier Not Feeding Cattle.**

A shipper of cattle, who is obliged to pay a feed bill in order to obtain their possession from the carrier, is entitled to recover from the carrier the amount of such bill if the cattle were not in fact fed, or if they were fed contrary to the shipper's directions not to feed them en route. *Galveston, H. & S. A. Ry. Co. v. Botts*. (Civ. App.), 70 S. W. 113.

#### **h. Special Damages—Notice of Special Circumstances.**

In an action against a carrier for damages to a shipment of horses, it not appearing that the carrier was notified that plaintiff intended to use the horses for the purpose of putting in a crop, he could not recover damages because of his failure to put in as much of a crop as he otherwise would have done, nor recover the value of extra time and trouble in moving the crippled horses from the place of destination to the place where he was putting in the crop. *Missouri, K. & T. Ry. Co. of Texas v. Allen*, 87 S. W. 168, 39 Tex. Civ. App. 236.

**Mare in Foal.**—A common carrier is not liable for injuries to a mare while being transported, resulting from her being in foal, unless it has notice that she is in foal, or of facts sufficient to charge it with knowledge of her condition. *Missouri Pac. Ry. Co. v. Fagan* (Civ. App.), 27 S. W. 887.

#### **i. Speculative or Remote Damages.**

See, generally, the title DAMAGES.

No recovery can be had against a common carrier for the loss of an unborn colt, through negligence of the carrier during shipment of the mare, although recovery may be had for the enhanced value of the mare resulting from her being with foal. *Texas, etc., R. Co. v. Randle*, 18 Tex. Civ. App. 348, 349, 44 S. W. 603.

By reason of the failure of defendant, a common carrier, to provide sufficient pens at the point of destination to accommodate cattle shipped over its road, it became necessary, in order to prevent considerable damage to said cattle, for plaintiffs to turn them out on the common in the nighttime, by reason of which some escaped and were lost, one being killed in the pen before being let out. Plaintiff brought suit to recover the value of the cattle lost and killed, money expended in searching for the lost cattle, and their own time lost in said search. Held,

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that the damages claimed are not remote. *Gulf, C. & S. F. Ry. Co. v. York*, 2 Willson, Civ. Cas. Ct. App. § 814.

#### **4. Mitigation of Damages.**

##### **a. Sale of Dead Animals.**

Where an owner of cattle, which died from injuries in transit, sold the same at the point of destination, the amount received therefor should be deducted from damages recovered against the carrier for injuries to the cattle. *Gulf, etc., R. Co. v. Butler*, 31 Tex. Civ. App. 576, 73 S. W. 84.

##### **b. Doctrine of Avoidable Consequences.**

In an action against a carrier for injuries to cattle received while in transit, when it appears that there was no market value for the cattle at their place of destination in their injured state, the jury may consider the fact that, by reasonable care and at a reasonable expense on the part of the owner, and within a reasonable time, the damages could have been mitigated by a recuperation of the cattle, if this appears from the evidence. *Houston & T. C. Ry. Co. v. Williams* (Civ. App.), 31 S. W. 556.

**Need Not Keep Horses.**—While an injured party is required to do what he could do, with slight effort and cost, at his command, or by reasonable care, to lessen his damages, a shipper of cattle for sale is not required to hold and feed his cattle for a period of time in order to obviate the effect of a carrier's negligence, but he may dispose of them at once in the market, and sue for the difference between what their market value was at that time and place, and what it would have been if properly transported. *St. Louis, etc., R. Co. v. Hunt* (Civ. App.), 81 S. W. 322, 323.

**Need Not Send to Another Market.**—A shipper of cattle damaged in transit may put them on the market for sale at their place of destination, and is not required to seek some other



market. *St. Louis & S. F. Ry. Co. v. Honea* (Civ. App.), 84 S. W. 267.

The rule that the owner of property which is injured in transportation must exert himself to prevent damages or render the injury as slight as possible, and, when he has done so, may recover his reasonable and necessary labor or expense performed or incurred for the purpose (*Suth. Damages*, § 921), has no application where he had been allowed to recover the general measure of damages. *St. Louis, etc., R. Co. v. Foster* (Civ. App.), 89 S. W. 450, 451.

**Carrier Stamping Bill of Lading "Southern Cattle."**—In an action by the shipper of cattle from Texas to Ohio, based on defendant carrier stamping the bill of lading with the words "Southern Cattle," by reason of which the government inspector refused, when they were in St. Louis, in defendant's possession, to allow them to go forward, and defendant appropriated them, the doctrine of avoidable consequences is not available, so that an instruction that if the shipper could have taken charge of the cattle at St. Louis, when they were stopped, and by reasonable diligence have saved any considerable loss in the handling and sale of the cattle, the carrier was liable only for the amount of damages which could not have been so saved, is properly refused. *St. Louis, I. M. & S. Ry. Co. v. Cassidy* *Southwestern Commission Co.*, 107 S. W. 628, 48 Tex. Civ. App. 484.

##### 5. Excessive or Inadequate Damages.

See the title NEW TRIALS.

In an action against a railway company for breach of a verbal contract to furnish cars for the shipment of certain cattle within a given time, where, according to the market price at the place of destination, the cattle would have sold for \$968 more than they did if they had been shipped as agreed, and plaintiffs incurred further expense, amounting to \$95, in caring

for the cattle while waiting for shipment, a verdict for \$700 is not excessive. *Gulf, C. & S. F. Ry. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716.

In an action for damages to horses shipped on defendant's railroad the plaintiff claimed that one horse killed was worth \$100, that the damage to another was \$65, and that to another was \$25. There was some evidence that the one horse was not dead, but had been badly injured, and left at an intermediate station. The consignee of the horses testified that the damage was as alleged, and this was the extent of evidence relating to value or damages. Held, that there was no basis for a verdict for \$104.50, but plaintiff, if he was entitled to recover at all, was entitled to the whole amount testified to. *Moseley v. Houston & T. C. R. Co.* (Civ. App.), 75 S. W. 912.

Verdict for nine hundred and fifteen dollars, for injury sustained by plaintiff's cattle through refusal to stop and allow them to be watered en route, held not excessive. *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611, 612, 8 S. W. 312.

Where the only testimony relative to the damage to the cattle, and their value, is that the cattle were worth \$12 per head at destination, that 60 of the cattle were killed, and the whole herd of 643 damaged on an average of \$2 per head,—a verdict of \$1,200 is not excessive. *Gulf, etc., R. Co. v. Simmons* (Civ. App.), 28 S. W. 625, affirmed in 93 Tex. 662, no op.

In an action against a railroad for injuries to cattle, where plaintiff claimed only \$400 damages for injury to his individual cattle, and \$100 for injury to the cattle of another, and the evidence showed that the injury to the other's cattle amounted, at most, to about \$75, a verdict for the full amount of \$500 could not be sustained. *St. Louis, etc., R. Co. v. Honea* (Civ. App.), 84 S. W. 267.

Where the amount of damages awarded for injury to cattle in transitu did not exceed the limit justified by the evidence and defendant, who had several experts on the stand, did not ask them to estimate the damages, the finding of trial court will not be disturbed. *St. Louis, etc., R. Co. v. Turner*, 1 Tex. Civ. App. 625, 632, 20 S. W. 1008. See, generally, the title **APPEAL AND ERROR**, vol. 1, p. 313.

### **IX. Liability for Wrongful Delivery or Refusal to Deliver.**

**Carrier Shipping to Wrong Destination.**—Where a carrier by mistake ships stock to the wrong destination and sells them upon refusal of the shipper to accept them there, the carrier is liable for the value of the stock and not merely for the price received at the sale. *Missouri, K. & T. Ry. Co. v. De Bord & Lackey*, 21 Tex. Civ. App. 691, 53 S. W. 587.

**Delivering Wrong Cattle to Shipper—Measure of Damages.**—In action against carrier for breach of contract in delivering cattle other than those received by it for shipment to connecting carrier, measure of damages is difference in value of cattle delivered and of plaintiff's cattle at time they would have reached destination. *Galveston, etc., R. Co. v. Borden* (Civ. App.), 29 S. W. 1100, 1101.

**Shipment in Violation of Quarantine Law.**—A common carrier is not liable for failure to deliver cattle shipped from another state in violation of the quarantine laws of Texas, shipper knowing existence of such laws at time of shipment. *St. Louis, etc., R. Co. v. Smith*, 20 Tex. Civ. App. 461, 49 S. W. 627, affirmed in 93 Tex. 670, no op.

**Refusal to Deliver as Conversion.**—In conversion it appeared that defendant carrier received a horse consigned to "T. & W.," and transported it to the point of destination; that plaintiff

claimed the shipment was to himself, and demanded possession of the horse; that defendant refused to deliver it till it had some evidence of plaintiff's right to receive the horse, and used all reasonable efforts to ascertain who was the proper consignee; that plaintiff never furnished any evidence; and that when it was finally determined to whom the horse should be delivered, he refused to accept the horse, and pay the charges, whereupon defendant sold it at public auction. Held, that there was no conversion by defendant. *Gulf, C. & S. F. Ry. Co. v. Fowler*, 12 Tex. Civ. App. 683, 34 S. W. 661.

**Failure to Deliver Promptly—Measure of Damages.**—The measure of damages for a carrier's refusal to promptly deliver cattle upon their arrival at destination was the value of any cattle that died through the carrier's fault and the difference between the reasonable value of the remaining cattle in the condition in which they were delivered and their reasonable value at the time they should have been delivered. *Southern Kansas Ry. Co. of Texas v. J. W. Burgess Co.* (Civ. App.), 90 S. W. 189.

### **X. Limitation of Liability.**

#### **A. POWER TO LIMIT.**

##### **1. In General.**

By statute in Texas a railroad company can not limit its common-law liability by special contract, even in regard to matters concerning which it might legally contract at common law. *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567.

**Statute Includes Carriers of Live Stock.**—The words "common carriers of goods, wares and merchandise" as used in Rev. St., art. 278, prohibiting such carriers from attempting to restrict their common-law liability, are not to be construed as limiting or extending the class of property to be embraced by the carrier undertaking to transport goods for hire, these terms

being used descriptively rather than as limitation, and hence the statute includes carriers of live stock as well as any other property. *Missouri Pac. R. Co. v. Harris*, 1 White & W. Civ. Cas. Ct. App. § 733.

**Contract Made without State.**—A special contract of affreightment entered into between a shipper of horses and a common carrier, containing reasonable conditions limiting the common-law liability of the carrier, when the contract was made without the state, and was not to be performed wholly within the state, is valid. *International & G. N. R. Co. v. Watt*, 2 Willson, Civ. Cas. Ct. App. § 781.

## 2. Necessity for Consideration.

See post, "By Written Contract Made after Receipt of Cattle under Oral Contract," X, A, 3.

The carrier is required to have a rate, reasonable in its terms, at which those who do not choose to release it from its common-law liabilities may have their goods transported. If in compliance with this requirement it fixes and publishes such a rate, then there must be some consideration in the way of a concession or reduction from this rate, in order to support contracts releasing it from some of those liabilities imposed by common law. *St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 658, 105 S. W. 1131; *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565; *St. Louis, etc., R. Co. v. Rogers*, 49 Tex. Civ. App. 304, 108 S. W. 1027, affirmed, no op. See post, "Presumption as to Consideration for Written Contract," XI, F, 3.

**Effect of Recital of Consideration in Contract.**—Where, as against a written contract of shipment improperly exacted by the carrier, the shipper proves that the consideration expressed therein was wanting, this is

sufficient, unless the carrier proves a different or additional consideration, and the words "and other consideration" recited in the contract are immaterial. *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 897, affirmed in 93 Tex. 673, no op.

**Signing Written Contract Limiting Liability after Making Oral Contract without Limitation.**—Where an oral contract of shipment had been made and the railroad requires the signing of a written contract limiting liability without any reduction in freight charges, there is no consideration for the execution of the written contracts, and the verbal contract must be looked to in determining the rights of the parties. *San Antonio, etc., R. Co. v. Wright*, 20 Tex. Civ. App. 136, 137, 49 S. W. 147; *Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 680, 26 S. W. 286, affirmed in 93 Tex. 699, no op.; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565; *Missouri, etc., R. Co. v. Darlington (Civ. App.)*, 40 S. W. 550; *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 897, affirmed in 93 Tex. 673, no op.; *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806; *Missouri, etc., R. Co. v. Withers*, 16 Tex. Civ. App. 506, 512, 40 S. W. 1073, affirmed in 93 Tex. 691, no op.; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716; *Gulf, etc., R. Co. v. Jackson (Civ. App.)*, 86 S. W. 47, reversed on another point in 99 Tex. 343, 89 S. W. 968; *Gulf, etc., Ry. v. Wood (Civ. App.)*, 30 S. W. 715; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567; *Galveston, etc., R. Co. v. Botts*, 22 Tex. Civ. App. 609, 55 S. W. 514; *McNeill v. Galveston, etc., R. Co. (Civ. App.)*, 86 S. W. 32; *Gulf, etc., R. Co. v. McCord (Civ. App.)*, 81 S. W. 1032.

**Free Pass as Consideration.**—When carrier received cattle for shipment under oral agreement of its agent, it can not claim that written contract subse-

quently demanded of shipper, was binding because under such written contract he was granted free pass over road with the cattle when in consideration of such pass shipper had to care for stock. *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235, 239, 46 S. W. 897, affirmed in 93 Tex. 673, no op.

**Using Transportation Provided in Written Contract as Ratification of Limitation of Liability.**—After plaintiffs' cattle were loaded ready for shipment pursuant to an oral contract, the carrier required plaintiffs to execute a written contract. Plaintiffs testified that they supposed the written contract was for the purpose of affording them personal transportation for themselves and employees. Held that, by using such contract for the purpose of transportation, plaintiffs did not ratify the provision therein limiting the carrier's liability. (Civ. App.), *Gulf, C. & S. F. Ry. Co. v. Jackson & Edwards*, 86 S. W. 47, judgment reversed (Sup.), 89 S. W. 968.

**Failure of Consideration Must Be Pleaded under Affidavit.**—Where plaintiff sues a railway company for damages occurring in the shipment of live stock, and desires to avoid a stipulation in the written contract of shipment releasing all damages that may have occurred from delay in receiving the stock, furnishing cars promptly, etc., on the ground that such release is without consideration, he should plead such want of consideration under affidavit, as required by article 1265 of the Revised Statutes. *Gulf, etc., R. Co. v. Wright*, 1 Tex. Civ. App. 402, 21 S. W. 80.

### 3. By Written Contract Made after Receipt of Cattle under Oral Contract.

#### a. In General.

See ante, "Modification or Merger," IV, E; "Necessity for Consideration," X, A, 2.

**Shipper Knowing Carrier's Custom to Require Written Contract.**—Where

plaintiff and his agent were in the habit of shipping stock over defendant's line, for which they always signed written contracts, and plaintiff, prior to the shipment in question, inquired of defendant's agent the rate, and plaintiff's agent afterwards signed a written contract limiting defendant's liability to its own line, which he did not have time to read prior to leaving with the stock, the contention that such written contract was void for want of consideration and as signed under duress was without merit, since the evidence tended to show that plaintiff knew it was defendant's custom to require such a contract. *Ft. Worth & D. C. Ry. Co. v. Wright*, 58 S. W. 846, 24 Tex. Civ. App. 291.

An agent of shippers of cattle, on their request, made an arrangement with the company's agent for cars for shipment to a certain point, but nothing was said as to rates or service, except a possible statement by the company's agent that his road would give as good service as any other. After the cars were loaded, one of the shippers, who knew that written contracts were customary, and that one was to be signed on this occasion, went to the company's office, and signed such a contract without reading it. The company's agent testified that the company never shipped cattle except on written contract. Held insufficient to support a finding of a verbal contract, so as to leave no consideration for the written contract, which limited the company's liability. *Houston & T. C. R. Co. v. Smith*, 97 S. W. 836, 44 Tex. Civ. App. 299.

**Charge—Oral or Written Contract in Issue.**—Where the issue was whether or not the parties to a contract for the shipment of live stock contemplated that a written contract therefor should be signed in pursuance of a previous oral agreement, and it was not controverted that a written contract was in fact signed, it was error for the

charge to preclude a finding in the carrier's favor unless they found that in making such prior verbal agreement it was then the intention of the parties to sign such written contract, "and that same should govern the shipment of said stock," as this would follow as matter of law, and was not a question for the jury, and such charge limited the legal effect of the contract. *Ft. Worth, etc., R. Co. v. Wright*, 30 Tex. Civ. App. 234, 70 S. W. 335.

**Shipper Expecting to Sign Written Contract.**—Where shippers, at the time they delivered cattle to a carrier, expected to sign the written contract which they afterwards signed, it governs on the question of the carrier's liability. *Texas & P. Ry. Co. v. Byers Bros.* (Civ. App.), 73 S. W. 427.

**b. Duress as Vitiating Contract.**

See the title DURESS.

Plaintiff loaded his cattle on defendant's cars under a parol contract, which did not limit its common-law liability. When the train was about to start, defendant's agent refused to transport the cattle until plaintiff signed a shipping contract which limited the company's liability to damages by negligence, and which increased the rate of carriage, although it recited it was executed "in consideration of a reduced rate and other considerations." Held, that the written contract was without consideration, and void because executed under duress. *Texas, etc., R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 897, affirmed in 93 Tex. 673, no op.

**Refusal to Ship unless Shipper Signed Written Contract.**—Contract limiting common carrier's liability signed by shipper after cattle on train and induced by company's refusal to ship unless so signed, is void on ground of duress. *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, 692, 699, 29 S. W. 565.

**Yards at Destination under Water—New Contract Limiting Liability for**

**Delay in Shipping.**—In action for delay in shipping cattle, carrier having contracted to ship at 10 a. m. delayed loading until 4 p. m. when shipping contracts were executed, and defendant, on learning its yards at destination were under water, refused to ship there but drew up new contracts to a point beyond, providing therein against any claim for damages for the delay. Held, that evidence was sufficient to support a finding that new contracts were made by compulsion and did not bind shipper. *San Antonio, etc., R. Co. v. Barnett* (Civ. App.), 27 S. W. 676, 677.

**c. Fraud and Misrepresentation in Securing Written Contract as Vitiating Contract.**

See the title FRAUD AND DECEIT.

**Signing Written Contracts under Representation That They Were Vouchers to Be Shown Conductors.**—Where plaintiff verbally contracted with a railroad for the carriage of stock, and subsequently, when the stock had been loaded, the railroad's agent presented several contracts to plaintiff for his signature, stating they were vouchers to be shown the conductors, and plaintiff signed them without examination, having no opportunity to do so, the terms of the verbal contract, and not those of the written ones, controlled the carriage. *Southern Pac. Co. v. Anderson*, 63 S. W. 1023, 26 Tex. Civ. App. 518.

**Requiring Signing at Intermediate Point without Time to Read.**—Where hogs are shipped under verbal contract and shipper and his men are afterward, at a way station and under coercion, hurriedly called on to sign for transportation certain papers which they are not given time to read, these facts constitute fraud in securing written contract for shipment. *Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 681, 26 S. W. 286, affirmed in 93 Tex. 699, no op.

**Presenting Written Contract Limiting Liability When Train Ready to Start.**—A shipper loaded his cattle on cars of a railroad company under a parol contract with the company which did not limit its common-law liability. When the cattle were on the cars, and the train about to start, the company's agent asked the shipper to sign a paper, which he did, without reading it further than to see whether the freight rate was the same as was agreed on, as he had not time to do so before the train started. The shipper stated that the papers he had been in the habit of signing when he shipped cattle are used as passes. The paper signed by him was a contract of shipment, different in terms from the parol contract, and limited the liability of the railroad company. Held, that the parol contract was the one under which the cattle were shipped. *Missouri, K. & T. Ry. Co. of Texas v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

## **B. VALIDITY OF LIMITATIONS.**

### **1. In General.**

A stipulation in a contract for transportation of live stock releasing the carrier from all injury or loss which the animals might suffer in consequence of their being weak, or escaping or injuring themselves or each other, or in consequence of overloading, heat, suffocation, fright, viciousness, or being injured by fire or the burning of any material while in possession of the carrier, is valid, in the absence of statute prohibiting limitation of liability. *Texas & P. Ry. Co. v. Davis*, 2 Willson, Civ. Cas. Ct. App. § 191.

### **2. Limiting Liability for Negligence.**

The duty of a railroad company to carry and care for stock intrusted to its custody for shipment can not by contract be shifted to some one else, so as to relieve the company from liability for its own negligence. *Gulf, C. & S. F. Ry. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161; *Chicago, etc.,*

*R. Co. v. Gillett* (Civ. App.), 99 S. W. 712, 713; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 169, 2 S. W. 574; *Gulf, etc., R. Co. v. Wilhelm*, 4 App. Civ. Cases, § 243, 16 S. W. 109; *Houston, etc., Ry. Co. v. Davis*, 11 Tex. Civ. App. 24, 29, 31 S. W. 308, affirmed in 88 Tex. 593; *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611, 8 S. W. 312; *Gulf, etc., R. Co. v. Vaughn*, 4 App. Civ. Cases, § 182, 16 S. W. 775, 777; *Texas, etc., R. Co. v. Hamm*, 2 App. Civ. Cases, § 491; *Texas & Pac. R. Co. v. Davis*, 2 App. Civ. Cases, § 191.

And especially is this so when it appears that the negligence of the servants of the carrier was the direct cause of the loss. *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 122, 26 S. W. 161.

**Negligent Loss by Fire.**—Common carrier can not contract so as to relieve itself from liability for injuries to horses shipped caused by fire resulting from its own negligence. *Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 29, 31 S. W. 308, affirmed in 88 Tex. 593.

**Relieving from Liability against All Negligence Except Willful Negligence.**—A contract exempting a railroad company from all damages sustained by any delay in the transportation of cattle not resulting from the company's willful negligence is in contravention of Rev. St., art. 278, prohibiting carriers from limiting their common-law liability. *Missouri Pac. Ry. Co. v. Harris*, 1 White & W. Civ. Cas. Ct. App. § 1257; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

**Limiting Liability for All Damage Not Caused by Fraud or Gross Negligence.**—A stipulation in a contract for the transportation of live stock which exempts the carrier from all damage that shall not have been caused by its fraud or gross negligence is void, as against public policy. *Texas & P. Ry. Co. v. Davis*, 2 Willson, Civ. Cas. Ct. App. § 191.

### 3. Against Injuries Caused by Shipper.

Since Rev. St. 1895, § 320, prohibits common carriers of freight within the state from limiting their common-law liability only, they may stipulate against liability for injury to a shipment of live stock which results from the fault of the shipper or the vicious propensities or "proper vice" of the animals. *Texas & P. Ry. Co. v. Stribling* (Civ. App.), 34 S. W. 1002.

### 4. Restricting Liability to Own Line.

See the titles CARRIERS OF GOODS, ante, p. 502; CONNECTING CARRIERS.

### 5. Requiring Notice of Claim within Specified Time.

See the title CARRIERS OF GOODS, ante, p. 502.

### 6. Limitation as to Measure of Damages.

#### a. Limiting Liability to Value at Place of Shipment.

See ante, "Evidence as to Value or Damage," VIII, E, 3.

**Rule in Absence of Statute.**—A stipulation in a contract for the shipment of live stock providing that in case of damage the value of the sheep at the date and place of shipment should govern the settlement is reasonable and valid, in the absence of statute prohibiting the limitation of liability. *Texas & P. Ry. Co. v. Davis*, 2 Willson, Civ. Cas. Ct. App. § 156; *International & G. N. R. Co. v. Caldwell*, 3 App. Civ. Cases, § 439.

Where shipping contract provided that market value of jack at point of destination should be liquidated damages for its loss, consignee can not recover from carrier above the sum for which it was sold to him by consignor. *G., C. & S. F. R. Co. v. Key*, 4 App. Civ. Cases, § 257, 16 S. W. 543.

Where a contract of shipment of cattle provided that in case of damage to the cattle their value at the place and date of shipment should govern the settlement, it is error to award as

damages for the loss of the cattle their market value at the place of destination. *Missouri Pac. Ry. Co. v. Ryan*, 2 Willson, Civ. Cas. Ct. App. § 432.

**Custom** can not require that shipper of stock agree to condition that in case of total loss measure of damages shall be cash value at place of shipment. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749.

**Under Statute Prohibiting Limitation of Common-Law Liability.**—Article 320, Rev. Stat., renders nugatory a stipulation in bill of lading for stock, that damages for loss shall be measured by value at place of shipment, in no case to exceed a certain sum, and it is contrary to public policy and void. *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 311, 312, 14 S. W. 607; *Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 29, 31 S. W. 308, affirmed in 88 Tex. 593; *International, etc., R. Co. v. Parish*, 18 Tex. Civ. App. 130, 132, 43 S. W. 1066; *Houston, etc., R. Co. v. Williams* (Civ. App.), 31 S. W. 556, 558.

It has even been held, regardless of such a statutory inhibition, that a condition in a bill of lading providing that the amount of loss or damage incurred by the carrier shall be computed upon the value of the property at the place of shipment, and which makes no provision for repayment of the freight charges received by the carrier, is unreasonable, against public policy and void. *International, etc., R. Co. v. Parish*, 18 Tex. Civ. App. 130, 132, 43 S. W. 1066.

#### Contract Void—No Consideration.

The contract of transportation provided that any damage to plaintiff's cattle was to be determined according to the actual cash value thereof at the time and place of shipment, and recovery was limited to a maximum amount per head, but no reduction in the freight rate was made in consideration of such stipulation. Held, in an action to recover for damages to the

cattle by defendant's negligent delay en route, that the stipulation limiting any damage to the value at the place of shipment, etc., was not binding, being without consideration. *St. Louis, I. M. & S. Ry. Co. v. Rogers*, 108 S. W. 1027, 49 Tex. Civ. App. 304.

**Validity of Foreign Stipulation.**—A stipulation that, in case of injury to cattle shipped, their value at the place of shipment in case of total loss should constitute the measure of damages, and, in case of partial loss, in the same proportions, being valid under the law of Arkansas, was enforceable in Texas. *St. Louis, I. M. & S. Ry. Co. v. Hambrick* (Civ. App.), 97 S. W. 1072.

#### **b. Limiting Liability within Certain Sum.**

An agreement exacted by a railway company of a shipper, fixing a maximum of value for stock shipped, is against public policy if such agreement provides that in event of loss the shipper shall not recover the value of his property so lost by the negligence of the carrier. *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 12 S. W. 815; *Taylor, etc., R. Co. v. Montgomery*, 4 App. Civ. Cases, §§ 238, 239, 16 S. W. 178, overruling, on this point, *International & G. N. R. Co. v. Caldwell*, 3 App. Civ. Cases, § 439.

Provisions in a contract for the shipment of live stock which arbitrarily fix the amount of the damages and which relieve the carrier from damages resulting from certain named risks, and from "any and all other causes whatever," are void as contrary to public policy. *Pecos & N. T. Ry. Co. v. Hughes*, 98 S. W. 410, 44 Tex. Civ. App. 135.

#### **7. Against Inherent Vice of Cattle.**

Rev. Stat. 1895, § 320, does not prevent the carrier from limiting its liability resulting from the fault of the shipper or the vicious propensities of the animals. *Texas, etc., R. Co. v.*

*Stribling* (Civ. App.), 34 S. W. 1002.

#### **8. Requiring Shipper to Load and Unload.**

See post, "Requiring Shipper to Care for, Feed and Water Stock," X, B, 9.

A contract for the shipment of live stock may properly require the shipper to load and unload the stock at his own expense and risk and to feed and water them while in transit or in the carrier's pens. *Gulf, Colorado & S. F. Ry. Co. v. Williams*, 4 Tex. Civ. App. 294, 23 S. W. 626.

A carrier, though prohibited from limiting its liability, is not deprived of the right to make a special contract with the owner of live stock tendered for transportation, requiring such owner to see that the stock is properly loaded. *Texas & P. Ry. Co. v. Edins*, 83 S. W. 253, 36 Tex. Civ. App. 639.

A provision in a contract of shipment of stock that the shipper shall unload and reload and feed and water the stock, will be held reasonable, in the absence of evidence to the contrary. *Houston, etc., R. Co. v. Mayes*, 44 Tex. Civ. App. 31, 97 S. W. 318.

#### **9. Requiring Shipper to Care for, Feed and Water Stock.**

**In Absence of Statute.**—Formerly a stipulation in contract for shipment of cattle that shipper would accept care given them by railroad, was unreasonable and invalid. *G., C. & S. F. R. Co. v. Wilhelm*, 3 App. Civ. Cases, § 458.

**Expressly Permitted by Statute.**—But a stipulation in the contract requiring the shipper to load and unload and to feed and water the cattle shipped is expressly recognized as reasonable. Rev. Stat., art. 284; *Gulf, etc., R. Co. v. Williams*, 4 Tex. Civ. App. 294, 23 S. W. 626; Rev. Stat. 1895, art. 326; *Texas, etc., R. Co. v. Davis* (Civ. App.), 40 S. W. 167; *Houston, etc., R. Co. v. Brown*, 37 Tex. Civ. App. 595, 600, 85 S. W. 44; *Taylor, etc., R. Co. v. Montgomery*, 4 App. Civ. Cases, §



238, 16 S. W. 178; Texas, etc., R. Co. v. Byers Bros. (Civ. App.), 73 S. W. 427; St. Louis, etc., R. Co. v. Hunt (Civ. App.), 81 S. W. 322; Gulf, etc., R. Co. v. Frost (Civ. App.), 34 S. W. 167, 168, 169; Ft. Worth, etc., R. Co. v. Daggett, 87 Tex. 322, 329, 28 S. W. 525, reversing 27 S. W. 186; St. Louis, etc., R. Co. v. Musick, 35 Tex. Civ. App. 591, 80 S. W. 673.

**Benefits May Be Waived by Carrier.**

—It is binding unless, under the facts of the particular case, the benefits derived from it are waived by the agreement or forfeited on account of the conduct of the carrier. The benefits of such a limitation upon the carrier's liability may be forfeited by its own negligent conduct. Ft. Worth, etc., R. Co. v. Daggett (Civ. App.), 27 S. W. 186, 187, reversed, on another point, in 87 Tex. 322. See post, "Requiring Shipper to Care for, Feed, and Water Stock," X, B, 9.

**Rev. Stat. 1895, Recognizing Validity of Stipulation, Not Affected by Art. 320.**—The right of a carrier to specially contract that the shipper shall feed and water his live stock during transportation, being expressly recognized by Rev. St. 1895, art. 326, is unaffected by article 320, relating to the carriage of freight generally, and forbidding carriers to limit their common-law liability, even if said articles are conflicting. Texas & P. Ry. Co. v. Davis (Civ. App.), 40 S. W. 167.

**Not Void for Want of Consideration.**—Rev. St. art. 326, provides that a carrier shall not be liable to the penalty imposed by that section for failure to feed and water stock in transit, where the duty is undertaken by special contract by the owner. Held, that the fact that no reduction is made in the regular freight rate does not render the contract by the owner to care for the stock void for want of consideration, and therefore make the carrier liable to the penalty. Texas & P. Ry. Co. v. Peters, 71 S. W. 70, 31 Tex. Civ. App. 6.

**Shipper Bound Where Reasonable**

**Facilities Exist.**—A special contract by which the shipper assumes the duty of feeding and watering the stock relieves the carrier from such duty; and the shipper is bound to such duty when reasonable facilities therefor are furnished by the carrier. This duty is imposed upon the shipper under act of Congress. Rev. Stats. U. S., § 4387. Ft. Worth, etc., R. Co. v. Daggett, 87 Tex. 322, 28 S. W. 525, reversing 27 S. W. 186. See ante, "Where Shipper Has Assumed Duty," III, H, 1, c.

**Can Not Limit Liability for Failure to Provide Proper Facilities for Feeding and Watering.**

—A carrier can not limit its liability for failing to provide, as required by law, proper facilities for feeding and watering live stock, and to give an opportunity to the shipper to feed and water the same when requested; and, though a contract of shipment binds the company to stop for watering and feeding when requested to do so in writing by the shipper, the shipper may make a verbal request, and may recover damages resulting from a noncompliance with such request. Gulf, C. & S. F. Ry. Co. v. Kimble, 109 S. W. 234, 49 Tex. Civ. App. 622.

**10. Requiring Notice of Claim before Removal of Cattle.**

See the title CARRIERS OF GOODS, ante, p. 502.

**Invalid Limitation under Rev. Stat. 1895, Art. 320.**—Under Rev. St. 1895, art. 320, forbidding the restriction of the common-law liability of a common carrier, a provision in a contract of shipment of cattle that no recovery could be had for damages to the cattle unless notice in writing should be given of the claim for damages before removal of the cattle from the cars was void. Missouri, K. & T. Ry. Co. of Texas v. Allen, 87 S. W. 168, 39 Tex. Civ. App. 236; Houston, etc., R. Co. v. Davis, 11 Tex. Civ. App. 24, 26, 28, 31 S. W. 308, affirmed in 88 Tex. 593.

**Act of 1891 Renders Stipulation Void.**—A stipulation in a contract for the shipment of live stock, requiring the shipper to give notice of his claim for damages before the stock are removed from the delivering station, etc., is made void by the act of 1891, which allows the shipper ninety days within which to give such notice. *Gulf, etc., R. Co. v. Gann*, 8 Tex. Civ. App. 620, 28 S. W. 349.

**Stipulation Formerly Valid.**—Though formerly such a stipulation in a contract of shipment requiring written notice of loss or damage before stock is removed from point of destination or delivery and before mingled with other stock, was valid and a condition precedent to cause of action for such loss or damage. *Missouri Pac. R. Co. v. Scott*, 2 App. Civ. Cases, § 324; *Texas, etc., R. Co. v. Scrivener*, 2 App. Civ. Cases, § 328; *Missouri Pac. R. Co. v. Harris*, 1 App. Civ. Cases, §§ 1257, 1265; *G., H. & S. A. R. Co. v. Harman*, 2 App. Civ. Cases, § 136; *Texas Cent. R. Co. v. Morris*, 1 App. Civ. Cases, § 374; *G., H. & S. A. R. Co. v. Boothe*, 3 App. Civ. Cases, § 364; *Texas, etc., R. Co. v. Hamm*, 2 App. Civ. Cases, § 491.

**Valid Limitation under Rev. Stat., Art. 278.**—A carrier may by contract require a shipper, as a condition precedent to recovery for loss to cattle transported, to give notice of the loss before the cattle are removed from place of delivery and before they are mingled with other stock, and such a contract is not repugnant to Rev. St., art. 278, prohibiting carriers from limiting their common-law liability. *Missouri Pac. Ry. Co. v. Harris*, 1 White & W. Civ. Cas. Ct. App. § 1257.

**Burden Is on Carrier to Show Reasonableness of Stipulation.**—When provisions requiring plaintiff to give notice of his claim for damages to the nearest station agent before the cattle were removed from the place of delivery, are enforced, it is upon the assumption that such agreement is

reasonable when considered in the light of the subject matter of the contract and the circumstances and surrounding of the parties. To prove that such conditions in a contract are reasonable is a burden resting upon the carrier, who must show by proper pleadings and evidence the existence of facts that call for an enforcement of the condition. There were no pleadings and proof whatever upon this question coming from the carrier. *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 111, 17 S. W. 834. See, also, *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 132, 9 S. W. 749; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 167, 2 S. W. 574.

**Injuries to Horses by Burning Car—Unreasonable Stipulation.**—Stipulations in a contract for an interstate shipment, limiting the carrier's liability, must be reasonable, and a stipulation requiring notice of a claim for damages to be given before the removal of the shipment from the station is, as applied to injuries to horses caused by the burning of the car in which they were shipped, prima facie unreasonable, it not being probable that the full amount of damage to the horses would be immediately disclosed. *Houston & T. C. R. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308.

**Void Stipulation in Certain Cases.**—A stipulation that the shipper shall not recover for loss or injury unless he gives written notice thereof to the officers of the company before the cattle are removed from the place of destination, and before they have been mingled with other stock, is void. *Gulf, C. & S. F. R. Co. v. Vaughn*, 4 Willson, Civ. Cas. Ct. App. § 182, 16 S. W. 775.

A contract between a carrier and the shipper of live stock provided that, as a condition precedent to the shipper's right to recover damages, the shipper should give notice in writing of his claim to some officer of the

company, or to the nearest station agent, before the stock should have been removed from the place of destination, and before the stock should have been slaughtered or intermingled with other stock. The shipper agreed not to move the stock from the station at destination until the expiration of three hours after the giving of any such notice. It was provided that the written notice could not be waived by any one except a general officer of the company, and that no damage should be recoverable unless written claim should be made within 91 days after its occurrence. Held, that the requirements were so interdependent as to be inseparable, and as a whole they were unreasonable and void. (Civ. App.) *Pecos & N. T. Ry. Co. v. Evans-Snyder-Buel Co.*, 93 S. W. 1024, judgment affirmed; *Same v. Evans-Snyder-Buel Co.*, 42 Tex. Civ. App. 60, 97 S. W. 466.

**Cattle Not Having Room to Eat and Drink—Stipulation Unreasonable.**—Stipulation, in a contract of carriage of cattle, that recovery can not be had for injury at any place where they may be unloaded during the trip, unless the shipper give notice to the station agent at that point, before they are removed therefrom, specifying the nature of his claim, is unreasonable, in a case where they are not given room to eat and drink, the injury from which afterwards appears. *Gulf, C. & S. F. Ry. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109.

#### 11. Limiting Liability for Damages from Overloading.

Article 320, Rev. Stat. 1895, prohibiting common carriers from limiting their liability as at common law, renders nugatory a provision in a contract for the shipment of live stock exempting the carrier from liability for injuries in overloading. *International, etc., R. Co. v. Parish*, 18 Tex. Civ. App. 130, 43 S. W. 1066.

**Where Shipper Loads.**—A contract between a carrier and a shipper of horses by which the latter assumes the duty of loading the stock into the cars and waives any claim for injury to the horses from overloading is not invalid because limiting the liability of the carrier. *Texas, etc., R. Co. v. Edins*, 36 Tex. Civ. App. 639, 83 S. W. 253.

#### 12. Requiring Shipper to Furnish Conductor Statement as to Condition of Cattle.

A stipulation in a contract for the transportation of cattle that the shipper would furnish to each conductor in whose charge the cattle might be placed a statement of their condition, and that a failure to furnish such report to the conductors should be conclusive evidence that the cattle were in good condition, is unreasonable. *Missouri, K. & T. Ry. Co. of Texas v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

#### 13. Limiting Liability for Defective Cars.

A railroad company can not by contract exempt itself from liability for damage to live stock transported by it, caused by its failure to furnish suitable cars. *Gulf, C. & S. F. Ry. Co. v. Wilhelm*, 3 Willson, Civ. Cas. Ct. App. § 460.

#### 14. That Carrier's Business Should Not Be Detained to Load and Unload.

A stipulation in a contract for the shipment of live stock that the carrier's business shall not be delayed by a detention of trains to unload and load the animals for any cause whatever is valid, in the absence of a statute prohibiting limitation of liability. *Texas & P. Ry. Co. v. Davis*, 2 Willson, Civ. Cas. Ct. App. § 156.

### C. OPERATION AND EFFECT OF STIPULATIONS.

#### 1. In General.

**Refusal of Carrier to Transport Shipper Free of Charge.**—Where a

contract for the shipment of live stock provided that the owner might be transported on the same train free, and also have the privilege of side-tracking cars containing the stock, and the company refused to perform such conditions, in an action by the shipper for damages for injury to the stock the company can not claim advantage of stipulations in the contract limiting his common-law liability. *Texas & P. Ry. Co. v. Davis*, 2 Willson, Civ. Cas. Ct. App. § 156.

### 2. That Shipper Accepts Cars.

A provision in a contract for the interstate shipment of horses that the shipper accepts the cars tendered, and agrees that they are satisfactory, does not relieve the carrier from liability for defects therein. *San Antonio & A. P. Ry. Co. v. Dolan* (Civ. App.), 85 S. W. 302.

### 3. Requiring Shipper to Load and Unload Cattle.

**Carrier's Agents Assuming Duty.**—In an action for injury to a shipment of live stock, a provision in the shipment contract that plaintiff should load, unload, and reload the stock at his own risk is no defense, where the unloading and loading of the cars at the various feeding and watering points en route were assumed by the carrier. *Missouri Pac. Ry. Co. v. Kingsbury* (Civ. App.), 25 S. W. 322; *Mexican Nat. R. Co. v. Savage* (Civ. App.), 41 S. W. 663, affirmed in 93 Tex. 646, no op.; *San Antonio, etc., R. Co. v. Dolan* (Civ. App.), 85 S. W. 302.

**Carrier Not Relieved from Duty to Furnish Suitable Cars.**—A contract for transportation of cattle by which the shipper agrees to load and unload at his own expense and risk can not relieve the carrier from duty to furnish cars of sufficient space to carry them safely, and where they were overloaded, over the shipper's protest, the carrier was liable for the resulting

damages. *International, etc., R. Co. v. Pool*, 24 Tex. Civ. App. 575, 59 S. W. 911.

**Failure to Accompany Precludes Recovery for Damages Proximately Resulting.**—In an action for injuries to cattle in shipment, an instruction that defendant was not liable if the cattle were damaged in any way by reason of plaintiff's failure to unload them and to properly feed and water them was properly refused, since such failure on part of plaintiff merely precluded him from recovering such damages as resulted therefrom, but did not bar a recovery for damages that were proximately caused by the negligence of defendant. *Missouri, K. & T. Ry. Co. of Texas v. Chittim*, 60 S. W. 284, 24 Tex. Civ. App. 599.

### 4. Requiring Shipper to Feed, Water and Care for Stock.

**Carrier Preventing Performance.**—Though, under shipping contract, shipper was to care for cattle en route, where he was prevented by carrier from doing so, and carrier's servants took charge, carrier is liable to shipper for injury resulting from negligence therein. *Gulf, etc., R. Co. v. Frost* (Civ. App.), 34 S. W. 167, 168, 169.

**Relieves Carrier Where Reasonable Facilities Exist.**—Special contract with shipper of cattle that his agent shall accompany them to feed and water them, relieves railroad company of duty as to points where reasonable facilities are provided. *Fort Worth, etc., Ry. v. Daggett*, 87 Tex. 322, 329, 28 S. W. 525, reversing 27 S. W. 186.

**Carrier Liable Where Facilities Nonexistent.**—Even if the duty, under the contract, of feeding and watering the animals, devolved upon the shipper where the carrier failed to give the shipper opportunities or facilities for watering them, it was just as liable as though the duty of feeding devolved on the company. *Galveston,*

etc., *R. Co. v. Thompson* (Civ. App.), 23 S. W. 930, 932; *Gulf, etc., R. Co. v. Gann*, 8 Tex. Civ. App. 620, 28 S. W. 349; *Taylor, etc., R. Co. v. Montgomery*, 4 App. Civ. Cases, § 238, 16 S. W. 178; *Texas, etc., R. Co. v. Byers* (Civ. App.), 73 S. W. 427.

**The shipper's failure to notify the carrier of his wish to feed and water** does not affect the carrier's liability, where the carrier did not offer reasonable facilities for doing so. *Taylor, etc., R. Co. v. Montgomery*, 4 App. Civ. Cases, § 238, 16 S. W. 178.

**Negligence of Shipper's Servant as Negligence of Shipper.**—Agent of owner accompanying cattle shipment under special contract with carrier that owner shall feed and water cattle can not during transit relieve his principal of this assumed duty, and his failure to perform where carrier furnishes proper facilities is negligence of principal. *Ft. Worth, etc., R. Co. v. Daggett*, 87 Tex. 329, 28 S. W. 525, reversing 27 S. W. 186.

**Carrier Not Liable Where Injuries Caused by Shipper's Neglect.**—Where, in an action against a railroad company for damage to live stock transported by it the evidence showed that such damage resulted from plaintiff's failure to comply with his special contract to accompany the stock, and water, feed, and attend to it, a verdict against the defendant was erroneous, and should be set aside. (Tex. Civ. App. 1903) *Texas & P. Ry. Co. v. Byers Bros* (Civ. App.), 73 S. W. 427.

**Effect of Giving Drover's Pass to Caretaker.**—While carrier is not relieved from liability for neglect of duty to shipment of stock by giving shipper drover's pass, yet such pass operates as license to shipper to look after them, and carrier is not liable for his negligence in exercising it. *Receivers v. Armstrong*, 4 Tex. Civ. App. 146, 150, 23 S. W. 236.

**Carrier Not Released from Liability for Its Own Negligence.**—A contract

of shipment of live stock which stipulates that the shipper shall assume all risks of feeding, watering, etc., of the stock while in cars, yards, etc., does not relieve the carrier from liability for its own negligence. *Chicago, R. I. & P. Ry. Co. v. Mitchell* (Civ. App.), 85 S. W. 286.

**Failure of Shipper to Accompany as Preventing Recovery.**—Where one of plaintiff's mules was injured by a protruding bolt in a car in which they were confined for shipment, which was defective in that respect, the carrier was not relieved from liability by the shipper's failure to accompany and care for the mules during the entire journey, as provided by the contract of shipment. *St. Louis & S. F. R. Co. v. Brosius & Le Compte*, 105 S. W. 1131, 47 Tex. Civ. App. 647.

**No Water in Pens—Shipper Assuming Care.**—A shipper of cattle, whose contract provided that he assumed all risk and expense of feeding and watering them while in cars or pens, can not recover for damages to them from want of water while at the station from which they were shipped, where they were in pens from the forenoon till they were loaded during the night, though the carrier's agent, when asked about watering them, told the shipper there was no water in the pens; the shipper not testifying that he asked for water to be furnished him, and stating that he made no effort to water them there because he did not think they were suffering. *St. Louis Southwestern Ry. Co. v. Hunt* (Civ. App.), 81 S. W. 322.

**Shipper Using Free Passage to End of Journey.**—Shipper of live stock contracting to care for them at his own risk and expense is not relieved from such duty, by carrier's negligent delay, especially where shipper accepted free passage to end of journey and continued to use it. *Texas, etc., R. Co. v. Arnold*, 16 Tex. Civ. App. 74, 76, 40 S. W. 829.

**Unreasonable Delay as Relieving Shipper.**—A contract for the shipment of cattle provided that the shipper should feed and water the cattle en route, and relieved the carrier from all liability except for negligence. Held, that an unreasonable delay in transportation relieved the shipper of the duty to feed and water such cattle, and cast it thereafter upon the carrier. *Ft. Worth & D. C. Ry. Co. v. Daggett* (Civ. App.), 27 S. W. 186.

**Delay of 20 Hours as Authorizing Shipper to Abandon Shipment.**—Where cattle are shipped under a contract whereby the shipper agrees to feed and water them, the fact that it is necessary to unload the cattle two hours after shipment, owing to a wreck on the road caused by the carrier's negligence, thereby causing a delay of 20 hours, does not authorize the shipper to rescind the special shipment contract, and abandon the cattle, and so cast the duty of feeding and watering the same on the carrier, when the injury resulting from the delay could be almost entirely averted by his continuing to attend to them. *Ft. Worth & D. C. Ry. Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525, reversing (Civ. App. 1894) 27 S. W. 186.

**Charge That Duty Fell upon Carrier Where Shipper Assumed Duty.**—Where, in an action against a railroad for damages because of its delay in furnishing cars for the transportation of plaintiff's cattle, whereby the cattle suffered loss in weight, owing to the fact that there was no food nor water for them at the point where they were driven to meet the cars, appeared that plaintiff had himself undertaken to feed and water the cattle, an instruction that the law makes it the duty of common carriers to feed and water during the conveyance and that the liability of the carrier attaches when the shipper has done all that is required of him to prepare the property for shipment, and has de-

livered the property, was erroneous. *St. Louis Southwestern Ry. Co. of Texas v. Musick*, 80 S. W. 673, 35 Tex. Civ. App. 591.

##### 5. Requiring Notice of Claim before Removal of Cattle.

**Escape of Cattle—Notice When Recovered Sufficient.**—Where cattle were unloaded at a point where the company had no pens, and they scattered over the country, so that it took several days to collect them, a written notice soon after they were collected was a sufficient compliance with a requirement that written notice of any claims should be served on the company before the cattle should be removed from the place of destination, verbal notice of the claim having been given on the night the cattle were unloaded. *Houston & T. C. Ry. Co. v. Hester*, 2 Posey Unrep. Cas. 296.

**Sufficiency of Verbal Notice.**—Where there was a stipulation in the contract of shipment between plaintiff and defendant railroad company that, as a condition precedent to plaintiff's right to recover any damage for any loss or injury to stock, he would give notice in writing of his claim therefor, to some officer of the company or its nearest station agent, before removing said stock from the place of destination, a verbal notice given to the superintendent of a stock yard and the conductor of the train of his claim for damages is not sufficient. *Missouri Pac. Ry. Co. v. Scott*, 2 Willson, Civ. Cas. Ct. App. § 279.

Where a shipping contract provides that the shipper will give written notice of any injury to stock carried thereunder, a verbal notice in writing is not sufficient to entitle plaintiff to recover. *Missouri Pac. Ry. Co. v. Scott*, 2 Willson, Civ. Cas. Ct. App. § 280.

**Shipper Should Send Contract to Consignee Where Not Accompanying**

**Stock.**—A stipulation in a contract of affreightment of live stock requiring the owner to give notice in writing of his claim for damages, to some officer of the company or its nearest station agent, before the stock is removed from the place of destination, is a reasonable stipulation and binding on the owner, and he can not recover on failure to give such notice, though he did not go in person, or send an agent, with the stock, as in such case he should have sent a copy of his contract to the consignee, in order that the latter might have complied with the stipulation. *Galveston, H. & S. A. Ry. Co. v. Harman*, 2 Willson, Civ. Cas. Ct. App. § 128.

**Notice to General Freight Agent in Another State.**—An agreement by a shipper of cattle to notify a general officer of the railroad company, or its nearest station agent, of injury to the cattle, before he removed them from their place of destination, is not fulfilled by writing a letter to a general freight agent in a distant state, merely complaining of delay and an overcharge. *Texas & P. Ry. Co. v. Jackson*, 3 Willson, Civ. Cas. Ct. App. § 41.

**No Agent at Destination.**—A stipulation in a contract for the shipment of cattle requiring the shipper to give to the station agent or conductor notice of the condition of the cattle before they should be removed or mixed with other cattle will not be enforced where it does not appear that at the point of destination there was an agent to whom notice could be given, or that the shipper, by reasonable diligence, could have ascertained who was the proper person to receive the notice, and the injuries to the cattle consisted, in the main, of loss of weight, due to slow transportation and improper care. *Missouri, K. & T. Ry. Co. of Texas v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565.

**Carrier's Default as Preventing Compliance.**—By reason of the failure of

defendant, a common carrier, to provide sufficient pens at the point of destination to accommodate cattle shipped over its road, it became necessary, in order to prevent considerable damage to said cattle, for plaintiffs to turn them out on the commons in the nighttime, by reason of which some escaped and were lost. In an action for damages therefor, defendant pleaded a special contract of affreightment, one of the conditions of which was that plaintiffs should give notice in writing, etc., of damage sustained before taking the cattle from the place of delivery, etc., and that appellees had failed to give such notice. Held, that the default of defendant rendered it impossible for plaintiffs to comply with this condition of the contract, and to allow defendant to insist on this condition would be to enable it to stipulate against the consequences of its own misconduct, which would be contrary to law. *Gulf, C. & S. F. Ry. Co. v. York*, 2 Willson, Civ. Cas. Ct. App. § 813.

**Waiver of Notice.**—Waiver of notice may be established by proof of circumstances inconsistent with right of antecedent party to insist upon observation of conditions in the contract in suit against carrier for injury to stock in shipment. *Missouri Pac. R. Co. v. Scott*, 2 App. Civ. Cases, § 324.

Plaintiff, who shipped stock under a contract which provided that he would give written notice of damage claimed by him, to some officer of the road, or its nearest station agent, and he verbally notified the superintendent of the stock yards and the conductor of the stock train of his claim for damage, and they told him to wait a reasonable time and the company would settle with him. Held insufficient to show a waiver of written notice. *Missouri Pac. Ry. Co. v. Scott*, 2 Willson, Civ. Cas. Ct. App. § 280.

**Depreciation in Market Price Not Covered by Stipulation.**—A depreciation in the market price of cattle resulting from negligent delays is not covered by the stipulation for a notice in writing for loss or injury to their stock. *Southern Kansas R. Co. v. Curtis Bros.*, 44 Tex. Civ. App. 477, 480, 99 S. W. 566, affirmed in 102 Tex. 593, no op.

**6. Requiring Shipper to Furnish Conductor Statement as to Condition of Cattle.**

Receipts and statements exacted by carrier from shipper of live stock, as to their condition, are merely admissions, contradictable by other evidence. *Missouri Pac. R. Co. v. Ivy*, 79 Tex. 444, 447, 15 S. W. 692; *Missouri Pac. R. Co. v. Fennell*, 79 Tex. 448, 449, 15 S. W. 693; *St. Louis, etc., R. Co. v. Turrer*, 1 Tex. Civ. App. 625, 20 S. W. 1008.

In an action to recover of a railroad company damages to stock from negligence in its transportation, plaintiff is not bound by admissions that the stock was in good condition, made in various reports signed by him along the route, without reading, on the representations of the conductors presenting them that the reports were merely to show that there was no accident during the run. *Missouri Pac. Ry. Co. v. Ivy*, 79 Tex. 444, 15 S. W. 692.

**7. Releasing Carrier for Delay in Receiving and Shipping.**

A clause in a contract for the shipment of live stock, by which the shipper agreed to release the carrier from liability for delay after delivery to its agent and for delay in receiving the shipment after it should be tendered to its agent, did not release the defendant from liability for delay caused by the negligence of its own employees. *Texas & N. O. Ry. Co. v. Farrington*, 88 S. W. 889, 40 Tex. Civ. App. 205.

The word "agent," as used in the clause in the contract of shipment, by

which the shipper agrees to release the carrier from all liability for delay after delivery to its agent or for delay in receiving the shipment after it should be tendered to its agent, clearly refers to the connecting line to which the initial carrier contracted to deliver the shipment. *Texas, etc., R. Co. v. Farrington*, 40 Tex. Civ. App. 205, 208, 88 S. W. 889.

**8. Restricting Liability to Own Line.**

See the title **CONNECTING CARRIERS**.

While, under contract pleaded, liability is restricted to its own line, and carrier would not be liable for damages growing out of the negligence of its connecting carriers, nevertheless it might and would be liable for damages resulting from its own negligence in failing to properly bed the cars in the first place, even though the injuries occasioning such damages did not develop until after the cattle had left its line and were in the hands of the other carriers. *Texas Cent. R. Co. v. O'Loughlin*, 37 Tex. Civ. App. 640, 642, 84 S. W. 1104, affirmed in 101 Tex. 662, no op.

**XI. Actions.**

**A. RIGHT OF ACTION.**

Where it was in evidence that the carrier held out inducements to shippers by representations to ship by its line and system, and the shipper acting upon these representations, shipped the cattle on that system, in such case, no written contract being in evidence, it can not claim that it was only bound by the terms of the written contract. The right to recover rests upon an implied contract. *Missouri, etc., R. Co. v. Wells*, 24 Tex. Civ. App. 304, 308, 58 S. W. 842.

**Refusal to Pay Higher Rate—Damages While Detained.**—Shippers having a contract for a certain rate for carrying cattle are not, by refusing for a time to pay a



higher rate than demanded, prevented from recovering damages for injuries to the cattle from ill-treatment while detained. *Gulf, etc., R. Co. v. Leatherwood*, 29 Tex. Civ. App. 507, 69 S. W. 119.

**Cattle Dying after Delivery.**—Although cattle did not die until after delivery by carrier, this does not affect right to recover damages for them as killed by carrier's negligence. *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 310, 14 S. W. 607.

**Waiver of Tender of Stock as Precedent to Recovery.**—A carrier's announcement through its agent that it will not ship stock at the time previously contracted for is a waiver of tender of the stock which would otherwise be necessary to entitle the shipper to recover damages. *Texas Pac. Ry. Co. v. Nicholson*, 61 Tex. 491.

## B. PARTIES.

### 1. Plaintiffs.

#### a. Owner.

**The fact that cattle were shipped in the name of another** would not prevent the true owner from recovering damages. *Gulf, etc., R. Co. v. Humphries*, 4 Tex. Civ. App. 333, 23 S. W. 556; *G. H. & S. A. R. Co. v. Freeman*, 57 Tex. 156; *Atchison, etc., R. Co. v. Bryan* (Civ. App.), 37 S. W. 234.

#### **Shipping in Another's Name to Gain Advantage of Special Contract.**

—The fact that the owner of cattle shipped them over defendant's railroad in the name of another, who had a grazing contract on which he had advanced a portion of the freight, and the shipment was so made with the knowledge and assent of defendant's agent and the shipper paid the usual amount of freight thereon will not constitute a defense to an action to recover damages for delay in shipment, in the absence of proof that the agent had no authority to authorize the arrangement, and that plaintiff knew it.

*Atchison, etc., R. Co. v. Bryan* (Civ. App.), 37 S. W. 234.

#### **Shipper Not Owning All Cattle.**

Where a carrier contracts to carry a certain number of cattle in a shipment, it is immaterial to the liability of the carrier whether the shipper is owner of all the cattle, or whether some belong to a third person. *Gulf, etc., R. Co. v. Brown* (Civ. App.), 86 S. W. 53, reversed in 99 Tex. 349.

**Right of Third Person to Bring Action.**—Where a shipper of cattle contracted to ship a certain number, and, not having that number himself, agreed with a third person to include the latter's cattle in the shipment, and the carrier's station agent had knowledge of this arrangement, the carrier is liable to such third person under the contract with the shipper. *Gulf, etc., R. Co. v. Zimmerman* (Civ. App.), 86 S. W. 54, reversed in 99 Tex. 349.

**Joint Owners.**—Joint owners of a shipment of cattle may jointly sue for damages sustained by each, arising from injuries to cattle during transportation. *Texas & P. Ry. Co. v. Andrews* (Civ. App.), 80 S. W. 390.

In an action for breach of a contract to furnish cars for the shipment of cattle to market, there was no error in allowing a recovery by plaintiff of the full amount of damage sustained, though the cattle were owned by himself, his father, and two brothers jointly. (Civ. App.), *Southern Kansas Ry. Co. of Texas v. Morris*, 99 S. W. 433, judgment affirmed 100 Tex. 611, 102 S. W. 396.

**Partnership.**—In an action for damages to cattle shipped over defendant's railroad, and which were bruised and injured by improper transportation, so that they lost 25 per cent. in value, plaintiffs alleged that they were partners, and the cattle were shipped on defendant's road through plaintiffs. A witness testified that he knew plaintiffs; that he bought 30 of the cattle, for which he paid them a certain sum each for the smallest; that

they were in the stock pen at the railroad. P. testified that the cattle were the lot shipped by him over defendant's road. Held, that the partnership, not being denied under oath, need not be proved (Rev. St. art. 1265), and that the evidence, on demurrer to it, authorized the inference that the cattle belonged to plaintiffs. *Good v. Galveston, H. & S. A. Ry. Co.* (Sup.), 11 S. W. 854.

#### b. Consignor.

**Consignor May Sue Carrier for Injury to the Freight.**—The consignor may sue the carrier for breach of contract (e. g., for injury to stock shipped) without reference to his property in the goods shipped. *Missouri, etc., R. Co. v. Smith*, 84 Tex. 348, 19 S. W. 509.

**Consignor Sues When Delivery at Specified Place Essential.**—When contract for sale of cattle provided they were to be shipped and delivered at specified place, and they were injured in transit to such place, right of action against the carrier was in consignor and not consignee, for until delivery the cattle were at the consignor's risk. *Missouri Pac. R. Co. v. Scott*, 4 Tex. Civ. App. 76, 79, 26 S. W. 239.

**Knowledge of Carrier's Agent as to Undisclosed Principal Unimportant.**—It is not important whether the carrier's agent knew for whom cattle were shipped or not, for the principal in the contract, whether disclosed or undisclosed, has the right to sue upon it. *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 44, 33 S. W. 109, affirming 29 S. W. 806.

**Necessity for Joining Co-Owners.**—One in whose name a contract for the shipment of live stock is made may sue the carrier for injuries sustained in transportation, without joining as plaintiffs others interested with him in the stock. *Texas & P. Ry. Co. v. Klepper* (Civ. App.), 24 S. W. 567.

#### c. Consignor's Assignee.

An agent contracting for shipment of cattle of another by rail, and receiving, after suit brought, a transfer of the interest of the owner in the damages occasioned, will be permitted to recover in his own name from the carrier for injuries in transit. *Texas, etc., R. Co. v. Davis*, 93 Tex. 378, 379, 54 S. W. 381, 55 S. W. 562, reversing 54 S. W. 381.

#### d. Consignee.

**Consignee May Sue When Title in Him.**—In an action for injuries to cattle while being held in defendant's pens, caused by defendant's delay in furnishing cars for transportation, evidence examined, and held to show that the title to the cattle was in plaintiff when his vendor placed them in the pens, although the latter had agreed with plaintiff to put them on the cars for him free of charge, making plaintiff the proper party to maintain the action. *Ft. Worth & R. G. Ry. Co. v. Harrold*, 101 S. W. 267, 45 Tex. Civ. App. 362.

**When Consignee Bound Only by Contract to Pay for Cattle delivered.**—A contract for the sale of cattle bound the buyer only to pay for the number of cattle that were delivered at the place of delivery, and those that died en route were to remain the property of the seller. Calves were thrown in and went with the mother cows. Some of the calves died en route, but the evidence did not show that mother cows were not delivered at the place of delivery. Held, that the buyer was entitled to recover from the carrier for the calves killed. *International & G. N. R. Co. v. Jones*, 91 S. W. 611, 41 Tex. Civ. App. 327.

**Compromise of Consignor's Claims as Affecting Consignee's Claims.**—Where certain cattle were sold and the buyer was to pay for those delivered only, and the cattle that died en route were to be at the loss of the shipper, and the shipper sued the rail-

road for damages to the cattle while en route and not delivered to the shipper, and the buyer sued the carrier for damages and injuries to those cattle received, an agreement between the shipper and the carrier compromising his acts and stating that it is in payment and satisfaction of all claims and damages sustained by him in the transportation of the cattle, does not affect the right of the buyer to recover for damages and injuries to cattle delivered. *International, etc., R. Co. v. Jones*, 41 Tex. Civ. App. 327, 333, 91 S. W. 611, affirmed in 101 Tex. 644, no op.

## 2. Defendants.

See the title **CONNECTING CARRIERS**.

Where, in an action against railroads to recover damages for negligence in transporting plaintiff's cattle, the petition did not allege negligence to have occurred on the line of another road, but alleged specific acts of negligence on defendant's respective lines, it was not error to overrule defendant's motion to have such road made a party defendant to the suit; the court restricting plaintiff's recovery to such damages as resulted from negligence occurring on defendants' respective roads. *Gulf, C. & S. F. Ry. Co. v. Battle* (Civ. App.), 94 S. W. 345.

## C. FORM OF ACTION.

A railroad company may be sued in tort for delay in shipping stock. *San Antonio, etc., R. Co. v. Graves* (Civ. App.), 49 S. W. 1103.

## D. LIMITATION OF ACTIONS.

See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**.

A petition alleging that defendant carrier contracted to transport plaintiff's cattle to Chicago safely and expeditiously, but that it failed to provide suitable cars, and ran its cars negligently, whereby some of the

cattle were killed, and others were bruised and became sick and depreciated in value, states an action of trespass for injury to property coming within the two years' statute of limitations. *Ft. Worth, etc., R. Co. v. McAnulty*, 7 Tex. Civ. App. 321, 26 S. W. 414.

## E. PLEADING.

### 1. Petition.

#### a. In General.

A petition alleged that plaintiff shipped cattle over several connecting lines of railroad, one of which was defendant's, and that such shipment was made on three bills of lading, at agreed and through rates for the whole route, the contracts with each route being recognized and carried out by the others, and that the cattle were damaged by defendant's negligence. Held, that the petition was founded on a special contract, and not on the common-law liability of the carrier. *Texas & P. Ry. Co. v. Wheat*, 2 Willson, Civ. Cas. Ct. App. § 165.

**Injury to Cattle in Same Train Need Not Be Pleaded.**—In an action against a railroad company for injury to a shipment of cattle caused by delays and rough handling, it was proper to allow plaintiff to testify that cattle in the same train were killed, though the petition contained no allegation to this effect, since it was not a proper subject for pleading, but tended to show rough handling of plaintiff's cattle. *Southern Kansas Ry. Co. of Texas v. Bennett*, 103 S. W. 1115, 46 Tex. Civ. App. 379.

**Amendment—Seeking Additional Damages to Other Cattle Injured at Same Time.**—Where railway company is sued for injuries to cattle, caused by improper shipment, an amended petition, filed more than two years after first, seeking additional damages for injuries to other cattle, sets up new cause of action, though injuries occurred at same time. *Ft. Worth, etc., R. Co. v. McAnulty*, 7 Tex. Civ. App.

321, 323, 26 S. W. 414. See the title **AMENDMENTS**, vol. 1, p. 203.

**b. Averment as to Tender of Payment of Freight.**

**Refusal to Make Shipment.**—In suit against a carrier for refusal to make a shipment, an allegation that plaintiff was ready and willing to pay the freight was sufficient without alleging that payment of freight was tendered. *Texas & Pac. R. Co. v. Hays*, 2 App. Civ. Cases, § 390.

**c. Necessity for Averments for Recovery of Interest.**

See ante, "Interest," VIII, E, 4, b.

**d. Averments as to Contract and Breach Thereof.**

**(1) In General.**

The petition alleging that defendant is a common carrier, and fully setting out the cause of action for injuries in transit to a live stock shipment, and charging a breach of duty imposed on defendant by law, is sufficient without an express declaration on a bill of lading or contract of carriage. *St. Louis, I. M. & S. Ry. Co. v. Berry*, 93 S. W. 1107, 42 Tex. Civ. App. 470.

**Proximate Result.**—Where petition in action for breach of contract of carriage of cattle alleges that fifteen cattle were lost by stampede caused by hunger and thirst of cattle resulting from delay in transportation and that said loss resulted indirectly from railroad's delay in transporting cattle, exceptions to such allegation on ground that such damage was not natural, direct and proximate result of alleged breach of contract of carriage, and that allegation would not authorize recovery of such damages, is properly overruled. *G. H. & S. A. R. Co. v. Stovall*, 3 App. Civ. Cases, §§ 251, 308.

**Averments as to Agent Making Contract.**—In suit against a carrier for damages to cattle in shipment, a petition alleging that the contract was made with the company was sufficient against demurrer that it failed to al-

lege agent of company with whom made. *Missouri, etc., R. Co. v. Withers*, 16 Tex. Civ. App. 506, 511, 40 S. W. 1073, affirmed in 93 Tex. 691, no op.

**(2) Averments as to Plaintiff's Interest.**

A complaint alleging that defendant contracted with plaintiff to ship a car load of cattle to a certain place, but shipped them by mistake to another place, and that plaintiff was injured thereby in a certain sum, is demurrable for failure to show plaintiff's interest in the cattle or in the performance of the contract. *Galveston, H. & S. A. Ry. Co. v. Borden* (Civ. App.), 29 S. W. 1100.

**e. Averments as to Negligence.**

**Negligence Must Be Charged in Petition.**—In an action against a carrier for damages to a shipment of live stock, negligence on the part of defendant must be charged in the petition. *Missouri Pac. Ry. Co. v. Graves*, 2 Willson, Civ. Cas. Ct. App. § 676.

**Facts Sufficient to Raise Presumption Sufficient.**—But the petition need not allege defendant's negligence in terms, if such facts are stated as will raise presumption of negligence, and when sufficiently averred, further allegations that the negligence was willful or malicious, will be treated as surplusage. *Missouri Pac. R. Co. v. Graves*, 2 App. Civ. Cases, § 676.

**Failure to Provide Proper Cars.**—It is not necessary to plead or prove the defendant's negligence in an action against a carrier for injuries to a shipment of stock, caused by its failure to provide proper cars, since it is responsible for such injuries, without regard to the question of negligence. *International & G. N. R. Co. v. Pool*, 59 S. W. 911, 24 Tex. Civ. App. 575.

**Facts Constituting Negligence Need Not Be Averred.**—In an action against a carrier for injuries to a shipment of live stock, it is not necessary for plaintiff to set out in the petition the facts constituting the negligence com-

plained of. *Missouri Pac. Ry. Co. v. Graves*, 2 Willson, Civ. Cas. Ct. App. § 676.

In an action for damages for delay in delivering cattle, a petition alleging that defendant carriers were partners, the shipping and destination of the cattle, that defendants did not exercise reasonable diligence and speed in hauling the cattle on their respective lines, and did not deliver them in due time, and that each negligently and carelessly delayed the cattle in transit, etc., is sufficiently specific without setting out the evidence relied on to prove the negligence. *San Antonio & A. P. Ry. Co. v. Martin*, 108 S. W. 981, 49 Tex. Civ. App. 197.

**Sufficiency of Allegations.**—In an action against a common carrier for injuries to stock, plaintiff alleged in his petition that the said defendant so negligently loaded and transported said animals that some of them were badly injured, describing the injuries received by each. Held, that the allegations of negligence are sufficient. *Missouri Pac. Ry. Co. v. Cook*, 2 Willson, Civ. Cas. Ct. App. 676.

In an action against a carrier for injuries to a shipment of live stock, an allegation as to the acts constituting the alleged injury and charging that it was negligently and carelessly done is sufficient. *Missouri Pac. Ry. Co. v. Graves*, 2 Willson, Civ. Cas. Ct. App. § 676.

**Necessity for Pleading Cause of Delay.**—In an action against a railway company for delay in transporting cattle, plaintiff may prove that the delay was caused by the engine being out of repair, though he does not specially plead that fact. *Atchison, T. & S. F. Ry. Co. v. Bryan* (Civ. App.), 28 S. W. 98.

**f. Averments as to Damages.**

**Sufficiency of Averments.**—In an action against a carrier for injuries to cattle in transit, a petition alleging that of the cattle shipped about 100

were so injured as to die; that the market value of the cattle at their destination had they been properly transported was \$15 per head; that the remaining 360-odd head of cattle were so injured as to be damaged in the sum of \$4 per head from said market value—the total damage being alleged at \$2,993—was sufficiently specific in its averments of damage. *Texas, etc., R. Co. v. Sherrod* (Civ. App.), 87 S. W. 363, affirmed in 99 Tex. 382, 89 S. W. 956.

A citation reciting: "The nature of plaintiff's demand is as follows, to wit: That \* \* \* they shipped from O. to F., and from there, over its connecting carrier's line of railway, to K., at which place said cattle were to be promptly sold upon the market thereof; that said cattle were delayed on defendant's road at F. for a period of 5 hours; that said cattle had been upon the cars for about 20 hours when they reached F.; \* \* \* that in consequence of said cattle being negligently left upon the cars at F. they hooked, horned, scarred, bruised, and disfigured each other; that by reason of the premises defendant became bound and promised to pay to plaintiffs their said damages," etc.,—is sufficient to indicate a claim of damages for injuries to cattle. *Texas & P. Ry. Co. v. Truesdell*, 51 S. W. 272, 21 Tex. Civ. App. 125.

In an action against a railroad company for damages for delay in the transportation of certain cattle, an allegation that "the cattle were negligently delayed fifteen hours in transit, leaving them in the cars for that time without food or water, whereby they lost flesh, and lessened in value to the extent of \$5 per head," was sufficient on general demurrer. *St. Louis, A. & T. Ry. Co. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. 1008.

**Necessity for Alleging Number of Each Kind of Cattle Killed.**—An allegation in plaintiff's petition that the

cattle shipped consisted of bulls, cows, two-year-olds, yearlings and calves not showing the number of each, but alleging that 100 head were killed or died from the injuries, and not alleging the kind or classes of cattle that died, and further alleging that the cattle killed were worth \$15 per head at their destination, is sufficient as against a special exception that the petition failed to state the number of cattle dead of each class and the value of each class. *Texas, etc., R. Co. v. Sherrod*, 99 Tex. 382, 384, 89 S. W. 363, affirming 87 S. W. 363.

**Need Not State Number Dying in Transit and Dying after Reaching Destination.**—An allegation in a petition that 500 head of plaintiffs' cattle, reasonably worth \$16 per head, were killed by the negligence of defendant in transporting them, is sufficiently specific, without separately stating the number that died in transit and the number that died after reaching their destination. *Missouri Pac. Ry. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607.

**Averments as to Items of Damage.**—Petition alleging that, if plaintiff's mules had been shipped with reasonable diligence, he could have sold them profitably, but that, by reason of defendant's negligence, he could not sell them at destination, that he had to drive them from place to place seeking a market, thereby greatly reducing their value, that extra expense of driving and feeding was one hundred dollars, loss of time was one hundred dollars, depreciation in value of mules was three hundred dollars, sufficiently alleges items of damage. *Missouri, etc., R. Co. v. Cocreham*, 10 Tex. Civ. App. 166, 167, 30 S. W. 1118.

**Separate Statement of Damage Due to Decline in Price and Depreciation in Value Required.**—Where, in a suit against a carrier for delay and injuries to live stock, plaintiff claimed that he was damaged by a fall in the market by reason of delay in transportation,

and by depreciation in value of the animals caused by defendant's alleged negligence in keeping them in a muddy pen, it was error for the court to refuse to require plaintiff to separately state what amount of damages he claimed by reason of the decline in price, and also for depreciation in value. *Texas, etc., R. Co. v. Farrington*, 40 Tex. Civ. App. 205, 88 S. W. 889.

**Averments as to Amount of Damage Only Insufficient.**—A petition for damages to transported sheep, alleging that plaintiff's damage was a certain sum, without alleging the value of the sheep that were lost, or how much those not lost were depreciated in value, is insufficient to entitle plaintiff to a recovery. *Gulf, C. & S. F. Ry. Co. v. Wilhelm*, 3 Willson, Civ. Cas. Ct. App. § 458.

**Allegation That Cattle Were Sold for Specific Sum Less than Value Insufficient.**—The petition in an action against a carrier for injuries to cattle in transit contained no allegation that the cattle in their injured condition had no market value, nor that the price actually procured was either their intrinsic or market value, nor was it averred therein what efforts plaintiff made to procure a fair price. Held, that an allegation in the petition that the cattle in their damaged condition on arrival were sold for a specific sum much less than their value if uninjured, and that plaintiff was unable to sell them for more, is subject to a special exception thereto. *Gulf, etc., Co. v. Wright* (Civ. App.), 87 S. W. 191.

**g. Averments as to Value.**

**Value of Horses Need Not Be Alleged.**—A complaint against a carrier for failure to water horses in transit need not allege the value of the horses. *Galveston, H. & S. A. Ry. Co. v. Williams* (Civ. App.), 25 S. W. 311.

It is not necessary to allege the market value of cattle at their destina-

tion, in an action against a carrier for failure to deliver them, the law fixing the measure of damages. *Missouri, K. & T. Ry. Co. v. Chittim* (Civ. App.), 40 S. W. 23.

**Allegation as to Contract Price—Not an Element of Damages.**—Where the petition in an action against a carrier for injuries to cattle in transit alleged that the cattle were contracted to be sold to a certain buyer at a named price, it was not vulnerable to a special exception on the ground that the true measure of damages was the difference between their market value in good condition on arrival and their market value in the condition in which they actually arrived, in view of a further allegation of the complaint that the price named in the contract of sale was the market price of the cattle at their destination on their arrival there if in good condition, though the allegation as to the contract of sale had no proper place in the petition, in the absence of allegation of notice to defendant. *Gulf, C. & S. F. Ry. Co. v. Wright* (Civ. App.), 87 S. W. 191.

**h. Averments as to Weight of Cattle.**

In a suit by a stock shipper for damages for loss in weight of cattle caused by delay, allegations as to weight must state when and where such weight was taken. *Easton v. Dudley*, 78 Tex. 236, 240, 241, 14 S. W. 583.

**i. Averments for Recovery of Statutory Penalty for Failure to Feed and Water.**

It is not necessary that the pleadings allege that a demand or request that cattle be watered was made upon any particular agent. *Houston, etc., R. Co. v. Brown*, 37 Tex. Civ. App. 595, 598, 85 S. W. 44.

**That Duty Had Not Been Waived Should Be Pleading.**—A party who seeks to recover the penalty for failure to feed and water, provided by article 326, should allege the fact that the duty imposed upon the carrier, as

required by this statute, was not waived by a special contract. *Houston, etc., R. Co. v. Brown*, 37 Tex. Civ. App. 595, 598, 85 S. W. 44.

Where the original petition did not in terms allege that there was no special contract in writing relieving the carrier of the duty to feed and water, but the carrier pleaded a contract in writing which sought to relieve the carrier of that duty, to which the shipper by supplemental petition replied to the effect that while it was true such a contract was signed, that it was without consideration and executed under circumstances that were not binding upon the plaintiff, held, the pleadings upon the subject being in this condition, the provisions of the statute as to negating the exceptions in the pleadings were sufficiently complied with. *Houston, etc., R. Co. v. Brown*, 37 Tex. Civ. App. 595, 598, 85 S. W. 44.

**Places Where Failure to Feed Occurred Need Not Be Alleged.**—In an action against a railroad company for damages to stock which, through its negligence, died or were injured in course of shipment, the petition alleged that defendant failed to furnish food and water for unreasonable periods; that by reason thereof a certain number died, which were of a certain value; and that the balance, specifying the number, became sick and were damaged in a certain sum each, to the total damage of a certain amount. Held, that the statement of damages was sufficient, and that it was not necessary to allege the places on the road where defendant failed to feed and water. *Gulf, C. & S. F. Ry. Co. v. Wilhelm*, 4 Willson, Civ. App. Ct. App., § 243, 16 S. W. 109.

**j. Averments for Recovery of Penalty for Failure to Furnish Cars.**

It is not necessary to allege, as in actions for the statutory penalties for failure to furnish cars on written demand, that the demand to furnish the

cars for the transportation of the stock was in writing. *Houston & T. C. R. Co. v. Brown*, 85 S. W. 44, 37 Tex. Civ. App. 595.

**k. Averments as to Discrimination in Furnishing Cars.**

In a suit against a carrier for failure to furnish cars on a certain day for the shipment of cattle, the court did not err in refusing to strike from the petition an allegation that defendant had been guilty of discrimination against plaintiff in furnishing cars to other shippers whose orders were several days subsequent to his. *Southern Kansas Ry. Co. of Texas v. Samples* (Civ. App.), 109 S. W. 417.

**l. Limitation of Liability—Reasonableness of Stipulation.**

**Party Alleging Reasonableness of Stipulation Must Allege Facts Making It So.**—Where a shipper's contract with a common carrier, for transportation of animals to a point outside the state, depends for its validity upon being reasonable, the party who asserts its validity must allege facts which make it so. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 172, 2 S. W. 574.

**2. Answer.**

**a. In General.**

**Sufficiency of Averments as to Inability to Transport Because of Strike.**—

In an action against a railway company for damages caused by the refusal of the company to ship a number of calves tendered to it for shipment by plaintiff, defendant's answer alleged that all of the regular firemen in its employ were engaged in a strike when the cattle were tendered, and the movement of its trains was greatly embarrassed and in many instances entirely prevented; that the strikers prevented it by violent and unlawful means from employing other persons as firemen, and prevented it from moving its trains, and that because of such strike defendant was wholly unable to transport live stock during many days immediately succeeding the date on which the cattle

were tendered for shipment, and that, if defendant had accepted said shipment, it would have been wholly unable to transport the same, and for that reason refused to receive the same until six days thereafter, when it received and transported the cattle. Held, that the pleading sufficiently set forth the defense of inability to transport the cattle, and it was not necessary for the company to show that the strike could not have been prevented by either the company or the civil authorities, or that the strike was then pending, causing at the time of the delay a total stoppage of transportation, and that the defendant could not control the same by any means at defendant's command, nor that the state, after being applied to by defendant, could not control said strike, and the allegations were sufficient to form a basis for proof of reasonable diligence. *Galveston, H. & S. A. Ry. Co. v. Karrer* (Civ. App.), 109 S. W. 440.

**Sufficiency of Averments as to Plaintiff Overloading Car.**—Where, in an action for injuries to cattle by breach of a carrier's contract to furnish cars on a specified day, the petition alleged a verbal promise to accept the cattle for transportation on or about June 12, 1904, and that the carrier instructed plaintiff to have the cattle gathered and under herd at that time, such allegation was sufficient to permit evidence that the cars were not furnished as defendant promised. *San Antonio & A. P. Ry. Co. v. Timon*, 99 S. W. 418, 45 Tex. Civ. App. 47.

Where, in an action against a carrier for injuries to live stock by overcrowding, defendant alleged that by contract plaintiff "specially undertook \* \* \* to see that they were properly loaded," and charged that they were overloaded, such plea sufficiently charged that plaintiff undertook to load and overloaded the stock. *Texas & P. Ry. Co. v. Edins*, 83 S. W. 253, 36 Tex. Civ. App. 639.



**Failure to Allege Facts Showing Compliance with Duty to Furnish Cars.**

—In an action against a carrier for failure to furnish cars after demand, as required by Rev. Stat. 1895, arts. 4497-4502, an answer failing to allege facts showing that the carrier had performed, its duty of providing a sufficient number of cars to meet the ordinary needs of its business, which it could reasonably anticipate, or what the scarcity of cars and existing demands for them were the result of circumstances beyond its power reasonably to control and provide against, was demurrable. *Allen v. Texas, etc., R. Co.*, 100 Tex. 525, 101 S. W. 792, affirming 42 Tex. Civ. App. 331.

**Rush of Business—Failure to Furnish Cars.**—The answer to a complaint against a carrier for damages to cattle for delay in furnishing cars after demand, sufficiently pleads excuse by alleging that the rush of business and demand for cars had been so unusual, unexpected, and unprecedented that defendant did not and could not, in the exercise of any degree of care and foresight whatever, have expected and anticipated the same, and it did not have, and could not have had, at its command, cars to meet the demand for cars and transportation of freight as made all along its line in the order made. *Wallace v. Pecos & N. T. Ry. Co.*, 50 Tex. Civ. App. 296, 110 S. W. 162.

**Averments as to Carrier Having Facilities for Feeding and Watering.**

—In an action against two railroads for negligence in transporting plaintiff's cattle, the petition alleged that defendants had not exercised proper care in the construction of their water tanks, pipes, troughs, etc., for watering stock. Each defendant's answer set forth its agreement to stop the cars in which the cattle were shipped, at any of its stations, for watering and feeding, wherever it had facilities for

so doing. Held equivalent to an allegation that defendants had such facilities, and therefore an issue in the pleadings. *Southern Kansas Ry. Co. of Texas v. Crump*, 74 S. W. 335, 32 Tex. Civ. App. 222.

**b. Allegations as to Special Contracts Limiting Liability.**

**Special Contract Must Be Specially Pled.**—In an action for injuries to cattle in transit where the petition avers facts giving plaintiff a right of action for the injuries, the company can not show a special contract limiting its liability to their value at the time and place of shipment without specially pleading it. *Missouri Pacific Ry. Co. v. Edwards*, 75 Tex. 334, 12 S. W. 853.

**Facts Showing Reasonableness Must Be Pled.**

—Where in a suit against a railway for damages to stock in shipment, defendant pleads plaintiff's failure to observe stipulation in contract of shipment making certain notice of claim condition precedent to suit, such plea is demurrable unless it alleges circumstances showing reasonableness of such stipulation. *Houston, etc., R. Co. v. Davis*, 88 Tex. 593, 594, 32 S. W. 510, affirming 11 Tex. Civ. App. 24, 31 S. W. 308, 32 S. W. 163; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

**Answer Must Allege Company Had Officer or Agent at or Near Destination.**

—In an action against a railway company for negligence in failing to deliver cattle to a point outside of the state, within a reasonable time, an answer setting up a condition precedent, on part of shipper, as prescribed by contract, to give notice to an officer or agent of company, at the place of destination, of his claim for injuries, is insufficient, unless it shows that the company had an officer or agent at or near the place where notice was to be given. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 172, 2 S. W. 574.

In an action for injury to live stock.

of a condition precedent, that the shipper shall not recover unless he gives written notice of loss or injury to the officers of the company before removing the stock from the place of destination or commingling them with others, must allege that there was such an officer or agent at the destination point to receive the notice. *Gulf, C. & S. F. Ry. Co. v. Vaughn*, 16 S. W. 775, 4 Willson, Civ. Cas. Ct. App. § 182.

#### **Officer's Name Should Be Alleged.**

—In an action against railroad for damages to live stock during shipment, plea setting up stipulation in contract of shipment providing for giving of notice of claim for damages to some agent of railroad which alleges that such notice was not given and that company had agent at destination, but does not allege agent's name nor where he could be found, nor that plaintiff knew that there was such agent, is insufficient. *G., C. & S. F. R. Co. v. Wilhelm*, 3 App. Civ. Cases, § 458.

### **3. Issues and Proof.**

#### **Exposure to Contagious Disease—Shipper Not Proving He Sold Cattle.**

—Where, in an action against a carrier for injuries to a shipment of calves for feeders, resulting from their being exposed to a contagious disease, making it necessary for them to go forward as exposed cattle for immediate slaughter, the shipper did not prove when, where, how, or at what price he had sold the calves, or even that he had sold them, there could be no recovery, though the difference between the price of feeders and of cattle sold for immediate slaughter was proved. *Texas & P. Ry. Co. v. Beal & Self*, 97 S. W. 329, 43 Tex. Civ. App. 588.

**Evidence of Want of Feed and Water—Injury Because Cattle Were Wild and Vicious.**—Plaintiff's evidence that injuries to his cattle during trans-

portation were due to want of feed and water is admissible under defendant's answer, averring that the cattle injured themselves because they were wild and vicious. *Gulf, C. & S. F. Ry. Co. v. Porter*, 61 S. W. 343, 25 Tex. Civ. App. 491.

**Bedding of Car Not in Issue—Instruction Refused.**—Where, in an action against a carrier for injuries to plaintiff's horses, it was neither pleaded nor proved that plaintiff had undertaken to bed the car for such shipment, it was not error for the court to refuse to instruct to find for defendant, if the car in which the horses were shipped was improperly bedded. *Texas & P. Ry. Co. v. Dishman*, 91 S. W. 828, 41 Tex. Civ. App. 250.

**Infected Pens—Failure to Prove Notice.**—A shipper of calves for feeders, suing the carrier for damages arising from the fact that diseased cattle had infected the pens into which the calves were put, prior to the shipment, requiring the forwarding of the calves as exposed cattle for immediate slaughter, who failed to prove that the carrier had any knowledge of the infected condition of the pens, could not recover where the petition alleged that the carrier had been notified that the pens had been quarantined. *Texas & P. Ry. Co. v. Beal & Self*, 97 S. W. 329, 43 Tex. Civ. App. 588.

**Delays Specifically Alleged—Testimony as to Other Delays.**—In an action against connecting carriers for damages to cattle by delays, a complaint alleging that the cattle were damaged by the long time they were kept on the cars, and that, among numerous delays en route over the roads, there was a delay at the starting point specified, and another by one of the defendants, and still another between two other points specified, on the line of the same defendant, the pleading did not set out the delays with such particularity as to preclude plaintiff from showing other delays than those

specifically alleged. *San Antonio & A. P. Ry. Co. v. Griffith* (Civ. App.), 70 S. W. 438.

**Suit for Injury in Collision—Damages for Delay Not Allowed.**—Where the petition claims damages only for the injury to and loss of horses through a collision, it is error to charge that plaintiff may recover for injury caused by delay and detention. *Texas & P. Ry. Co. v. Sims* (Civ. App.), 26 S. W. 634.

**Admissions of Contract as Obviating Necessity of Defendant Producing Original.**—Where defendant railway company, sued for damages for injuries to cattle, occasioned during transportation, pleads a special contract, under which it received such cattle, to which a general denial is pleaded by plaintiff, and also a plea that he signed such contract under duress, plaintiff's admission of the contract does not excuse defendant from producing original. *Fort Worth, etc., R. Co. v. McNulty*, 7 Tex. Civ. App. 321, 324, 26 S. W. 414.

**Suits for Damages to Cattle before Putting into Cars—Treatment of Cattle during Transportation.**—Where, in an action for injuries to cattle by a carrier's delay in furnishing cars, plaintiff only claimed damages occurring before the cattle were put into the cars, all testimony referring to the treatment of the cattle along the road was inadmissible. *San Antonio & A. P. Ry. Co. v. Timon*, 99 S. W. 418, 45 Tex. Civ. App. 47.

**Action for Negligent Handling—Failure to Furnish Proper Troughs.**—Where, in an action against a carrier for injuring horses in transit, the negligence alleged was in handling the horses in a rough and improper manner, so as to inflict physical injuries on them, evidence as to the carrier's failure to furnish proper troughs in which to water the horses was not within the issues. *Texas & P. Ry. Co. v. Stephens* (Civ. App.), 86 S. W. 933.

**Special Averments of Causes—Improper Bedding Not Specified.**—In an action against a carrier for injuries to cattle in transit, where the plaintiff specifically averred the causes to which the alleged injuries were due, but did not include improper bedding as one of the causes, evidence that improper bedding was a cause of injury to the cattle was inadmissible. *Gulf, C. & S. F. Ry. Co. v. Wright* (Civ. App.), 87 S. W. 191.

**Written Contract Averred—Oral Contract Not Provable.**—Where, in an action against a railroad for damages resulting from negligence in transporting plaintiff's cattle, plaintiff alleged that the shipment was made under a written contract, proof of a verbal contract differing from such written contract, without a proper pleading impeaching the validity of the latter, was inadmissible. *Gulf, C. & S. F. Ry. Co. v. Batte* (Civ. App.), 94 S. W. 345.

**Under Plea Denying Execution of Contract—Agent's Lack of Authority Provable.**—Under plea denying under oath the execution of shipping contract, it is competent to show that party's agent in charge of the cattle shipped had no authority to execute a contract signed by him by reason of carrier's statement that he had to do so in order to ship the cattle. *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 305, 12 S. W. 815.

**Action for Depreciation in Market—Evidence as to Noncompliance with Terms of Contract Inadmissible.**—Where damages are claimed for cost of keeping the cattle, and for loss by a depreciated market, it is not proper to allow defendant to show that the loss in price was caused by the cattle not being of the grade represented by plaintiffs to persons who had agreed to buy them at a specified price. *Gulf, C. & S. F. Ry. Co. v. McCorquodale*, 71 Tex. 41, 9 S. W. 80.

**Original Petition as Evidence—Not in Issue.**—Where, in an action for in-

juries to cattle shipped, whether they were injured on the line of another railroad company was not in issue, it was not error for the court to refuse to permit defendant to prove a paragraph of plaintiff's original petition alleging that the cattle were so injured. *Missouri, K. & T. Ry. Co. v. Garrett* (Civ. App.), 96 S. W. 53.

**Testimony as to Injury of Other Stock Inadmissible.**—Plaintiff suing carrier for injury to stock should not be allowed to testify as to injury of other stock than that specified in petition; such testimony is calculated to mislead jury. *Missouri, etc., R. Co. v. Smith*, 84 Tex. 348, 351, 19 S. W. 509.

**Foreign Contract—Coin in Which Payable.**—In calculating damages in action against railroad for negligence and delay in transportation of hogs, for which shipper was to be paid in foreign money, evidence of what he was to be paid in such money, and value of such money in United States currency is admissible, though petition contains no allegation as to payment in such money. *Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. 286, affirmed in 93 Tex. 699, no op.

**Allegation as to Unsuitable Pens—**

**Inclosed Lane.**—Where, in an action against a carrier, the complaint alleged that defendant kept plaintiff's cattle, after arrival at destination, in unsuitable "pens," the allegation was sufficient to admit evidence that the cattle, after being unloaded, were held in an inclosed lane, extending about a mile, and about 300 yards wide. *Atchison, T. & S. F. Ry. Co. v. A. S. Veale & Co.*, 87 S. W. 202, 39 Tex. Civ. App. 37.

**Evidence as to Shipment Other than Averred Inadmissible.**—Where a petition declares on a contract for the shipment of cattle to a designated point, evidence can not be introduced to show a shipment to a destination other than that averred. *Texas & P.*

*Ry. Co. v. Hamm*, 2 Willson, Civ. Cas. Ct. App. § 491.

**Destination of Cattle.**—In action for injury to live stock shipment, evidence that C. was the destination was properly admitted, where the petition alleged a contract by defendant and another carrier to ship to N., and the answer alleged defendant was to ship to H. and there deliver to connecting carrier who was to ship to C., and annexed shipping contract showed stock was so consigned. *Galveston, etc., R. Co. v. Johnson* (Civ. App.), 29 S. W. 428, 429.

**Evidence of Strike Not Admissible under General Denial.**—In an action for delay in transporting a shipment of cattle, evidence of a strike at the point of destination, by reason whereof the cattle could not be delivered as agreed, can not be introduced under the general denial. *St. Louis, I. M. & S. Ry. Co. v. Pumphrey* (Civ. App.), 42 S. W. 246.

**Allegation of Rough Handling—Proof of Defective Car.**—In an action against a carrier by a shipper of horses, an allegation of rough handling is not sufficient to admit proof of a defective car. *Texas & P. Ry. Co. v. Stewart*, 96 S. W. 106, 43 Tex. Civ. App. 399.

**Action for Death of Three Cattle—Death of Other Cattle Not Provable.**

—Where the petition in an action against a carrier for injuries to cattle during transportation only claimed damages arising from the death of three head of cattle, the allowance of damages arising from the death of other cattle is erroneous. *Texas, etc., R. Co. v. Andrews* (Civ. App.), 80 S. W. 390.

**4. Variance.**

**Time of Making Contract.**—In suit against a carrier for its failure to furnish stock cars as specified, it is immaterial on what particular day the contract to furnish them was entered into, hence, variance between pleading and proof in that respect is immaterial.

*Morehouse v. Texas, etc., R. Co.*, 4 App. Civ. Cases, § 267, 17 S. W. 1086.

**Agents Making Contract.**—Where, in an action for breach of a carrier's contract to furnish cars in which to ship certain cattle, plaintiff alleged that defendants' agents who acted for them in negotiating the contract, to wit, W. and S., were duly authorized to make such contract, proof that plaintiff negotiated the contract with S. through letters and telegrams, and consummated a verbal contract with M., did not constitute a fatal variance. *Pecos River R. Co. v. Latham*, 88 S. W. 392, 40 Tex. Civ. App. 78.

**Assumption of Duty to Feed and Water Cattle.**—Where the petition alleged, that by the contract of shipment defendant undertook to feed and water the stock while en route and the contract read in evidence contained a clause in which plaintiff undertook at his own risk and expense to feed and water the stock while in defendant's stockyards or elsewhere, held, there was variance. *Gulf, etc., R. Co. v. Gann*, 8 Tex. Civ. App. 620, 624, 28 S. W. 349.

A common carrier can not relieve itself of liability by virtue of a clause in the contract of shipment whereby the shipper undertakes to feed and water the stock en route in a case where it has not offered him opportunity and facilities for so doing, thereby putting the matter out of his power; and such clause in the contract does not make it a variance from the petition, which alleged that the common carrier undertook the duty of watering and feeding the stock. *Gulf, etc., R. Co. v. Gann*, 8 Tex. Civ. App. 620, 28 S. W. 349.

**Variance as to Destination.**—In an action against a railroad for breach of contract to transport certain cattle, the petition alleged that they were to be shipped from one certain place to another, but the contract introduced in evidence showed that they were

to be shipped to a different place. Held, that an objection to the evidence on the ground of variance was properly sustained. *Texas & Pacific Ry. Co. v. Hamm*, 2 Willson, Civ. Cas. Ct. App. § 495.

## F. PRESUMPTIONS.

### 1. Presumption of Negligence from Injury or Loss.

If cattle were received from the carrier in good condition, and while in its custody were injured or killed, a prima facie inference of negligence in the carrier attaches. *Missouri, etc., R. Co. v. Scott*, 4 Tex. Civ. App. 76, 78, 26 S. W. 239; *International, etc., R. Co. v. Nowaski*, 48 Tex. Civ. App. 144, 106 S. W. 437.

In an action for damages for the burning of stock being shipped over defendant's railway, the plaintiffs having proved the burning, the damages, and that such were not caused by negligence of servants in plaintiffs' employ, a prima facie cause is made against defendant company; and, it failing to rebut such evidence, plaintiffs are entitled to recover. *St. Louis & S. F. Ry. Co. v. Parmer* (Civ. App.), 30 S. W. 1109.

**Disease Does Not Raise Presumption of Negligence.**—But the mere fact that an animal, apparently sound when delivered for shipment, arrives at its destination sick with a disorder, such as pneumonia, does not raise the presumption that the carrier has been guilty of negligence which caused it. *St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1131, 1136; *Weed v. International, etc., R. Co.*, 21 Tex. Civ. App. 689, 53 S. W. 356.

### 2. Presumption as to Stoppages for Feed and Water.

Article 4388, U. S. Rev. Stat., provides that when animals are carried in cars in which they can and do have proper food, water, space and opportunity to rest, the provisions in

regard to their being unloaded for five hours shall not apply. Plaintiff accompanied the cattle, and, in an action against the railway company for damages for delay, testified that there was no necessity to stop and unload the cattle in order to feed and water them, but was silent as to whether there was proper space in the car for them to rest. Held, that the presumption would obtain that the stoppage was made in a proper endeavor to comply with the law. *Galveston, etc., R. Co. v. Warnken*, 12 Tex. Civ. App. 645, 646, 35 S. W. 72.

### 3. Presumption as to Consideration for Written Contract.

A written contract for transportation imports a valuable consideration, but does not conclusively presume one. *McFadden v. Ry. Co.*, 4 S. W. 691; *Hutchinson on Carr.*, §§ 122, 123. Under proper pleadings, this presumption of a consideration may be rebutted, and the fact shown that none in reality existed; and for that reason the contract is not enforceable, but where the agent himself testified that he only had two rates to offer shippers, and both contained forms of contracts limiting the company's liability in the usual way, it is proper to submit to the jury the issue as to whether or not the contract had been executed upon a valuable consideration. *St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 657, 105 S. W. 1131. See ante, "Necessity for Consideration," X, A, 2.

### 4. Presumption as to Agent's Authority.

**Presumption as to Power Being General.**—Where it was shown that a certain person was the agent of the carrier at a certain point, in the absence of proof as to his powers, it will be presumed that they were general powers. *Atchison, etc., R. Co. v. Bryan* (Civ. App.), 37 S. W. 234, 235;

*Collins v. Cooper*, 65 Tex. 460, 465; *Missouri Pac. R. Co. v. Simons*, 6 Tex. Civ. App. 621, 25 S. W. 996.

It will not be presumed that a railroad station agent has authority to contract with a shipper to furnish cars for a shipment to be made from another and different station. *Texas, etc., R. Co. v. Ray Bros.*, 37 Tex. Civ. App. 622, 84 S. W. 691.

### 5. Presumption as to Ratification of Agent's Agreement.

In an action to recover for loss from defendant's negligent delay in furnishing cars for transporting cattle to market, where defendant's traveling freight agent promised to furnish plaintiff cars, and telegraphed to its chief freight representative for the cars, and the cars were actually furnished, though after the time promised, it may be presumed that defendant was sufficiently informed of the agreement with plaintiff to furnish the cars to constitute its action in furnishing them a ratification of the promise of its freight agent, and a charge submitting the issue or ratification to the jury was proper. (Civ. App.) *St. Louis, I. M. & S. Ry. Co. v. Boshear*, 108 S. W. 1032, judgment affirmed (Sup.), 113 S. W. 6.

Defendant not being legally bound to furnish cars on another line, unless it had agreed to do so, and the rule of the other line requiring defendant to do so to insure the passing of the shipment to destination over defendant's line, the fact that it furnished cars to be so used at the instance of its agent would justify an inference that it acted upon the agent's agreement. Judgment (Tex. Civ. App.) 108 S. W. 1032, affirmed. *St. Louis, I. M. & S. Ry. Co. v. Boshear*, 113 S. W. 6, 102 Tex. 76.

### 6. Presumption as to Injury Occurring on Last Carrier.

See the title CONNECTING CARRIERS.

**7. Presumption as to Verdict.**

Where action against a railroad company for damages in negligently transporting two shipments of cattle under a contract limiting its liability to its own line, showed one of the shipments was to a point beyond its line, held, a verdict for plaintiff on the shipment beyond defendant's line will be presumed as finding that the damage resulted from defendant's negligence and not from that of the connecting road, the terms of defendant's contract having been explained by the court to the jury. *Texas, etc., R. Co. v. Scharbauer* (Civ. App.), 52 S. W. 590, 591, affirmed in 93 Tex. 675, no op.

**Jury Presumed to Have Considered Proper Evidence Only.**—Injuries to cattle in shipping resulted from the acts of the owners in overcrowding the cars, and also from acts of the carrier. The jury, in an action against the carrier, having been instructed that plaintiffs were not entitled to recover for damages resulting from overcrowding, rendered a general verdict for plaintiffs in a sum not greater than the damages claimed as resulting from acts of the carrier. Held, that the jury must be presumed to have considered, in estimating damages, only such facts as, under the charge, would fix liability on the carrier. *Houston & T. C. Ry. Co. v. Hester* (Sup.), 7 S. W. 776.

**8. Presumption as to Contracts Limiting Liability.**

See ante, "Limitation of Liability," X.

**As to Having Officer at Destination.**—Where a common carrier's contract with a shipper of cattle for carriage to a point outside of state requires notice to be given to an officer or agent of company, at place of destination, of his claim for damages, the carrier must show that it had an officer or agent at such place to receive such notice, as such fact can not be presumed. *Missouri Pac.*

*R. Co. v. Harris*, 67 Tex. 166, 172, 2 S. W. 574.

**G. BURDEN OF PROOF.****1. In General.**

In an action against a carrier for injuries to cattle by delay in transit, the burden is on plaintiff to establish by a preponderance of evidence, facts entitling him to recover. *Sterling v. St. Louis, I. M. & S. Ry. Co.*, 86 S. W. 655, 38 Tex. Civ. App. 451.

**Receiver—Earnings Applied to Improvements.**—In action against a railroad for damages for injuries to a horse shipped over its road, while in the hands of a receiver, the burden is on defendant to show that earnings applied by the receiver to the improvement of the road were not net earnings. *Texas, etc., R. Co. v. Barnhart*, 5 Tex. Civ. App. 601, 604, 605, 23 S. W. 801, 24 S. W. 331.

**2. To Show Negligence.****a. In General.**

See ante, "Presumption of Negligence from Injury or Loss," XI, F, 1.

The general rule is well settled, where the cattle are in the exclusive possession of the carrier, that, when an animal is delivered to a carrier in sound condition, and arrives at its destination injured by cuts, wounds or bruises, the burden is on the carrier to show that the injuries resulted from some of the causes for which it is not liable. *St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 655, 105 S. W. 1131; *Texas, etc., R. Co. v. Arnold*, 16 Tex. Civ. App. 74, 40 S. W. 829; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 111, 17 S. W. 834.

**Inherent Vice.**—Where cattle are injured in a train wreck, the burden is on the carrier to prove that part of the injury was caused by inherent viciousness. *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 111, 17 S. W. 834.

**Carrier Need Not Show Specific Cause of Animal's Death.**—A carrier of an animal in sound condition when delivered for transportation is not required to show the specific cause of the animal's death during the transportation in order to be relieved from liability therefor; but it is acquitted of liability where the proof excludes the idea that the death was due in whole or in part to any other cause than an inherent vice. *Thomas v. Wells-Fargo Express Co.* (Civ. App.), 95 S. W. 723.

**Cattle Sustaining Disease En Route.**—Upon proof that horses shipped by rail during raining and freezing weather were wet during shipment from leaking of water tanks on the cars and became sick with pneumonia and catarrhal fever after arrival at their destination, the burden is upon the shipper to prove that the sickness or the injuries sustained by the animals was occasioned by the negligence alleged. *Weed v. International, etc., R. Co.*, 21 Tex. Civ. App. 689, 53 S. W. 356.

**Negligent Delay.**—Article 4496, providing a remedy for the refusal of a railway company to transport property "at the regularly appointed time," places the burden of proof on the company "to show that the delay was not negligent." *Texas, etc., R. Co. v. Smith*, 34 Tex. Civ. App. 571, 573, 79 S. W. 614, affirmed in 98 Tex. 635, no op.

**b. Where Shipper Accompanies Stock.**

But in shipments of live stock, where the owner accompanies the stock under a special contract to take care of them himself, and is given an opportunity to do so, the reason for the rule (that the facts are peculiarly, if not exclusively, within the knowledge of the carrier) does not apply, and hence the rule itself is held to be inapplicable. The rule in such cases therefore is that the burden of proof is upon the shipper to show that a

breach of duty upon the part of the carrier caused the injury or loss, and, if the carrier is liable only for negligence, the burden is upon the plaintiff to show such negligence. *Texas, etc., R. Co. v. Arnold*, 16 Tex. Civ. App. 74, 40 S. W. 829.

Where, after one of the plaintiffs in charge of a shipment of mules had been informed by the defendant's servants that the mules would not be unloaded again, he left them in charge of the carrier, and took a regular passenger train to his destination, he was not in charge of the car in such a manner as to shift on him the burden of showing what negligence, if any, probably resulted in injury to one of the mules. *St. Louis & S. F. R. Co. v. Brosius & Le Compte*, 105 S. W. 1131, 47 Tex. Civ. App. 647.

In an action for damages to cattle in shipment, stipulation that owner should care for them is valid and casts upon him the burden of clearing himself of negligence. *Gulf, etc., R. Co. v. Williams*, 4 Tex. Civ. App. 294, 298, 23 S. W. 626.

**3. As to Limitations of Liability.**

**a. Carrier Must Prove Reasonableness of Stipulation.**

Stipulation in a contract for interstate shipment of horses providing for written notice of a claim for damages to freight as a condition precedent to the right to sue and recover damages, the burden is on railroad to prove reasonableness of such provision. *Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 28, 31 S. W. 308, affirmed in 88 Tex. 593; *St. Louis, etc., R. Co. v. Bryce*, 49 Tex. Civ. App. 608, 110 S. W. 529.

**b. Carrier Must Show Injury Comes within Limitation.**

Where animals are delivered to a carrier in good condition and arrive at destination injured, even when the shipment is under a contract limiting the common-law liability of the carrier, an injury, when shown to have



been received during transportation, puts upon the carrier the burden of showing, not only that the injury comes within the exemptions to which it is entitled under the contract, but that it was inflicted without its negligence or that of its servants. *St. Louis, etc., R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 655, 105 S. W. 1131.

**Fire—Carrier Must Show Freedom from Negligence.**—Though the contract under which animals were carried by a railroad excepted fire from the risks assumed, when not caused by the carrier's negligence the burden of proof was on the carrier, in an action for damages from fire, to show that the injury done was not due to its negligence. *Texas & P. Ry. Co. v. Dishman & Tribble*, 85 S. W. 319, 38 Tex. Civ. App. 277; *Galveston, etc., R. Co. v. Chittim* (Civ. App.), 28 S. W. 700, 701.

**Shipper Accompanying Cattle.**—Although the contract of shipment excepted loss by fire when not caused by the carrier's negligence, the rule, that the burden of proof is on the carrier to show that the injury done to the cattle by fire was not due to its negligence, is not changed by the fact that the shipper accompanied the cattle, where the burden of proof fails to show that they assumed the duty of taking care of the cattle. *Texas, etc., R. Co. v. Dishman*, 38 Tex. Civ. App. 277, 279, 85 S. W. 319, affirmed in 101 Tex. 663, no op., distinguishing *Texas, etc., R. Co. v. Arnold*, 16 Tex. Civ. App. 74, 40 S. W. 829.

**c. Carrier Must Show Shipper's Non-compliance with Terms of Stipulation.**

The burden is on the defendant in an action against a carrier for injury to cattle in shipment to show that notice of the claim as required by the terms of the contract was not given. *Texas & P. Ry. Co. v. Crowley* (Civ. App.), 86 S. W. 342.

In an action for injuries to horses in transit, where the shipping contract provided that as a condition to recovery for loss by delay or injury, the shipper should present a claim in writing to defendant's agent within a certain time, the action being for the breach of a common-law duty of a common carrier, the burden is on the carrier, not only to allege and prove the contract limiting its liability and the facts showing such stipulation to be reasonable, but also to allege and prove the noncompliance therewith by the shipper. *St. Louis & S. F. Ry. Co. v. Bryce*, 110 S. W. 520, 529, 49 Tex. Civ. App. 608.

In an action to recover for loss by negligent delay in transporting cattle to market, if a written agreement for notice of any claim for damage to be given before the cattle are unloaded is founded on a valid consideration, the burden is on defendant to show that such notice was not in fact given by plaintiff, as required. (Civ. App.) *St. Louis, I. M. & S. Ry. Co. v. Boshear*, 108 S. W. 1032, judgment affirmed (Sup.), 113 S. W. 6.

**d. To Show Improper Feeding and Watering Facilities.**

Where a shipper assumes the care of his stock en route, and the stock is injured by his failure to feed and water them as he had assumed to do, the burden is upon him to show that his failure was caused by failure of the company to furnish facilities. *Texas & P. Ry. Co. v. Arnold*, 40 S. W. 829, 16 Tex. Civ. App. 74.

**4. To Show Contributory Negligence.**

See the titles NEGLIGENCE; PRESUMPTIONS AND BURDEN OF PROOF.

A requested charge, in an action for injury to a shipment of horses, making it a prerequisite to a verdict for plaintiff that the jury believe the damage was caused by the fault of defendant, unmixed with any fault or

negligence on the part of plaintiff, is bad in imposing on plaintiff the burden of disproving contributory negligence. *St. Louis, I. M. & S. Ry. Co. v. Berry*, 93 S. W. 1107, 43 Tex. Civ. App. 470.

#### 5. To Show Market Value.

A requested charge in an action for injury to a shipment of horses from rough handling and delay in carriage, that it devolved on plaintiff to prove that there was an "established" market value for the horses at their destination, is misleading because of the word "established." *St. Louis, I. M. & S. Ry. Co. v. Berry*, 93 S. W. 1107, 43 Tex. Civ. App. 470.

#### 6. To Show Agent's Authority to Make Special Contracts.

Burden of proving authority on part of railroad company's station master to make verbal contracts for furnishing of stock cars at particular time, is not on plaintiff in suit for damages for failure to furnish them as per contract. *Gulf, etc., R. Co. v. Wright*, 1 Tex. Civ. App. 402, 404, 21 S. W. 80.

**Burden to Show Knowledge of Lack of Authority.**—Station master is, by virtue of his position, ordinarily agent of carrier for making of contracts to furnish cars for shipment of cattle, and if carrier seeks to limit authority implied from nature of his agency, carrier must show by evidence not only that authority did not exist, but that such fact was known to shipper. *Gulf, etc., R. Co. v. Hume Bros*, 6 Tex. Civ. App. 653, 657, 24 S. W. 915, reversed in 87 Tex. 211. 27 S. W. 110.

### H. EVIDENCE.

#### 1. Admissibility.

##### a. In General.

**Calves Weighing from 303 to 306 Pounds—Evidence as to Depreciation of 350 Pound Cattle Inadmissible.**—Where, in an action against a carrier for injuries to a shipment of cattle, it appeared that the calves shipped

weighed from 303 to 306 pounds each, it was error to permit a witness to testify that calves weighing from 340 to 350 pounds each, transported as the calves involved were, would depreciate in weight a certain amount. *Texas & P. Ry. Co. v. Leggett*, 99 S. W. 176, 44 Tex. Civ. App. 296.

**Appearance of Mule's Remains, Establishing Cause of Death.**—In an action against a carrier for death of a mule delivered to it for transportation, evidence of the appearance of the mule's remains, their condition and surroundings, was only admissible to establish the cause of death. *International & G. N. R. Co. v. Nowaski*, 106 S. W. 437, 48 Tex. Civ. App. 144.

##### b. To Show Negligence.

**Character and Condition of Cattle before Shipment.**—In an action against a railroad for negligence in furnishing insufficient pens at the shipping point for the accommodation of plaintiff's cattle, plaintiff was properly permitted to testify that his cattle were a good quality of well-bred, high-grade calves, large and in good condition. *Texas & P. Ry. Co. v. Slator* (Civ. App.), 102 S. W. 156.

**Failure to Notify Consignee of Arrival.**—Evidence of a witness that he told a carrier's agent to telephone the consignee of the arrival of a hog, and that it needed attention, which the agent refused to do, and the hog died for want of attention, is admissible in an action against the carrier for its loss. *Pacific Exp. Co. v. Lothrop*, 49 S. W. 898, 20 Tex. Civ. App. 339.

**Evidence of Agreement to Notify Consignee on Arrival of Cattle.**—Evidence that a carrier was given timely notice that a hog had been shipped, and was expected to arrive, and that it agreed to give the consignee notice of arrival by telephone, which connected its office with his residence, which it failed to do, by reason of which the hog died, is admissible on the issue of defendant's negligence.

*Pacific Exp. Co. v. Lothrop*, 49 S. W. 898, 20 Tex. Civ. App. 339.

**Negligence in Not Opening Crate.**—

Testimony of a witness, who was present when a hog was unloaded at the place of delivery, that it was hot and restless, and could have been saved if the crate in which he was shipped had been opened, and he had been allowed to move about, and that witness told defendant's agent that the hog should be turned out of the crate, which the latter refused to do, was admissible to show negligence of the carrier. *Pacific Exp. Co. v. Lothrop*, 49 S. W. 898, 20 Tex. Civ. App. 339.

**c. To Show Special Contract for Transportation.**

See ante, "Special Contracts for Transportation," IV.

Where cattle were shipped under through contract with defendant with stopover privilege at an intermediate point, evidence of a verbal contract with a local agent of a connecting carrier at such point to transport the cattle through to destination without being unloaded, in a specified time, was inadmissible without proof of the authority of such agent to make such an agreement for defendant. *St. Louis & S. F. R. Co. v. Frazar*, 97 S. W. 325, 43 Tex. Civ. App. 585.

Such verbal contract was inadmissible because illegal where it appeared that the cattle could not reasonably have been transported to their destination within the 28 hours designated by the United States statute as the period beyond which cattle shall not be transported without stopping for feed and water. *St. Louis & S. F. R. Co. v. Frazar*, 97 S. W. 325, 43 Tex. Civ. App. 585.

**d. To Show Damage.**

See ante, "Liability for Loss or Injury," VIII.

**Nature of Injuries as Establishing**

**Damages.**—Evidence of the nature of injuries to a consignment of stock is no evidence on which to establish the

damages. *Gulf, etc., R. Co. v. Staton* (Civ. App.), 49 S. W. 277.

**Damage Caused by Shipper Remaining with Part of Shipment Sent over Wrong Line.**—In an action for breach of contract to transfer cattle over a certain line, where it appeared that some of the cattle were shipped as agreed, and the others over another line, it was error to admit evidence as to damage resulting from a delay in selling the cattle shipped over the line agreed, which was caused by plaintiff's remaining with the cattle shipped over the other line. *Texas & P. Ry. Co. v. Boggs* (Civ. App.), 30 S. W. 1089.

**Evidence as to Extra Expense for Feed.**—In an action for delay in the shipment of live stock, evidence of extra expense caused by the delay for feed at the destination and at another market to which the cattle were re-shipped, on account of the fall in the market during the delay was admissible. *St. Louis, I. M. & S. Ry. Co. v. Gunter*, 99 S. W. 152, 44 Tex. Civ. App. 480.

**Evidence Admissible to Show Payment Was to Be Made in Mexican Money.**—In an action against a railroad company to recover damages for injury to hogs while in transit from a place in the United States to the city of Mexico, testimony that the hogs were to be paid for in Mexican money was admissible on the question of damages. *Atchison, T. & S. F. Ry. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. 286.

**Loss in Market Value.**—On an issue as to the damages for a carrier's failure to seasonably unload cattle at their destination, evidence of the market value of the cattle at the place of destination, if delivered in as good condition as when turned over to the carrier, and as to their market value in the condition they were delivered in, is inadmissible, where the undisputed evidence shows that, if the cattle had been promptly delivered,

there would have been some deterioration in their value. *Galveston, H. & S. A. Ry. Co. v. Botts* (Civ. App.), 70 S. W. 113.

**Evidence as to Loss Per Head.—**

In an action against a carrier for damage to cattle, where plaintiff testified that the cattle at the place of shipment were worth \$25.25 per head, and with proper transportation they were worth at destination \$28.50, while in their damaged condition they were worth but about what they were worth before shipment, a further statement of plaintiff that the cattle were damaged at least \$3.25 per head was but a short method of stating the difference in market value of the cattle in the condition in which they did arrive and in the condition in which they would have arrived if properly transported. (Civ. App.) *Chicago, R. I. & T. Ry. Co. v. Halsell*, 80 S. W. 140, 35 Tex. Civ. App. 126, judgment affirmed 83 S. W. 15, 98 Tex. 244.

**Testimony as to What Shipment Ought to Be Worth.**—In an action against a carrier for damages to a shipment of cattle, testimony as to what the shipment ought to have been worth, instead of what it would have been worth, was properly excluded. *St. Louis, etc., R. Co. v. Dolan* (Civ. App.), 84 S. W. 393.

**Loss of Foal to Show Extent of Injury.**—In an action for injury to a shipment of live stock, evidence that some of the mares were caused to lose their foals after reaching their destination is admissible to show the extent of injuries received. *Texas & P. Ry. Co. v. Murtishaw*, 78 S. W. 953, 34 Tex. Civ. App. 447.

**e. To Show Agent's Authority to Make Special Contracts.**

See ante, "Authority of Agents to Make Special Contracts," IV, C.

**Similar Agreements of Agent as Showing Agent's Authority.**—Evidence that similar agreements of a traveling

freight agent to furnish cars at points on other lines for through shipments to points on his line were acted upon by the carrier tends to show that the making of such agreements was within the agent's actual authority. Judgment (Tex. Civ. App.), 108 S. W. 1032, affirmed. *St. Louis, I. M. & S. Ry. Co. v. Boshear*, 113 S. W. 6, 102 Tex. 76.

**f. To Show Failure to Feed and Water.**

**Evidence of Request to Feed—Carrier Not Shown to Have Control of Agent at Time.**—In an action against a carrier for injury to cattle, where the contract of shipment limited defendant's liability to its own line, and imposed the duty of feeding and watering the cattle on plaintiff, evidence that plaintiff requested defendant's agents to feed and water the cattle while they were in the pens of a connecting carrier was inadmissible, it not appearing that defendant had any control or authority over the cattle at the time the request was made. *Gulf, C. & S. F. Ry. Co. v. Dunman*, 76 S. W. 588, 33 Tex. Civ. App. 287.

**g. To Show Delay in Shipment, Transportation, or Delivery.**

See ante, "Liability for Delay in Transportation or Delivery," VII.

**Evidence to Show General Rule to Transport as Quickly as Possible.**—There was no error in permitting a witness to testify that the general rule of railroads was to transport cattle as quickly as possible. *St. Louis, I. M. & S. Ry. Co. v. Gunter*, 99 S. W. 152, 44 Tex. Civ. App. 480.

**Evidence as to the customary length of time consumed by freight trains in running between the points on defendant's line over which the shipment was made, was admissible to show unnecessary delay.** *Texas, etc., R. Co. v. Crowley* (Civ. App.), 86 S. W. 342.

**Showing Stock Trains Passed Through City within Certain Time.**—Where, in an action against a carrier

for delay in transporting cattle, it was shown that the cattle arrived at a city on a Sunday, where they remained 24 hours, it was not error to permit plaintiff to ask a witness whether any stock trains passed through the city, going in the direction of the destination of the cattle, during that time, as against the objection that there was no evidence that the carrier could have carried the cattle on such trains, or as to the destination of such trains, as the question might have been asked for the purpose of showing the condition of carrier's road, or that trains were operated. *Gulf, C. & S. F. Ry. Co. v. House & Watkins*, 88 S. W. 1110, 40 Tex. Civ. App. 105.

**Shipment of Cattle on Way Train to Show Delay.**—In an action for damages to cattle in shipping on the ground of unreasonable delay and improper operation of the train, evidence that the cattle were shipped on a way train, which necessitated many stops, is admissible, though defendants made no contract not to ship on such train, nor to transport at a given rate of speed; and evidence of rough handling of the train, and that injury resulting from the jerking in stopping and starting so often, is competent, to show carelessness. *Gulf, C. & S. F. Ry. Co. v. Ellison*, 70 Tex. 491, 7 S. W. 785.

**Failure to Ship within Contract Period.**—In an action against defendant railroad for damages to a shipment of plaintiff's cattle, evidence tending to show an agreement by defendant's agent to deliver the cattle at the place to which they were consigned in time for a particular market was admitted, although the written contract of shipment subsequently entered into between the parties stipulated that no agent had authority to make such an agreement, which agreement the carrier expressly declined to enter into. Held, that the evidence was properly admitted in the first place, not to establish the oral con-

tract to deliver the cattle in time for the particular market, but as bearing on the issue of negligence in failing to deliver them under the written contract at that time. *Ft. Worth & R. G. Ry. Co. v. Hadley & Alvord*, 86 S. W. 932, 38 Tex. Civ. App. 599.

## 2. Weight and Sufficiency.

### a. To Show Special Contract.

Instance of evidence held insufficient to establish contract on part of carrier to furnish stock cars at specified time and deliver the cattle at destination within marketable hours. *Texas, etc., R. Co. v. Pannill*, 4 App. Civ. Cases, § 273, 17 S. W. 1100.

**Fraud in Procuring Contract.**—In an action against a carrier for injuries to stock it appeared that, after the stock had been shipped under a verbal contract, the shipper, while en route, was handed a different written contract, and requested to sign the same, being told that it was merely a paper securing him transportation, and that, relying on the statement, he signed it without reading, not having time to do so. Held sufficient to sustain an allegation that his signature was obtained by fraud. *Atchison, T. & S. F. Ry. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. 286.

### b. To Show Failure to Feed and Water.

In an action against a carrier to recover the penalty for failure to feed and water cattle while in transit, the evidence examined, and held not to warrant a verdict for the plaintiff. *Texas & P. Ry. Co. v. Peters*, 71 S. W. 70, 31 Tex. Civ. App. 6.

**Charging Higher Freight Rate than Warranted.**—Evidence that plaintiff demanded cattle shipped to him by defendant on their arrival at their destination, but that defendant attempted to exact a greater freight charge than was due, and, on plaintiff's refusal to pay the same, retained the cattle until the next day, without feeding them, thereby

lessening their value, will support a judgment that defendant was negligent. *St. Louis S. W. Ry. Co. v. Williams* (Civ. App.), 32 S. W. 225.

**c. To Show Defective Pens.**

In an action against a railroad for damages to plaintiff's cattle through escaping from defendant's alleged defective cattle pens at a shipping point, after being frightened by negligent noise made by defendant's engine, causing them to stampede, evidence examined, and held insufficient to support a judgment for plaintiff. *Gulf, C. & S. F. Ry. Co. v. Taliaferro*, 89 S. W. 1120, 40 Tex. Civ. App. 388.

**d. To Show Delay in Transportation.**

**Failure to Furnish Cars.**—Instance of evidence held to show that shipper's cattle, by reason of defendant's failure to furnish cars for eight days, had so shrunk in weight as to be classified as "stale" in the cattle market. *Texas, etc., R. Co. v. Jones*, 23 Tex. Civ. App. 551, 552, 58 S. W. 174.

**Washout on Line.**—In an action against a railroad company for damages caused by delay in the shipment of cattle, evidence held insufficient to show that the delay was caused by washouts along the road. *Atchison, T. & S. F. Ry. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. 286.

**Failure to Deliver Cattle to Carrier within Proper Time.**—In an action against a connecting carrier for loss of profits by a failure to deliver cattle to a particular market, evidence considered, and held to show that the cattle were not delivered to the defendant in such time that it could have delivered the cattle by any means in time for the market for which they were shipped. *Crawford v. International & G. N. R. Co.* (Civ. App.), 109 S. W. 987.

In an action against a connecting carrier for damages from delay in a shipment of cattle, evidence considered and held insufficient to show that but for the delay the cattle should have been delivered to another connecting

carrier in time to be shipped to the market at the time they were due. *Crawford v. International & G. N. R. Co.* (Civ. App.), 109 S. W. 987.

**e. To Show Injuries in Transportation.**

Evidence held to show negligence of carrier of live stock supporting verdict of jury allowing damages to shipper. *Missouri Pac. R. Co. v. Ivy*, 79 Tex. 444, 447, 15 S. W. 692; *St. Louis, etc., R. Co. v. Brosus*, 47 Tex. Civ. App. 647, 105 S. W. 1131.

**When Evidence Need Not Show Actual Number of Each Kind Killed.**

—Where testimony tends to show average value of cattle killed and injured and number of each can be ascertained, the evidence need not show with absolute certainty the number of cattle of different ages. *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 310, 14 S. W. 607.

**Negligence Sufficiently Shown.**—In an action for injuries to cattle in transit, evidence held to support a verdict finding defendant carrier guilty of negligence. *Missouri, K. & T. Ry. Co. of Texas v. Russell*, 88 S. W. 379, 40 Tex. Civ. App. 114.

In an action for injuries to cattle while being transported over defendant's railroad, defendant's evidence showed that the cattle were delivered to it in an apparently good condition, and plaintiff's evidence supported the finding of the jury as to the amount of damages allowed. Held, that a judgment for plaintiff would not be disturbed because the court refused to charge that it devolved on plaintiff to prove defendant's negligence, and that the cattle were damaged while in its possession, and the amount of damage done by it. *Gulf, C. & S. F. Ry. Co. v. Gray* (Civ. App.), 24 S. W. 921.

**Evidence Showing Damages Were Caused by Wreck.**—Evidence by a shipper of a wreck of three cars of cattle on defendant's road, a portion of the train in which his cattle were

shipped, and that many cattle were then injured, warrants a finding that the injuries which existed at the time of the delivery of his cattle were caused by the wreck. *Texas & P. R. Co. v. Tom Green County Cattle Co.* (Tex. Civ. App.), 38 S. W. 1138, 15 Tex. Civ. App. 147.

**Sufficiency of Evidence to Show**

**Negligence—Jerking Train.**—In an action for injuries to mules through a carrier's negligence, plaintiff testified that the mules were in good condition when delivered to defendant, and that the train carrying them received a very hard jerk; that 15 minutes after he examined the mules, and found one of them dying; and that there was no sign of violence on the mule. The conductor of the train also testified as to the jerking of the train. Held not error for the court to refuse a motion for new trial, based on the ground that there was no evidence that the mule was killed through defendant's negligence. *Gulf, C. & S. F. Ry. Co. v. Russell* (Civ. App.), 23 S. W. 527.

**Cattle Sick When Delivered to Carrier.**—A calf, shipped by way of defendant railroad company, died some 10 days after its delivery to plaintiff. There was no evidence that it was injured while in defendant's possession, or that there was any failure or neglect in feeding, watering, and caring for it. It was sick when delivered to plaintiff, and there was evidence that it was also sick when delivered to defendant, and there was nothing to show that its sickness was not caused by natural causes. There was also evidence that when found dead it was in the horse's stall, and showed bruises which it had not had before. Held, that the evidence would not support a judgment for plaintiff. *Missouri Pac. Ry. Co. v. Heath* (Sup.), 18 S. W. 477.

**Verdict Based on Evidence of One Witness—Several Contradicting.**—Plaintiff, in a suit against a common carrier, proved positively by four wit-

nesses that his horses were materially damaged by defendant in transportation, and defendant produced only one witness in contradiction, who swore that he did not notice any damage to plaintiff's stock, but that he could not "in fact say whether any of them were injured in shipping or not." Plaintiff recovered judgment for \$2.12½. Held, that the judgment was against the evidence. *Eggleston v. Gulf, C. & S. F. Ry. Co.*, 4 Willson, Civ. Cas. Ct. App., § 290, 18 S. W. 137.

**Sufficiency to Show Disease Was Caused by Negligence.**—In an action against a carrier for death of a mule, evidence held insufficient to warrant a finding that the mule contracted pneumonia, from which it died, as the result of any negligence on defendant's part. *St. Louis & S. F. R. Co. v. Brosius & Le Compte*, 105 S. W. 1131, 47 Tex. Civ. App. 647.

**f. To Show Damages.**

In an action against carriers for injuries to cattle shipped, the jury were warranted in finding the value of the dead animals from evidence showing the number, condition, and average weight of the cattle at the time they were shipped, the average shrinkage in weight during transportation, their average weight at destination, their market value at destination, the condition in which they would have arrived but for defendants' negligence, and the market value of those delivered at destination in their then condition. *St. Louis, I. M. & S. Ry. Co. v. Dodson* (Civ. App.), 97 S. W. 523.

In an action against a railroad company for delay in delivering cattle shipped, it appeared that there was a delay of 26 hours in delivering the cattle, during which time the market fell 25 cents on the 100 pounds, which, after deducting the ordinary loss of weight, would have amounted to \$769.25. There was a verdict for \$865. On account of the delay, and because the cattle had not been properly fed

and watered, they were in such poor condition that they could not be put on the market on their arrival, but had to be held until the next day, when there was a further decline of 10 cents on the 100 pounds. The cattle sold for above the average price. Out of 31 lots sold on the same day, 26 sold for less and only 4 for more. Held, that the evidence was too unsatisfactory to sustain a judgment for the amount of the verdict. *Missouri Pac. R. Co. v. Russell* (Sup.), 15 S. W. 206.

**Decline in Market.**—In a suit for delay in the shipment of cattle, a witness for the carrier testified that he sold them to the plaintiff at \$2.45 per hundredweight on the 29th of June, and that they would have brought \$2.60 on the 27th. On cross-examination he testified that on the 27th they would have brought \$2.85, and on the 28th \$2.60, and on the 29th \$2.45. Testimony was taken by deposition, and there was no explanation of the discrepancy. This was the only evidence of a decline in the market. Held, that the evidence was not sufficient to support a judgment for damages based on the decline shown by the cross-examination. *Easton v. Dudley*, 78 Tex. 236, 14 S. W. 583.

## I. INSTRUCTION.

### 1. In General.

**Should Not Embrace Issues Not Made by Pleadings.**—In an action for injuries to stock, charge of court should be confined to the matters of negligence and injuries alleged in the pleadings and not embrace issues not made by them, even though made by the evidence. *Gulf, etc., R. Co. v. Cash*, 8 Tex. Civ. App. 569, 571, 28 S. W. 387.

**Charge Assuming Injury Where Evidence Conflicting.**—In an action against a carrier for damages to a shipment of cattle, the evidence being conflicting as to whether the cattle were injured, an instruction in an independent paragraph that "in all these

matters of fact," the jury were the sole judges of the weight of evidence, and that the measure of damages was the difference, if any, in the market value of the stock at the destination in the condition in which they were delivered, and the market value in the condition they should have been in, under proper handling, was erroneous, as calculated to lead the jury to believe that the cattle arrived in a damaged condition. *International & G. N. R. Co. v. Startz*, 94 S. W. 207, 42 Tex. Civ. App. 85.

**Joint Contract.**—Where plaintiff repudiated the making of a joint contract for stock transportation, and such issue was not submitted, a peremptory instruction on the ground that the petition declared on a joint contract was properly denied. *Texas, etc., R. Co. v. Hall*, 72 S. W. 1052, 31 Tex. Civ. App. 464, affirmed in 97 Tex. 648, no op.

**Ignoring Controverted Issues.**—In action for injury to cattle in shipment, it was error to charge if defendant was negligent in delaying cattle or in running cars, or in running into loaded cars, or in failing to feed and water, it was liable for damage done by any or all of said means or by any other means charged in petition, as it authorized the jury to ignore controverted conditions and questions affecting the carrier's liability for damages alleged to have been caused by yet other means submitted in a preceding paragraph of the charge. *Texas, etc., R. Co. v. Berchfield*, 12 Tex. Civ. App. 145, 147, 33 S. W. 1022.

**Charge Not Limiting Liability to Negligence of Plaintiff.**—In an action against two railroads for negligently transporting plaintiff's cattle, a charge "that neither of defendants were liable for damages resulting from any acts of negligence on the part of plaintiff or other parties in charge of, or feeding and watering, or hauling said cattle," etc., was properly refused, as it did not limit such negligence to the acts of



plaintiff or his representatives. *Southern Kansas Ry. Co. of Texas v. Crump*, 74 S. W. 335, 32 Tex. Civ. App. 222.

**Evidence Need Not Show Number of Each Kind of Cattle Killed.**—In an action against a carrier, where there is evidence from which the jury can ascertain the number of killed and injured cattle belonging to each of several different grades shipped, and their average value, it is proper to refuse an instruction that the evidence must show the exact number of the dead and injured cattle in each of the different grades in order to entitle plaintiffs to recover. *Missouri Pac. Ry. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607.

## 2. As to Contract of Shipment.

An instruction in an action against a carrier for damages to a shipment of cattle, alleged by the shipper to have been made under a verbal contract, and alleged by the carrier to have been made under a written contract, that unless there was an agreement as to rates of freight charges before the cars were placed and loaded, plaintiff could not recover anything because of such charges, was correct as far as it went, and if it did not go far enough, in that it failed to state that if the oral contract was superseded by the alleged written one, plaintiff would not be entitled to recover anything by reason of the oral contract, defendant should have asked a special charge supplying the omission. *Texas Cent. Ry. Co. v. Miller* (Civ. App.), 88 S. W. 499.

Where two contracts for the shipment of cattle were pleaded, and the facts pleaded authorized a recovery on the carrier's common-law liability, and negligence was shown, a special charge that the verdict should be for defendant if the shipment was made under any other than the oral contract was properly refused. *St. Louis Southwestern Ry. Co. of Texas v. Barnes* (Civ. App.), 72 S. W. 1041.

In an action to recover the penalty imposed by Sayles' Rev. Civ. St. 1897,

art. 326, where there was evidence of the existence of a special contract, and rebutting evidence presenting circumstances requiring the jury to pass upon the question whether such contract was binding or not, a charge authorizing a recovery without a finding negating the existence of the special contract relied on was affirmatively erroneous. *Houston & T. C. R. Co. v. Brown*, 85 S. W. 44, 37 Tex. Civ. App. 595.

## 3. As to Delay in Transportation.

Where suit against carrier is upon two causes of action, for breach of contract to furnish cars, and for injury to cattle en route, charge that delay to bring suit for injury within forty days is bar, is misleading. *McCarty v. Gulf, etc., R. Co.*, 79 Tex. 33, 38, 15 S. W. 164.

## Recovery for Damages from Unloading Cattle for Unreasonable Time.

—Where, in an action against a carrier for delay in transporting a shipment of cattle, it was shown that the cattle were unloaded at an intermediate point after a run of 17 hours, and there fed and watered and detained for about 23 hours, an instruction that the shipper was not entitled to damages on account of unloading the cattle was properly refused, because eliminating the period they were detained, in determining the reasonableness of the time consumed in making the entire trip. *Gulf, C. & S. F. Ry. Co. v. Beattie* (Civ. App.), 88 S. W. 367.

## Issue as to Whether Delay Existed Should Be Left to Jury.

—A charge that plaintiff is not barred by his contract, to estimate damages caused by delay in receiving and transporting cattle, if there was any unreasonable delay, is erroneous in not leaving to jury issue as to whether there had been delay. *Gulf, etc., R. Co. v. White* (Civ. App.), 32 S. W. 322, 323.

## Failure to Have Cattle Inspected.

In an action for injury to a shipment of cattle, partly due to delay in furnishing cars, there is no error in refus-

ing to charge that the carrier could not receive the cattle for shipment till they had been inspected; there being no evidence that the carrier's failure to receive them was attributable to their not having been inspected, but it appearing that it would not have received them till it did, had they been inspected, and that the shipper was ready to have them inspected whenever the carrier would receive them. *Gulf, C. & S. F. Ry. Co. v. Terry & McAfee* (Civ. App.), 89 S. W. 792.

A complaint alleged breach of contract by defendant carrier to receive and ship cattle promptly on the 17th day of the month. The answer alleged that the delay was caused by plaintiff's fault in not having the cattle inspected, as required by law, before they could be shipped. The replication alleged that they were ready to be inspected late on the evening of the 17th, but that defendant's agent informed plaintiff that they could not be shipped out that night, and that, therefore, inspection was delayed till the next morning. Held that, plaintiff's failure to have the cattle inspected being a sufficient excuse for defendant's failure to receive and ship them on the 17th, unless plaintiff was induced to forego the inspection by the agent's information, and the only issue, except the amount of damages, being whether he was so induced, it was error to submit the case to the jury with an instruction which, in effect, deprived defendant of its defense of noninspection. *Galveston, H. & S. A. Ry. Co. v. Rutledge* (Civ. App.), 37 S. W. 176.

**Defining Negligence.**—In an action against a carrier for damages to a shipment of cattle, caused by delay, it was not necessary for the court to define negligence. *Texas Cent. R. Co. v. West* (Civ. App.), 88 S. W. 426.

Plaintiff sued to recover for negligence of a railway company in failing to expeditiously transport certain cattle. Held, that defendant was not prejudiced by a charge defining negli-

gence as "the lack of that care which an ordinarily prudent person would exercise in the conduct of his own affairs, under the circumstances of the given case." *Missouri, K. & T. Ry. Co. of Texas v. Webb*, 49 S. W. 526, 20 Tex. Civ. App. 431.

**Length of Delay That Might Be Excused at Terminus.**—In an action against a carrier for damages to cattle during transportation, where there was no evidence that a certain place where they were delayed was a division terminus of the road where crews and engines had to be changed, it was error to charge upon the length of delay which might be excused at such terminus. *Pumphrey v. St. Louis, I. M. & S. Ry. Co.*, 14 Tex. Civ. App. 455, 37 S. W. 360.

**Violation of Special Contract Submitting Liability on Common-Law Liability.**—In suit against carrier for delay in transporting cattle, when plaintiff alleged specific contract to transport in certain time and also alleged defendant's failure to comply with its common-law duty to transport in reasonable time, and evidence showed violation of specific contract, defendant can not complain that court submitted the issue only on phase of its failure to transport in reasonable time. *Missouri, etc., Ry. Co. v. Webb & Co.*, 20 Tex. Civ. App. 431, 438, 49 S. W. 526.

**Negligence.**—In an action against a carrier for injuries to live stock, an instruction directed a verdict for defendant in the event the jury found the cattle were not delayed and roughly handled, and the succeeding paragraph charged that, if plaintiff failed to show by a preponderance of the evidence, his right to recover, the jury should find for the carrier. Held, that the previous paragraph was not objectionable as directing a verdict for defendant, if the jury found it was not guilty of the negligence charged. *Missouri, K. & T. Ry. Co. v. Garrett* (Civ. App.), 96 S. W. 53.

**Train Standing Unusual Length of Time.**—Where it was proved that cattle injured each other while the train on which they were loaded was standing, an instruction that plaintiff, to recover for such injuries, must show that the train was standing an unusual length of time by reason of defendant's negligence, and that while it was so standing the cattle were injured as they would not have been but for such unusual delay, is not objectionable as making defendant liable without reference to negligence. *Texas & P. Ry. Co. v. Fambrough* (Civ. App.), 55 S. W. 188.

#### 4. As to Care of Stock Awaiting Transportation.

**Negligently Running Train Near Pens, Stamping Cattle.**—An instruction, in an action against a carrier for injuries to live stock, in that the carrier negligently ran a train near the stock while confined in the carrier's pens and stampeded them, and caused them to break the pens, which were alleged to have been insufficient, which excluded the issue of sufficiency of the pens, was properly refused. *Texas Cent. R. Co. v. G. W. Hunter & Co.*, 104 S. W. 1075, 47 Tex. Civ. App. 190.

#### 5. As to Care of Stock during Transportation.

**Reasonable Dispatch in Transporting.**—In an action for injuries to stock in transit, a requested charge to find for defendant if it used ordinary care to transport the stock with reasonable dispatch, ignoring the question whether the stock were carefully handled by defendant during transportation, the failure to use ordinary care in that respect being one of the acts of negligence alleged in the petition and shown by plaintiff's evidence, was erroneous. *St. Louis Southwestern Ry. Co. of Texas v. Lovelady*, 81 S. W. 1040, 36 Tex. Civ. App. 282.

**Injuries Due to Track Being Out of Repair.**—Where, in an action against a

carrier for injuries to beef cattle by delay and rough handling, there was neither pleading nor evidence raising an issue that the damage was occasioned by defendant's tracks being out of repair, it was error to submit such issue to the jury. *St. Louis, I. M. & S. Ry. Co. v. Carlisle*, 78 S. W. 553, 34 Tex. Civ. App. 268.

**Eliminating Issues Set Out in Petition.**—Where, in an action against a carrier for injuries to cattle, plaintiff claimed damages by reason of delay and rough handling en route, as well as for defendant's failure to ship the same promptly, a request to charge eliminating the issue of the delays and rough handling en route was properly refused. *Ft. Worth & D. C. Ry. Co. v. Alexander*, 81 S. W. 1015, 36 Tex. Civ. App. 297.

**Insecure Pens—Damage by Derailed Car of Another Road.**—In an action against a railroad for negligence in permitting cattle to escape from its pens, the allegation in the petition that the pens were insecure, and, from want of repair, were insufficient to hold the cattle, would permit the admission of evidence to show their insecurity from any cause; and an instruction that defendant was not liable for an injury to the pens from the derailed car of another road, unless the pens were placed in such position with reference to the other railroad as was in itself negligence, was not objectionable as outside the issues. *Houston & T. C. Ry. Co. v. Trammell*, 64 S. W. 716, 28 Tex. Civ. App. 312.

**Due Care—Weak Stock.**—Where a shipper of stock seeks to recover of the carrier on the ground that the stock was injured by the improper handling of the train, it is error to instruct that plaintiff can not recover if defendant used due care, and the injuries were the result of the stock being weak and unable to keep their feet. *St. Louis S. W. Ry. Co. of Texas v. Dickens* (Civ. App.), 56 S. W. 124.

**Overheated Cattle.**—The court properly refused to instruct the jury that "if any cattle were injured, or had died from the effects of being overheated on account of hot weather, then plaintiff could not recover," the jury having been instructed that defendant would not be liable for any loss not caused by want of care, and there being evidence of negligence by defendant in watering the cattle, such instruction might tend to mislead the jury by eliminating the condition of the weather in determining the question of want of care by defendants in supplying the cattle with water. *Missouri Pac. Ry. Co. v. Cornwall*, 70 Tex. 611, 8 S. W. 312.

**Duty to Feed and Water.**—A charge in an action by a shipper to recover from a carrier for injuries to cattle in shipment, which states it to have been the duty of the carrier to feed and water the cattle en route, or to give the shipper an opportunity to do so, is erroneous as not applicable to the evidence, where the shipment required but about three hours' time, and no request to stop for feed or water was made by the shipper. *Texas & P. Ry. Co. v. Stribling* (Civ. App.), 34 S. W. 1002.

Averments, in a petition in a suit against a carrier for damages to cattle in transportation, to the effect that defendant bound itself to transport them in as good condition as possible, that they were damaged when delivered to plaintiff at their destination, and that, if they injured themselves because they were unruly, it resulted from defendant's failure to provide proper pens and water, are sufficient to support a charge authorizing a recovery for defendant's neglect to furnish feed and water. *Gulf, C. & S. F. Ry. Co. v. Porter*, 61 S. W. 343, 25 Tex. Civ. App. 491.

**Suitable Cars.**—In action for injury to shipment of stock, where there is no allegation as to condition of cars,

a charge that defendant is not liable if cars were safe, suitable and properly managed, is erroneous. *Galveston, etc., R. Co. v. Johnson* (Civ. App.), 29 S. W. 428, 430.

**Excessive Speed of Train.**—In an action against a carrier for injuries to a shipment of live stock, it was error to submit to the jury an issue as to negligence in running the train at an excessive rate of speed where there was no evidence tending to show the speed of the train at the time of the accident which caused the loss. *Texas & P. Ry. Co. v. Berchfield*, 12 Tex. Civ. App. 145, 33 S. W. 1022.

#### 6. As to Damages.

**Duty to Give Instruction as to Rule Governing in Arriving at Market Value.**—In suit against a carrier for injuries to stock on its tracks, the jury should be instructed regarding the rule governing them in arriving at its market and intrinsic value. *G. C. & S. F. R. Co. v. Dunman*, 4 App. Civ. Cases, § 99, 16 S. W. 421.

**The failure to instruct the jury as to the measure of damages** is more than a mere omission, and is positive error. *Houston, etc., R. Co. v. Buchanan*, 38 Tex. Civ. App. 165, 174, 84 S. W. 1073.

**Special Pleading by Carrier Not Required.**—The general denial by the carrier requires the court to give in charge the correct measure for the damages sustained, according to the facts as developed on the trial, and special pleadings alleging shipper's damage not to be so great as it at first appeared are not necessary. *Gulf, etc., R. Co. v. Godair*, 3 Tex. Civ. App. 514, 22 S. W. 777.

**Expenses of Pasturing—Alleging Expenses for Hands Only.**—In an action against a carrier for breach of a contract to furnish cars, where the petition alleged that plaintiffs were forced to "hire ten hands to keep the cattle under herd, day and night, for eight days, and to furnish horses, to their damage" in a certain sum, the

allegation did not justify a charge allowing the jury to find for expenses incurred for pasturing a certain number of horses, and amounts paid out for provisions of men. *Texas, etc., R. Co. v. Scott & Co. (Civ. App.)*, 86 S. W. 1065.

**Measure of Damages.**—Charge that measure of damages for delay in shipping cattle is depreciation in value while detained at shipping point and difference in market value at destination at time of arrival and at time they should have arrived, is not objectionable as holding defendant liable for double damages. *San Antonio, etc., R. Co. v. Pratt*, 89 Tex. 310, 311, 34 S. W. 445.

In suit against a carrier for overcharge in shipment of cattle, a charge authorizing plaintiff to recover, as claimed by him, the difference between what he paid, and the amount agreed on, and also for the overcharge in weights and charges for feeding and watering the stock, was error. *Galveston, etc., R. Co. v. House*, 4 Tex. Civ. App. 263, 268, 23 S. W. 332.

**Allowing Recovery for Damages Resulting from Voluntary Detention by Plaintiff's Agent.**—In an action against a carrier for injuries to cattle caused by delay in transporting them, wherein plaintiff alleged that the negligent detention on defendant's line caused delays on connecting lines, it appeared that the cattle were voluntarily detained by plaintiff's agent at certain points on such connecting lines. Held, that an instruction that, if the cattle were injured by the delay on defendant's line, plaintiff might recover their market value at the place of delivery on their arrival in the condition they were then in, and the market value at such place at the time they would have arrived in the exercise of ordinary diligence, in good condition, was erroneous, since it permitted a recovery of damages which might have resulted by the voluntary detention of the cattle by

plaintiff's agent. *San Antonio & A. P. Ry. Co. v. Woodley*, 49 S. W. 691, 20 Tex. Civ. App. 216.

**Failure to Feed and Water.**—In an action against a railroad company for damages to cattle while in course of shipment by reason, as alleged, of defendant's failure to feed and water them, an instruction to find for plaintiff if defendant failed to deliver the cattle according to contract, and if, when they were delivered, they were in bad condition, and damaged, and not worth as much as they would have been if delivered in the usual time and in good condition, is not objectionable as authorizing damages on an issue not made by the pleadings; and if it were so it would be harmless error, where there was no evidence upon which the jury could have found, except evidence of damage by reason of defendant's failure to feed and water the cattle. *Taylor, B. & H. Ry. Co. v. Montgomery*, 4 Willson, Civ. Cas. Ct. App. § 238, 16 S. W. 178; *Same v. Sublett*, Id. 182.

**Measure of Damages—Prejudicial Error.**—Since the court has no judicial knowledge that dead horses are not of greater value than live ones, it can not say, in an action against a carrier for the death of horses intrusted to it for transportation, that an instruction, that the measure of damages for the dead horses was the market value of the same at the place and time of delivery, was not prejudicial to the carrier. *Texas, etc., R. Co. v. Snyder (Civ. App.)*, 86 S. W. 1041. See the title **APPEAL AND ERROR**, vol. 1, p. 313.

**Liability for All Injuries Received on Carrier's Line.**—In an action for injuries to live stock, an instruction that defendant was liable for all injuries received on its line held too broad. *Gulf, etc., R. Co. v. Butler*, 31 Tex. Civ. App. 576, 73 S. W. 84.

**Failure to Furnish Cars—Measure of Damages.**—In an action against a

railroad company, there was evidence that defendant agreed to furnish cars at L. by 1 o'clock, June 10, 1893, for the shipment of plaintiffs' cattle, so that they would reach C. for market on the 14th; that defendant failed to provide cars until the 11th, and plaintiffs were compelled to hold such cattle in a crowded pen overnight, whereby they were damaged in a specified amount; that the cattle failed to reach C. on the 14th, and, before they reached C., the market declined. Held, that defendant was not prejudiced by charges, one of which directed the jury to allow the damages caused by the cattle being confined in pens at L., and the other to allow, as damages through the failure of "such cattle as were shipped" to reach C. on the 14th, the difference in the market price in C. on the 14th and the market price on the day they would have reached C., if they had arrived without delay, after leaving L. on the 11th. *San Antonio & A. P. Ry. Co. v. Pratt*, 89 Tex. 310, 34 S. W. 445.

**Overloading Car—Measure of Damages.**—Where the court charged that if plaintiff negligently overloaded the cattle in the cars, or contributed to the damage suffered, the verdict should be for defendants, the contention that an instruction that the measure of damages for the injured cattle was the difference in their market value at the time and place of destination, in the condition in which they would have arrived if properly handled and transported, and the condition in which they did arrive, was objectionable, in making defendant liable for injuries the cattle sustained through plaintiff's negligence, was without merit. *Missouri, K. & T. Ry. Co. of Texas v. Chittim*, 60 S. W. 284, 24 Tex. Civ. App. 599.

#### 7. As to Limitation of Liability.

**Consideration for Limitation.**—Where plaintiff, who was in the habit of shipping stock over defendant's line, for which he always signed written contracts, made a verbal contract

with defendant's agent as to the rate, and plaintiff's agent afterwards signed a written contract limiting defendant's liability to its own line, an instruction, in an action for damages occurring beyond defendant's line, "that if the verbal contract was entered into prior to the execution of the written agreement, and such agreement was signed by plaintiff's agent without said plaintiff or his agent knowing its contents, and without their having time to read it before the train carrying said stock left the depot, such contract was without consideration and void," was erroneous, as not fully submitting the issues to the jury. *Ft. Worth & D. C. Ry. Co. v. Wright*, 58 S. W. 846, 24 Tex. Civ. App. 291.

**Assumption of Loading and Unloading.**—Where, in an action against a carrier for negligence in the shipment of stock, it appeared that there was a contract whereby the shipper assumed the duty of loading and unloading the stock at his own risk, but there was evidence that the carrier in fact had charge of such matters, the shipper's employees merely assisting, an instruction that plaintiff might recover for injuries resulting from the failure of the carrier to use ordinary care in the loading was not objectionable, in the absence of a request for a more specific instruction, as holding the carrier liable for any negligence except its own. *San Antonio & A. P. Ry. Co. v. Dolan* (Civ. App.), 85 S. W. 302.

**Notice of Claim for Damages.**—In an action by a shipper for failure to furnish transportation at a time agreed on, it appeared that plaintiff signed a contract of shipment, making it a condition precedent to his right to recover for any injury to the cattle at any station where they might be loaded or unloaded that he should give the station master of the last-named station a written notice of his claim. The answer alleged that the cattle were unloaded at the station at P., and, though the station master at P. was

known and accessible to plaintiff, the latter failed to give him the notice required by the contract. Held that, if the words "the last-named station" could be properly construed as referring to the station at P., where the cattle were unloaded, the court erred in refusing to instruct the jury that, if they believed from the evidence that plaintiff, with due diligence, could have given the notice to the station master at P., and did not, to find for defendant, though the jury, in passing upon the reasonableness of such a requirement, would be authorized to consider the facilities afforded at P. for giving the notice, and all the attendant circumstances. *Gulf, C. & S. F. Ry. Co. v. Wright*, 1 Tex. Civ. App. 402, 21 S. W. 80.

**Duty to Feed and Water Stock.**—In an action against a railway company for injury to live stock in transit, where defendant pleaded a provision of the shipping contract, whereby plaintiff, in consideration of reduced rates and free transportation for two persons, had agreed to care for, feed, and water such stock, and where such persons testified that they at no time asked for an opportunity so to do, because they considered that such duty devolved on defendant, and that there was no consideration for such contract, it was error to charge that, if the validity of such contract had been called in question for want of consideration, the oral testimony offered in explanation thereof might be considered, as the practical effect of such instruction, in view of such evidence, was to annul the provision making it the duty of plaintiff to feed and water such stock. *Texas & P. Ry. Co. v. King* (Civ. App.), 45 S. W. 33.

## J. QUESTIONS OF LAW AND FACT.

### 1. In General.

**Shipment over Longer Route—No Increased Damage.**—Where a railroad shipped cattle over a route longer than

that selected by the shipper, and there was no testimony to show increased damages by reason of the greater distance, it was error to submit the issue to the jury. *Gulf, C. & S. F. Ry. Co. v. Irvine & Woods* (Civ. App.), 73 S. W. 540.

**Ratification of Agent's Contract.**—Whether a carrier ratified the contract of its traveling freight agent to furnish cars for a through transportation over its own and a connecting line, if he acted without authority, held, under the evidence, to be for the jury. Judgment (Tex. Civ. App.), 108 S. W. 1032, affirmed. *St. Louis, I. M. & S. Ry. Co. v. Boshear*, 113 S. W. 6, 102 Tex. 76.

**Effect Given to Quotation of Prices for Jury.**—Where, in an action against a railroad for negligence in furnishing insufficient shipping pens for the accommodation of plaintiff's cattle, a witness testified that the cattle in controversy were choice, fat, grass cows, it was for the jury to say what effect was to be given a quotation from a *Livestock Reporter*, quoting cows, choice, grass, at certain figures. *Texas & P. Ry. Co. v. Slator* (Civ. App.), 102 S. W. 156.

### 2. Whether Shipment Made under Written or Oral Contract.

Where the evidence was conflicting as to whether a shipment was made under a written or verbal contract, the question is for the jury, and the court should not assume in its instructions that the shipment was made under a written contract. *Gulf, etc., R. Co. v. Batte* (Civ. App.), 94 S. W. 345.

In an action against a carrier for injury to live stock, evidence examined, and held to warrant submission of question to the jury whether the shipment was on the terms of a written contract between plaintiff and defendant. *Missouri, K. & T. Ry. Co. v. Garrett*, 87 S. W. 172, 39 Tex. Civ. App. 246.

In an action against a railroad company for damages for the shipment of

cattle by a longer route than that by which plaintiff desired to have them shipped, evidence held to require submission to the jury of the issue whether plaintiff was bound by the written contract of shipment, which provided that the cattle should be shipped by the route by which they were actually sent. *Houston & T. C. R. Co. v. Buchanan*, 84 S. W. 1073, 38 Tex. Civ. App. 165.

**Parties Contemplating Signing of Written Contract.**—Where the parties to a shipping contract contemplated that a written contract should be signed in pursuance of, or in furtherance of, a previous oral agreement, the written contract subsequently signed governed the shipment as matter of law, and it was error to submit that question to the jury. *Ft. Worth & D. C. Ry. Co. v. Wright*, 70 S. W. 335, 30 Tex. Civ. App. 234.

### 3. Authority of Agent to Make Contract.

Whether a carrier's traveling freight agent was authorized to contract to furnish cars to plaintiff to transport his cattle, held, under the evidence, for the jury. *Judgment (Tex. Civ. App.)*, 108 S. W. 1032, affirmed. *St. Louis, I. M. & S. Ry. Co. v. Boshear*, 113 S. W. 6, 102 Tex. 76.

### 4. Sufficiency of Stock Pens.

Whether pens were sufficient or not is peculiarly a question for the jury's determination. *Texas, etc., R. Co. v. Slator (Civ. App.)*, 102 S. W. 156; *Southern Kansas R. Co. v. Cooper*, 75 S. W. 328, 32 Tex. Civ. App. 592.

To permit a witness to testify that pens were not sufficient is to take the question from the jury. Hence, in an action against a railroad for negligence in furnishing insufficient pens at the shipping point for the accommodation of plaintiff's cattle, it was error to permit a witness to testify that, after the shipment of plaintiff's cattle, witness advised defendant's superintendent

that the pens were insufficient, and asked him to build new ones, and that the superintendent told him, in reply, to get up plans for additions to the pens needed, and he would consider the matter. *Texas, etc., R. Co. v. Slator (Civ. App.)*, 102 S. W. 156.

In an action against a carrier for injuries to a shipment of cattle, the question whether the muddy condition of the pens furnished by the carrier for the reception of the cattle constituted negligence is one for the jury. *Ft. Worth, etc., R. Co. v. Galton*, 45 Tex. Civ. App. 67, 100 S. W. 166.

In an action for loss of cattle by reason of the defective condition of the carrier's pens in which the cattle were placed awaiting transportation, whether the cattle were lost is, under evidence, which does not show beyond a possibility that they were lost, a question for the jury. *Ft. Worth & D. C. Ry. Co. v. Waggoner Nat. Bank*, 81 S. W. 1050, 36 Tex. Civ. App. 293.

### 5. Whether Cattle Were Properly Loaded.

**Improper Loading.**—Where carrier has shown that cattle, besides being poor and weak, were loaded improperly, without regard to age or size, it is error to refuse charge submitting such question to jury in suit for loss. *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 313, 14 S. W. 607.

### 6. Care of Stock during Transportation.

The failure of a carrier to transport cattle without rough handling is not negligence as matter of law. *Missouri, K. & T. Ry. Co. v. Garrett*, 87 S. W. 172, 39 Tex. Civ. App. 246.

In an action for injuries to cattle in transportation, where the evidence leaves it doubtful as to what caused the injuries, the negligence of defendant in transporting the cattle is properly submitted to the jury. *Missouri, K. & T. Ry. Co. of Texas v. Schults (Civ. App.)*, 109 S. W. 445.



**Construction of Shipper's Written Statement as to Condition of Stock.—**

In an action against a carrier to recover the penalty for failure to feed and water stock in transit, the written statement as to the condition of the stock, signed by the person who had charge of them, on behalf of the owner, not being contractual in its nature, was important only as evidence, and was not one to be construed by the court. *Texas & P. Ry. Co. v. Peters*, 71 S. W. 70, 31 Tex. Civ. App. 6.

**Failure to Unload as Negligence.—**

Under Rev. St. U. S., § 4386 [U. S. Comp. St. 1901, p. 2995], providing that no railroad shall confine animals in cars longer than 28 hours without unloading them, and section 4388 [U. S. Comp. St. 1901, p. 2996], providing that the law shall not apply to transportation in cars in which they can obtain food, water, and an opportunity to rest, it is for the jury to determine whether a railway company was negligent in keeping horses on cars 32 hours without affording an opportunity to unload and care for them. *St. Louis Southwestern Ry. Co. v. Dolan* (Civ. App.), 77 S. W. 415.

**Penalty for Failure to Feed and Water.**—Whether or not plaintiff, in addition to his verdict for damages, was entitled to the penalty allowed by Rev. Stat., art. 284, for failure to feed and water horses, was a question of fact for the jury. *Galveston, etc., R. Co. v. Thompson* (Civ. App.), 23 S. W. 930.

**7. Limitation of Liability.**

**Reasonableness of stipulation** in contract for shipment of stock requiring written notice of claim for damages within given time, is question for jury. *International, etc., R. Co. v. Garrett*, 5 Tex. Civ. App. 540, 541, 542, 24 S. W. 354.

Where, in an action for injuries to a shipment of cattle, the evidence showed that the written contract stipulated that a claim for damages should

be presented within a specified time, and the shipper testified that the cattle were delivered under a verbal contract, that after they were loaded and shortly before the train was ready to start a written contract was presented to him and he asked what the effect would be if he refused to sign it, and he was told that the cattle would not be shipped, and that he then signed the contract, the court should submit to the jury the question whether the written contract was binding, and, if they found that it was, they must determine whether or not the claim for damages had been presented in accordance with the contract, and whether the stipulation therein was reasonable. *Gulf, C. & S. F. Ry. Co. v. Batte* (Civ. App.), 107 S. W. 632.

**Want of Consideration for Contract Limiting Liability.**—Where carrier, in

action for damages to stock in transit, pleaded a written contract that it should only be liable for damages occurring on its own line, and there was evidence tending to show want of consideration therefor, it was not error to submit question of failure of consideration to jury. *San Antonio, etc., R. Co. v. Botts* (Civ. App.), 57 S. W. 853.

**Diligence of Shipper to Comply with Contract.**—Where cattle shipping contract stipulates that shipper will give

notice of loss to station master at point of delivery before stock is removed, and such station agent was known to, and easily accessible to shipper, it is for the jury to determine whether shipper could have done so by exercising reasonable diligence. *Gulf, etc., R. Co. v. Wright*, 1 Tex. Civ. App. 402, 21 S. W. 80.

**K. VERDICT AND JUDGMENT.**

See the title VERDICT.

Where a special issue submitted to the jury called for the aggregate amount of damage occasioned to a shipment of cattle, and the jury answered "two dollars per head," without finding the number of the cattle,

this could not suffice as the basis of a judgment, even though there had been no conflict in the evidence as to the number of the cattle. Rev. Stat., art. 1333. Galveston, etc., R. Co. v. Botts, 22 Tex. Civ. App. 609, 55 S. W. 514.

Where, in an action against a carrier for injuries to a shipment of live stock, the answer alleged that the con-

dition of the stock pens and facilities for unloading at a station were known to the shipper, and that he assumed the risk, and was guilty of contributory negligence, a finding that he was not guilty of contributory negligence disposed of the issue raised. Chicago, R. I. & P. Ry. Co. v. Mitchell (Civ. App.), 85 S. W. 286.

## CARRIERS OF PASSENGERS.

BY S. BLAIR FISHER.

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### CROSS REFERENCES.

See the titles CARRIERS, ante, p. 304; CONFLICT OF LAWS; CONNECTING CARRIERS; CONTRACTS; CORPORATIONS; CROSSINGS; DAMAGES; DEAD BODIES; DEATH BY WRONGFUL ACT; ELEVATORS; EVIDENCE; EXEMPLARY DAMAGES; FALSE IMPRISONMENT; IMPUTABLE NEGLIGENCE; INSTRUCTIONS; INTERSTATE COMMERCE; JURISDICTION; LIMITATION OF ACTIONS AND ADVERSE POSSESSION; MALICIOUS PROSECUTION; MASTER AND SERVANT; NEGLIGENCE; ORDINANCES; PARTIES; PLEADING; PRESUMPTIONS AND BURDEN OF PROOF; RAILROADS; RECEIVERS; RELEASE; RES GESTÆ; SHIPS AND SHIPPING; STATUTES; STREET RAILROADS; TRIAL; VARIANCE; VENUE; WAREHOUSES AND WAREHOUSEMEN.

As to connecting carriers, see the title CONNECTING CARRIERS.

### I. Relation of Carrier and Passenger.

#### A. GENERAL RULES FOR DETERMINING EXISTENCE OF RELATION.

##### 1. Undertaking to Transport as Fixing Relation.

###### a. In General.

It may be stated as a general rule that the relation of carrier and passenger exists in every case in which the carrier receives and agrees to transport another not in its employment. *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, 375, 15 S. W. 280; *Texas, etc., R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 78 S. W. 548, affirmed in 98 Tex. 635, no op.

##### b. Necessity for Existence of Contract Express or Implied.

###### (1) In General.

The relation of passenger and car-

rier depends upon the existence of contract either express or implied. *Missouri, etc. R. Co. v. Williams*, 91 Tex. 255, 257, 42 S. W. 855 reversing 40 S. W. 350; *Cook v. Houston, etc., Nav. Co.*, 76 Tex. 353, 13 S. W. 475.

"It has been held that a passenger is one who travels in a public conveyance by virtue of an express or implied contract with the carrier." *Southerland v. Texas, etc., R. Co. (Civ. App.)*, 40 S. W. 193, affirmed in 93 Tex. 739, no op.

Proof that plaintiff either purchased a ticket before he boarded a train, or that he had money to pay his fare and did pay it after entering the train, established the relation of carrier and passenger between himself and the railway company, and it was not necessary for him to prove any express contract for carriage. *Galveston, H. & S. A. Ry. Co. v. Fink*, 99 S. W. 204, 44 Tex. Civ. App. 544.

**(2) Contract Need Not Be between Carrier and Passenger Himself.**

It is immaterial whether the agreement to carry be by contract between the carrier and the person to be carried, or between the carrier and some other person in whose employment the person to be carried is, for the purpose of transacting on the train the business of his employer as in the case of mail agents, express agents or messengers, and others having duties to their employers to perform, which can be performed only by such person, traveling on railway trains or other public conveyances. *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, 375, 15 S. W. 280; *Texas, etc., R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 78 S. W. 548, affirmed in 98 Tex. 635, no op.

Where, by an arrangement between a lumber company and the defendant railway company, the defendant agreed to carry the lumber company's employees to and from work, an employee riding to work on a logging train was entitled to the rights of a passenger. *Trinity Val. R. Co. v. Stewart* (Civ. App.), 62 S. W. 1085.

An employee of a shipper in charge of cattle is a passenger for hire and entitled to care due any other passenger upon a freight train. *Missouri Pac. R. Co. v. Ivy*, 71 Tex. 409, 9 S. W. 346.

**(3) Consent or Invitation of Employees as Constituting Contract.**

**(a) In General.**

In *Missouri, etc., R. Co. v. Huff*, 98 Tex. 110, 81 S. W. 525, reversing 78 S. W. 249, it was held that the question whether or not the relation of passenger or carrier ever arose between the plaintiff, traveling upon a flat car of a freight train, and the railroad company, depended upon the right of a brakeman to bind the company by receiving him at such a place, in such a train.

An arrangement made by a con-

ductor in charge of a train, with respect to the carriage of a person on the train, is binding on the carrier, and confers on such person the rights of a passenger. *St. Louis Southwestern Ry. Co. of Texas v. Fowler* (Civ. App.), 93 S. W. 484.

**(b) Where Person Consenting Is without Authority.**

**In General.**—It may be stated as a general rule that a person taking passage on a train forbidden by the rules of a railroad company to carry passengers, with knowledge of such rule, although by permission of an employee of the road, does not acquire the status of a passenger, entitling him to the degree of care and protection due a passenger. *San Antonio, etc., R. Co. v. Lynch* (Civ. App.), 40 S. W. 631; *Gulf, etc., R. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19; *Texas, etc., R. Co. v. Hayden*, 6 Tex. Civ. App. 745, 26 S. W. 331.

**Persons Riding on Freight Trains by Permission of Conductor or Brakeman.**—Where, by the rules of a railroad company, freight trains are forbidden to carry passengers, a conductor can not relax such rule without the consent of the company. *Gulf, etc., R. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19; *Texas, etc., R. Co. v. Black*, 87 Tex. 160, 161, 27 S. W. 118, reversing 27 S. W. 118; *Texas, etc., R. Co. v. Hayden*, 6 Tex. Civ. App. 745, 26 S. W. 331; *Grahn v. International, etc., R. Co.*, 100 Tex. 27, 93 S. W. 104; *Prince v. International, etc., R. Co.*, 64 Tex. 144.

Where the rules of a railroad company forbade persons being carried on freight trains, one who took passage on a freight train with knowledge of such rule was not a passenger, though he was riding on the train with the consent of the conductor. *Texas & P. Ry. Co. v. Hayden*, 6 Tex. Civ. App. 745, 26 S. W. 331.

That the conductor of a freight train on defendant's road accepted

fare from a person riding thereon does not render the company liable to him as a passenger, in the absence of evidence that the person was ignorant of a rule of the company forbidding passengers to ride on freight trains, or that freight trains were in the habit of carrying passengers on defendant's road. *St. Louis S. W. Ry. Co. v. White* (Civ. App.), 34 S. W. 1042, following *Texas & P. Ry. Co. v. Black* (1894) 87 Tex. 160, 27 S. W. 118.

Recovery can not be had for injury to one on a freight train, though the conductor consented to his riding thereon, if, when boarding it, he knew the company had a rule prohibiting passengers on freight trains, and that it was trying to enforce such rule, and prevent such carriage. *San Antonio & A. P. Ry. Co. v. Lynch* (Tex. Civ. App.), 40 S. W. 631.

A conductor of a freight train composed of cars suitable only for carrying freight can not without authority from the company receive passengers on the train and thereby render the company liable for the risk of transportation. *Texas & P. Ry. Co. v. Black*, 87 Tex. 160, 27 S. W. 118.

One must take notice of the fact that a train made up exclusively of freight cars is not for passengers. *Texas & P. Ry. Co. v. Black*, 87 Tex. 160, 27 S. W. 118.

Nor has a brakeman any implied authority to receive passengers on freight trains. *Texas, etc., R. Co. v. Black*, 87 Tex. 160, 161, 27 S. W. 118, reversing 27 S. W. 118; *Galaviz v. International, etc., R. Co.*, 15 Tex. Civ. App. 61, 38 S. W. 234; *Missouri, etc., R. Co. v. Huff*, 98 Tex. 110, 81 S. W. 523, reversing 78 S. W. 249.

A boy 12 years of age boarded a freight train by permission of a brakeman, to whom he paid 15 cents for a five-mile ride. The train was composed of an engine, flat car, and caboose, and the boy rode upon the flat car. It was not shown that the com-

pany allowed that train to carry passengers. Held, that the boy was not a passenger. *Texas & P. Ry. Co. v. Black*, 87 Tex. 160, 27 S. W. 118.

In an action against a carrier for personal injuries, where it appears that a freight train was forbidden to carry passengers, and the conductor so informed plaintiff, and told him he could not carry him, but a brakeman afterwards told him to get on, and he was injured while the train was being made up, it is error to refuse to charge that, if such were the facts, he can not recover, and that if the train was forbidden to carry passengers the conductor could not relax the rule without the consent of the company. *Gulf, C. & S. F. Ry. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19.

In an action against a railroad company by a boy who was knocked off of a freight train by a brakeman to whom he had paid his fare, it appeared that the company's rules forbade the carrying of passengers on freight trains. The court charged that if the conductor consented that the boy should ride thereon, or knew of his presence, and did not object, he could recover. Held, that the instruction was erroneous, as it allowed a recovery whether the boy knew of the rules or not, and whether the brakeman was acting within the scope of his employment or not. *Texas & P. Ry. Co. v. Hayden*, 6 Tex. Civ. App. 745, 26 S. W. 331.

A person upon the tender of a freight train, by the consent of the engineer and fireman, is not a passenger, and the rule of liability for injuries to such person is not that applied in the case of passengers. *International, etc., R. Co. v. Cooper*, 88 Tex. 607, 32 S. W. 517, reversing 30 S. W. 470.

**Persons Riding on Hand Cars by Permission of Employees.**—See post, "General Rule Stated and Applied," I, A, 2, a, (2), (b), aa.

Where employees of a railroad com-

pany permitted a person to ride on a hand car contrary to the rules of the company without payment of fare, such person did not occupy the relation of passenger to the company. *Gulf, Colorado & S. F. Ry. Co. v. Dawkins*, 77 Tex. 228, 13 S. W. 982.

**Persons Riding on Switch Engines at Invitation of Engineer.**—Where a rule of a railway company prohibits persons riding on the engines, a person, riding on a switch engine at the invitation of the engineer, who is aware that the engine is not intended for the carriage of passengers, can not hold the company liable for injuries to him as a passenger. *Wilcox v. San Antonio & A. P. Ry. Co.*, 11 Tex. Civ. App. 487, 33 S. W. 379.

**Persons Riding on Freight Boat by Consent of Employees.**—Since it takes a contract either express or implied to establish the relation of carrier and passenger, such relation was not created between the owners of a freight boat and a child whom the operatives of the boat had permitted to ride thereon, such operatives having been expressly forbidden to carry passengers on the boat and having no authority to bind the owners by a contract of carriage. *Cook v. Houston Direct Navigation Co.*, 76 Tex. 353, 13 S. W. 475.

In an action against a company owning a tug boat, where the petition alleges that defendant was a common carrier of passengers, and that the child of plaintiffs was killed while a passenger on the boat, an answer averring that the boat was not a passenger boat, and that the employees of the company were forbidden to carry any one as a passenger, is sufficient. *Cook v. Houston Direct Nav. Co.*, 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52.

**Right of Person Authorized by Conductor to Ride, to Invite Another to Ride with Him.**—The fact that one who was invited by the conductor of a train to ride on the engine, invited

deceased to ride with him on a box car of the train, did not make deceased a passenger on the train. *De Palacois v. Rio Grande & E. P. Ry. Co.* (Civ. App.), 45 S. W. 612.

**c. Question of Compensation Immaterial.**

Whether the public carrier of passengers receives an agreed compensation for the transportation of a person, is compensated therefor by the charge for the car, or for transportation of the property of which the person to be carried has charge, or receives no compensation whatever for the carriage of such person, is a matter of no importance in determining the existence of the relation of carrier and passenger. *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, 375, 15 S. W. 280; *Gulf, etc., R. Co. v. McGown*, 65 Tex. 640; *Texas, etc., R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 78 S. W. 548, affirmed in 98 Tex. 635, no op.

It is enough that a person is lawfully on the vehicle of the carrier and entitled to transportation to give him the character of passenger and to entitle him to recover for an injury resulting from the negligence of the carrier or its servants, if this occurs without fault on his part. *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, 375, 15 S. W. 280; *Texas, etc., R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 78 S. W. 548, affirmed in 98 Tex. 635, no op.

The same degree of care is required of a carrier toward passengers traveling free as toward those paying full fare. *Gulf, etc., R. Co. v. McGown*, 65 Tex. 640, 644.

Rules governing gratuitous bailments in reference to the degree of care incumbent on the bailee have no application to the relation of carrier and passenger. *Gulf, etc., R. Co. v. McGown*, 65 Tex. 640, 645.

The confidence induced by undertaking even a gratuitous service for another is a sufficient legal consideration to create a duty in its performance;

hence, a railway company is liable in damages for negligence which results to the injury of a passenger who is lawfully in its car, whether he is charged and pays his fare or not. *Prince v. International & G. N. Ry. Co.*, 64 Tex. 144.

Where, on the issue whether plaintiff, injured in a collision between trains, was a passenger on one of them, the evidence showed that arrangements were made with the local agent of the carrier and the conductor, permitting plaintiff to ride on the train without payment of fare, an instruction that if plaintiff made arrangements for his carriage as a passenger with the agents of the carrier authorized to make them, and plaintiff boarded the train for the purpose of being carried, believing that he had a right to do so, and he was permitted to ride without payment of the fare, and he was injured in a collision caused by the negligence of the carrier, he was entitled to recover, was not open to the objection that the evidence showed that he had no arrangements with any of the carrier's agents authorized to enter into the same, whereby he was entitled to be carried as a passenger. *St. Louis Southwestern Ry. Co. of Texas v. Fowler* (Civ. App.), 93 S. W. 484.

## **2. Presumptions and Proof as to Existence of Relation.**

### **a. Presumptions as to Status as Passenger or Trespasser.**

#### **(1) Persons Riding on Trains Usually Used to Carry Passengers.**

**In General.**—A person paying his fare or invited to ride on a train usually used to carry passengers is presumed to be lawfully on such train. *Prince v. International, etc., R. Co.*, 64 Tex. 144, 146.

Neither a carrier nor its employees can assume that a person on any car of a passenger train is a trespasser. (Civ. App.) *Missouri, K. & T. Ry. Co. of Texas v. Williams*, 40 S. W.

350, reversed 42 S. W. 855, 91 Tex. 255.

In a suit against a railroad company for personal injuries, the fact that the plaintiff had ridden on the platform of a baggage car to escape paying his fare, but afterwards went into the passenger coach and was injured before his fare was demanded, did not justify a charge upon the hypothesis that he was a trespasser on the train. *Fordyce v. Beecher*, 2 Tex. Civ. App. 29, 34, 21 S. W. 179.

Where there was evidence that one killed in a collision while on defendant's train had declared his intention to beat his way if he could get on the "blind baggage," and that he was riding there, unknown to defendant, when the accident occurred it was not error, in an action for his death, to refuse to charge that, "in the absence of evidence to the contrary," the law presumed him a passenger, and that the burden of establishing the contrary was on defendant. *Southerland v. Texas & P. Ry. Co.* (Tex. Civ. App.), 40 S. W. 193.

#### **(2) Persons Carried on Other than Passenger Trains.**

##### **(a) In Absence of Rules Forbidding Such Transportation.**

**In General.**—Where there are no rules forbidding the transportation of persons on other than cars generally devoted to passenger service, but passengers are sometimes taken upon such cars, a person who enters such cars as a passenger by invitation of the agents in charge of them, or with the intention of paying fare when demanded, is lawfully there, and is entitled to all the rights of a regular passenger. *Prince v. International, etc., R. Co.*, 64 Tex. 144.

##### **Persons Riding on Freight Trains.**

—In an action for death of an alleged passenger on a freight train, an instruction that, if deceased paid his fare to the conductor, and got on the train with his consent, he was a pas-



senger, and, if negligently killed, plaintiff could recover, fully presents the cause to the jury. *Crawleigh v. Galveston, H. & S. A. Ry. Co.*, 67 S. W. 140, 28 Tex. Civ. App. 260.

**(b) Where Transportation of Passengers Forbidden by Rules of Carrier.**

**aa. General Rule Stated and Applied.**

**General Rule.**—If, by the rules of the railroad company, passengers are expressly forbidden to be carried upon a particular train, the presumption is that any one claiming to be a passenger upon such a train is an intruder and without lawful right to be there. *Prince v. International, etc., R. Co.*, 64 Tex. 144; *International, etc., R. Co. v. Hanna* (Civ. App.), 58 S. W. 548 (see 94 Tex. 691, no op.).

**Persons Riding on Freight Trains.**

—Where it is proved that the conductor had no authority to relax a rule excluding passengers from freight trains, and that the person injured knew of the rule, the company will not be presumed to have contracted to carry him as a passenger, and no action can be maintained for the injury resulting in his death, caused by the wreck of the train. *Houston & T. C. Ry. Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98.

**Persons Riding on Work Trains.**

—A person, not an employee, riding on a work train in violation of a rule forbidding the carrying of passengers on work trains, is presumed to be a trespasser, and this presumption is not overcome by proof of any number of former trespassers having ridden thereon. *International & G. N. Ry. Co. v. Hanna* (Civ. App.), 58 S. W. 548.

**Persons Riding on Hand Cars.**

—One riding on a hand car contrary to express rules of a railway company is not a passenger, although ignorant of such rules, unless the carrying was done by authorized agent. *Gulf, etc., R. Co. v. Dawkins*, 77 Tex. 228, 231,

13 S. W. 982; *Prince v. International, etc., R. Co.*, 64 Tex. 144, 146.

Where plaintiff was injured by being thrown from a hand car on which he was riding at the invitation of one of defendant's servants, the evidence being conflicting as to the latter's authority, it is error to charge on the theory that he had the right to give defendant's consent to plaintiff's riding on the hand car. *International & G. N. R. Co. v. Cock*, 68 Tex. 713, 5 S. W. 635.

**bb. Presumption a Rebuttable One.**

The presumption that one riding on a train which is forbidden by the rules of the carrier to transport passengers is an intruder and not a passenger, may be rebutted by showing that notwithstanding the existence of such rule, yet, with the knowledge of the railroad company and without objection on its part, persons are habitually permitted to take passage upon such trains. *Prince v. International, etc., R. Co.*, 64 Tex. 144.

The company, through its proper officers, having the right to make these rules, may, through the same officers, relax or dispense with them, and the public are authorized to consider them as dispensed with, when not practically enforced. *Prince v. International, etc., R. Co.*, 64 Tex. 144.

Though a railway company had a rule prohibiting the carriage of passengers on its freight trains without special authority, where plaintiff did not know of such rule, and was on the train by consent of the conductor, and the company knew or should have known that this rule was generally violated and did not object, it was liable for his negligent injury. *St. Louis Southwestern Ry. Co. of Texas v. Morgan*, 98 S. W. 408, 44 Tex. Civ. App. 155.

Where passengers are forbidden to ride on a hand car they are presumed to be there unlawfully; this is rebuttable by showing a contrary custom.

*Prince v. International, etc., R. Co.*, 64 Tex. 144, 146.

Although the rules of a carrier prohibit a brakeman on freight trains from inviting passengers to board the same or collect fares, yet, if he exercises such authority with the knowledge of the company's officers, or has openly and habitually exercised it for such a length of time that the officers, by the exercise of ordinary care, might have known it, knowledge will be imputed to the company, and it will be responsible for such brakeman's acts. (Civ. App. 1903) *Missouri, K. & T. Ry. Co. of Texas v. Huff*, 78 S. W. 249, judgment reversed (1904) 81 S. W. 525, 98 Tex. 110.

Where a railroad company habitually permits passengers to travel on its freight trains, notwithstanding a rule prohibiting it, it is liable for their injury. *Houston & T. C. Ry. Co. v. Moore*, 49 Tex. 31.

#### b. Proof.

##### (1) Burden of Proof.

**In General.**—In *Domenico v. El Paso Elec. R. Co.* (Civ. App.), 90 S. W. 60, it was held that it was incumbent upon appellant to prove that he was a passenger upon one of appellee's cars before he could travel any further with his case.

In an action for injuries to a passenger, evidence held sufficient to show that plaintiff was not injured while a passenger on defendant's road. *Domenico v. El Paso Electric Ry. Co.* (Civ. App.), 90 S. W. 60.

In an action to recover for death of one riding on a freight train in violation of the company's rule forbidding the carrying of passengers on freight trains, the burden of showing that the attitude of the company assumed towards the deceased was that of a carrier of passengers was on the plaintiff. *San Antonio & A. P. Ry. Co. v. Lynch* (Civ. App.), 55 S. W. 517.

One claiming that he was injured

while riding on a freight train as a passenger must show that the railway company allowed such trains to carry passengers. *Texas & P. Ry. Co. v. Black*, 87 Tex. 160, 27 S. W. 118.

Where passengers are forbidden on freight trains and there are no cars attached to the trains except freight cars, the burden of proving that the injured person was justified in riding thereon is on the party claiming damages for his injury. *Houston & T. C. Ry. Co. v. Moore*, 49 Tex. 31.

**Burden of Proof to Show Authority of Employees to Allow Persons on Train.**—In *International, etc., R. Co. v. Cock*, 68 Tex. 713, 5 S. W. 635, there was no dispute as to appellee having the consent of the appellant to ride on a hand car, but it was denied that such servant had any authority to give appellant's consent for him to do so, and there was evidence tending to support this view of the case. It was held that the district court erred in holding as a matter of law, under the facts of the case, that appellee had the consent of appellant to ride upon a hand car, but that it should have been left to the jury, under appropriate instructions, to determine the status of appellee in connection of said car.

Where plaintiff took passage on defendant's freight train under an agreement with the brakeman, and did not ride in the caboose, but on a coal car, it was not to be presumed that the brakeman had authority to make such agreement, or that plaintiff acquired the relation of passenger by getting on the car, but the burden was on plaintiff to prove such facts. Judgment (Civ. App. 1903) 78 S. W. 249, reversed. *Missouri, K & T. Ry. Co. of Texas v. Huff*, 81 S. W. 525, 98 Tex. 110.

##### (2) Admissibility and Sufficiency.

**Admission of Testimony That Deceased Was "Riding as a Passenger."**

—Where the expression that deceased was riding "as a passenger" on a train

was used by witness in its ordinary, and not its legal, sense, for want of a better word to distinguish between the train crew and others being transported thereon, its admission was not error. *San Antonio & A. P. Ry. Co. v. Lynch* (Civ. App.), 55 S. W. 517.

**Age and Discretion Admissible as Determining Good Faith of Plaintiff.**

—In an action against railroad for damages sustained by a boy by being knocked by a brakeman from car on which he was riding by the brakeman's consent, in violation of a rule of the railroad forbidding the carrying of passengers on a freight train, the age and discretion of the boy should be considered in determining whether he got on the train in good faith believing he had the right to do so. *Texas, etc., R. Co. v. Hayden*, 6 Tex. Civ. App. 745, 750, 26 S. W. 331.

**Evidence Held to Show Plaintiff's Knowledge of Employees' Want of Authority.**

—A conductor of a freight train collusively agreed to carry plaintiff without payment of fare. Plaintiff testified that he did not know the rules of the road, and thought that he had a right to ride on the train, and added that he would have preferred to go on a passenger train if he could have gone for the same money. Plaintiff was 19 years of age, and the conductor permitted him to ride on the payment of a nominal sum for the conductor's use. Held to authorize the court to assume as a matter of law that plaintiff knew that the conductor had no authority to allow him to ride on the train as a passenger. *Grahn v. International & G. N. R. Co.*, 100 Tex. 27, 93 S. W. 104, 5 L. R. A. (N. S.) 1025.

**Evidence as to Payment of Fare.**

—Where, in an action for death of an alleged passenger on a freight train, plaintiff's only witness as to payment of fare to the conductor is not corroborated, though she states another person, who is in attendance on court,

was present, and such other person is not examined, and witness' testimony is discredited, a finding that deceased was not a passenger must be sustained. *Crawleigh v. Galveston, H. & S. A. Ry. Co.*, 67 S. W. 140, 28 Tex. Civ. App. 260.

**Evidence of Relaxation or Abrogation of Rules—In General.**

—An issue as to whether a rule forbidding the carrying of passengers on freight trains had been so generally disregarded that the public had the right to conclude that it had been abrogated could be determined only by inquiring as to the practice generally, and not at any particular time. *Houston, E. & W. T. Ry. Co. v. Norris* (Tex. Civ. App.), 41 S. W. 708.

It being alleged by plaintiff that the rule of defendant forbidding the carrying of passengers on its freight trains was habitually violated, and the evidence showing that the rule was promulgated several years before plaintiff's husband was killed while riding on a freight train, evidence of persons having so ridden at times varying from six months to three years previous to the accident is admissible. *San Antonio & A. P. Ry. Co. v. Lynch* (Civ. App.), 55 S. W. 517.

**Evidence Insufficient to Show Abrogation of Rules.**

—Repeated violations of a rule of a railroad company forbidding the carrying of passengers on freight trains, and failure to publish and practically enforce same, are mere facts to be considered by the jury in determining whether a reasonably prudent person would have concluded that the rule had fallen into disuse. Hence it was error for the court to charge that any particular state of facts would authorize persons to believe that same had been abrogated, or had been permitted to fall into disuse, but the issue should have been left to the jury. *San Antonio & A. P. Ry. Co. v. Lynch* (Civ. App.), 55 S. W. 517.

Defendant company had, six months before the accident complained of, posted notices forbidding conductors of freight trains to carry passengers, under penalty of discharge, in most of its cabooses and passengers depots, and in the caboose in which plaintiff's husband was killed. Defendant's superintendent of transportation testified that he had tried to detect violations, and two conductors had been discharged therefor. Its station agents were also charged with a similar duty, and one of them looked into the caboose in question, in compliance with such duty, but saw no one except those entitled to ride therein. Held, that the rule had not been abrogated by the company. *San Antonio & A. P. Ry. Co. v. Lynch* (Civ. App.), 55 S. W. 517.

No inference would arise that a brakeman on a freight train had authority to agree to carry passengers merely because his employer knew that such acts were done, as they might be done while the company was endeavoring to enforce rules forbidding such acts. Judgment (Civ. App. 1903) 78 S. W. 249, reversed. *Missouri, K. & T. Ry. Co. of Texas v. Huff*, 81 S. W. 525, 98 Tex. 110.

In an action for personal injuries, the court instructed that if a carrier of passengers was using for its purposes the kind of freight train which plaintiff boarded, and if plaintiff paid his fare to a brakeman, and was authorized by him to board the train, though the brakeman had no express authority, and if the conductor had no knowledge of plaintiff's presence, but the carrier's brakeman had been exercising such authority for so long that the carrier should have known it, then "plaintiff had the right to presume that such servant was authorized to perform such duties." Held erroneous, for authorizing such presumption, especially in view of evidence tending to show that plaintiff was informed

that the brakeman was acting without authority. Judgment (Civ. App. 1903) 78 S. W. 249, reversed. *Missouri, K. & T. Ry. Co. of Texas v. Huff*, 81 S. W. 525, 98 Tex. 110.

The instruction was erroneous for excluding from consideration evidence that such course of conduct was difficult to suppress, and was pursued in spite of efforts to suppress it. Judgment (Civ. App. 1903) 78 S. W. 249, reversed. *Missouri, K. & T. Ry. Co. of Texas v. Huff*, 81 S. W. 525, 98 Tex. 110.

Where defendant claimed that a person who was injured while riding in a freight train was so riding contrary to a regulation prohibiting the carriage of passengers in such trains, defendant was entitled to an instruction exempting it from liability for such injury if reasonable efforts had been used to enforce such regulation, and prevent its violation, though it had been occasionally or even frequently disregarded. *Houston, E. & W. T. Ry. Co. v. Norris* (Tex. Civ. App.) 41 S. W. 708.

Plaintiff's husband was killed while riding on defendant's work train in violation of a rule forbidding the carrying of passengers on work trains. Deceased was not an employee, but had voluntarily assisted in loading some ties before boarding it. The conductor saw him in the caboose, but, having observed him assisting in loading the ties, supposed he was one of the tie men, and said nothing to him, and he said nothing to the conductor. Persons had frequently ridden on the train before, in violation of the rule, and one had paid a conductor 25 cents fare on a freight or work train five or six years before the trial. With one exception, none of plaintiff's witnesses testified that they were specially authorized to ride on the train. Defendant's evidence showed that conductors had never knowingly allowed any one to ride on work trains who was not entitled to do so, that every

effort was made by the proper officers of the company to enforce the rule, and that they did not know it was violated; and there was no evidence that the death was caused by the willful, intentional act of defendant. Held, that defendant was not liable, since the evidence showed that it used reasonable efforts to enforce the rule, and that deceased was a trespasser on the train when injured. *International & G. N. Ry. Co. v. Hanna* (Civ. App.), 58 S. W. 548.

**Evidence Held Insufficient to Show Collusion between Plaintiff and Brakeman.**

Plaintiff was ordered off a freight train by a brakeman, who had consented that he should ride, having accepted the regular fare. Plaintiff refused to go, when the brakeman knocked him off. In an action for the injuries resulting, defendant went to trial under a general denial. Plaintiff testified that he had no knowledge of a rule forbidding trainmen to permit persons to ride on freight trains. He had frequently seen persons riding on such trains. During the pain caused by the injury he stated that he had been knocked off after he had paid his fare. Defendant's evidence was almost wholly directed to show that the brakeman had no authority to eject trespassers. The brakeman did not testify. On appeal defendant contended that plaintiff rode through collusion with the brakeman to defraud the company. Held, that the evidence did not support such defense. *Texas & P. Ry. Co. v. Black*, 57 S. W. 330, 23 Tex. Civ. App. 119.

**3. Existence of Relation as Question for Jury.**

**In General.**—Whether a person injured in a collision between two trains was a passenger on one of them, and entitled to the protection of a passenger, held, under the evidence, for the jury. *St. Louis Southwestern Ry. Co. of Texas v. Fowler* (Civ. App.), 93 S. W. 484.

Where plaintiff took passage on defendant's freight train under an agreement with the brakeman, and did not ride in the caboose, but on a coal car, in an action for personal injuries it was not sufficient to submit merely the question as to whether one taking passage on such train in good faith might become a passenger, but there should have been a submission as to whether plaintiff acquired that relation. Judgment (Civ. App. 1903) 78 S. W. 249, reversed. *Missouri, K. & T. Ry. Co. of Texas v. Huff*, 81 S. W. 525, 98 Tex. 110.

It is for the jury to determine from the evidence under an appropriate charge, where a child of tender years is injured while in a freight car of the defendant company (appellant) whether he was rightfully on the cars, as alleged, or was there merely as a trespasser. *Mexican Nat. R. Co. v. Crum*, 6 Tex. Civ. App. 702, 25 S. W. 1126.

In a suit against a railway company for damages for personal injuries inflicted on a deceased husband, who, it was alleged, was a passenger on defendant's train when his injuries were received through its alleged negligence, there was conflicting testimony as to whether the deceased was a passenger or not. It was held that, from the character of the case—the injury complained of having been caused by the negligence of a servant of the company—it was the duty of the court to give in charge to the jury the law by which, under the evidence, it could be determined what relation the deceased bore to the company when his injuries were received—whether he was passenger or servant. *Texas, etc., R. Co. v. Scott*, 64 Tex. 549.

In an action against a railroad company for injuries to plaintiff while riding on a freight car it was error to refuse to submit to the jury an issue as to whether plaintiff was on the car by the implied or express invitation of defendant where there was evidence

authorizing such submission. *Mexican Nat. Ry. Co. v. Crum*, 6 Tex. Civ. App. 702, 25 S. W. 1126.

In a personal injury suit against a carrier, when it is conceded that the plaintiff was a passenger, the court should not submit that as an issue to the jury. *Davis v. Missouri, etc., R. Co.*, 17 Tex. Civ. App. 199, 201, 43 S. W. 44.

**Immaterial That Person Was Received and Treated by Conductor as a Passenger.**—On the question whether one injured by a railroad accident was a passenger or a servant of the company, held, that the fact that the conductor of the train received and treated him as a passenger was of no consequence. *Texas & P. Ry. Co. v. Scott*, 64 Tex. 549.

**Relaxation or Abrogation of Rules.**—Where the jury are to determine whether a certain rule has been so generally disregarded as to authorize the belief that it has been abrogated, it is improper to instruct that such rule might be regarded as abrogated if it has not been "kept in full force and effect." *Houston, E. & W. T. Ry. Co. v. Norris* (Tex. Civ. App.) 41 S. W. 708.

Where the evidence that a certain rule had been established was contradicted, and there was no evidence of any positive act abolishing it, a charge requiring the jury to determine whether the "company had no such rule," or whether, in case such rule had been established, "the same had been abrogated by positive act of the company," submitted questions not raised by the evidence. *Houston, E. & W. T. Ry. Co. v. Norris* (Tex. Civ. App.) 41 S. W. 708.

## B. APPLICATIONS OF RULES TO PARTICULAR PERSONS OR CLASS OF PERSONS.

### 1. Postal Employees.

Under the general rule just laid down it has been uniformly held that employees of the postoffice depart-

ment riding in the mail car, in the performance of their duties, are passengers, and entitled to the care required to be exercised in the transportation of passengers. *Houston, etc., R. Co. v. Hampton*, 64 Tex. 427; *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, 375, 15 S. W. 280; *Texas, etc., R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 78 S. W. 548, affirmed in 98 Tex. 635, no op.; *Houston, etc., R. Co. v. McCullough*, 22 Tex. Civ. App. 208, 55 S. W. 392, affirmed in 93 Tex. 731, no op.; *International, etc., R. Co. v. Davis*, 17 Tex. Civ. App. 340, 43 S. W. 540, affirmed in 93 Tex. 710, no op.; *Sproule v. St. Louis, etc., R. Co.* (Civ. App.), 91 S. W. 657.

To establish a liability of a railroad company for injuries to a United States mail clerk, it is not necessary to show a written contract to carry mail between the company and the United States. *International & G. N. Ry. Co. v. Davis*, 43 S. W. 540, 17 Tex. Civ. App. 340.

### 2. Express Agents or Messengers.

Express agents or messengers, while in the performance of their duties on the conveyance of a common carrier, are passengers. *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, 375, 15 S. W. 280; *Texas, etc., R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 78 S. W. 548, affirmed in 98 Tex. 635, no op.

An express messenger riding in a baggage car is entitled to the same care as a passenger, so far as is consistent with his position in such car. *San Antonio & A. P. Ry. Co. v. Adams*, 6 Tex. Civ. App. 102, 24 S. W. 839.

### 3. Employees of News Companies.

In *Mexican Cent. R. Co. v. Mitten*, 13 Tex. Civ. App. 653, 36 S. W. 282, affirmed in 93 Tex. 714, no op., the newsboy on the train of appellant was considered to be a passenger thereon, arrangement having been made by his employees with appellant by which he was transported between certain points named from time to time.

See, also, Texas, etc., *R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 228, 78 S. W. 548, affirmed in 98 Tex. 635, no op.

#### 4. Persons Riding on Free Passes or Drover's Passes.

**In General.**—It has been uniformly held that persons riding on free passes or drover's passes are passengers, and entitled to care and protection as such. *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, 375, 15 S. W. 280; Texas, etc., *R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 78 S. W. 548, affirmed in 98 Tex. 635, no op.

And this too, whether such persons ride on passenger trains or on freight trains. *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, 375, 15 S. W. 280; Texas, etc., *R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 78 S. W. 548, affirmed in 98 Tex. 635, no op.

The liability of the carrier of passengers does not depend on the fact that compensation for the passenger has been paid to it, but the same degree of care is incumbent on the carrier in the case of a passenger traveling on a free pass as in the case of one paying full fare. *G., C. & S. F. Ry. Co. v. McGown*, 65 Tex. 640.

Plaintiff, having been sent a pass by one of defendant's officers that he might begin a contemplated employment as a bridge carpenter for defendant, boarded one of defendant's trains. After the conductor had first accepted the pass, he asked plaintiff to see it again, and then in the presence of others refused to return it, saying he had orders to take it up, and after demanding that plaintiff pay his fare said: "You s— of a b—, this pass does not belong to you." Held, that plaintiff was a passenger at the time, and that, if he was injured by the conductor's misconduct, the carrier was liable therefor. *St. Louis Southwestern Ry. Co. of Texas v. Hill* (Civ. App.), 103 S. W. 227.

A railroad company is liable to a passenger for hire, on a freight train,

who accompanied cattle, for the negligence of itself and its servants, resulting in personal injury, and to his personal representative, if his death was caused by the gross negligence of the company or its servants. *Missouri Pacific Railway Co. v. Ivy*, 71 Tex. 409, 9 S. W. 346.

A minor received as a passenger by a railway conductor, with knowledge that he had a "drover's pass," providing that minors should not be permitted to travel on such a pass as assistants to the drover, may recover against the company for injuries caused by its negligence, the same as any other passenger. *Texas & P. Ry. Co. v. Garcia*, 62 Tex. 285.

One accompanying stock as an attendant, with the consent of the agent of the express company which was transporting the stock and of the conductor of the train, was a passenger, and entitled to protection as such, although his name did not appear on the written contract as an attendant who was to accompany the stock. *American Exp. Co. v. Ogles*, 81 S. W. 1023, 36 Tex. Civ. App. 407.

Where, in an action for injuries to a passenger being transported in an express car with race horses, there was evidence that the owner, after making the contract of transportation, notified the agent that he intended to take plaintiff with the horses instead of another servant, to which the agent assented, a special charge that if the contract of transportation did not contemplate the carriage of plaintiff, and if he was on the car without the knowledge or consent of the railway company, he was not entitled to recover, was properly refused. *Gulf, C. & S. F. Ry. Co. v. Carter*, 71 S. W. 73, affirmed in 97 Tex. 634, no op.

Where a contract with a railroad company for shipping cattle stipulated that the owner should send a helper with the train to look after the cattle, and that such employee of the owner

was an employee of the railroad company and assumed the risks of injury, such employee was in fact a passenger for hire, and entitled to the care due any other passenger on a freight train. *Missouri Pacific Railway Co. v. Ivy*, 71 Tex. 409, 9 S. W. 346.

A shipper of stock given a pass to accompany the same is a passenger, entitled to recover of the carrier for injury through negligence of employees, notwithstanding stipulation in contract that he feed and water his stock, and during the passage be deemed an employee of the company, and assume all risks incident to his employment. *St. Louis S. W. Ry. Co. v. Nelson* (Civ. App.), 44 S. W. 179, affirmed in 93 Tex. 718, no op.

A provision in a contract of shipment of live stock that the shipper, to whom a shipper's pass on the same train was given, should feed and water the animals on the way, is not void as an attempt by the carrier to relieve itself of its duty in that respect, but is a license to the shipper to look after his stock; and he does not, by exercising such license, lose his status as a passenger, so as to preclude him from recovering for injuries, while so engaged, caused by the carrier's negligence. *Receivers International & G. N. Ry. Co. v. Armstrong*, 4 Tex. Civ. App. 146, 23 S. W. 236.

In an action for injuries to a person accompanying stock in transit, where there was evidence that defendant's agent and the conductor of the train consented to plaintiff riding as an attendant of the stock, it was proper to admit testimony that no one complained to plaintiff as to his presence on the car. *American Exp. Co. v. Ogles*, 81 S. W. 1023, 36 Tex. Civ. App. 407.

An owner of a car load of live stock, carried under a contract giving him the right to one free transportation, does not forfeit his rights as a passenger by taking an assistant with

him, where he tells the conductor to eject the assistant if the latter has no right there, and the conductor fails to do so. *Missouri Pac. Ry. Co. v. Aiken*, 71 Tex. 373, 9 S. W. 437.

**Effect of Fraudulent Representation as to Pass.**—Where a woman is carried without paying fare, on the false representation of the holder of a pass that she is the pass holder's wife, if she be cognizant of the fraud, the company is not bound to exercise extraordinary care for her safety. *Handley v. Houston & T. C. Ry. Co.*, 2 Posey, Unrep. Cas. 282.

#### 5. Employees of Railroad Traveling by Direction of Employer.

An employee of a railroad company, traveling on a train, pursuant to a direction of the company, is entitled to protection as a passenger. *Johnson v. Texas Cent. R. Co.*, 42 Tex. Civ. App. 604, 93 S. W. 433.

#### 6. Policemen Riding on Street Cars.

A special policeman riding on a street car which he had boarded believing in good faith that he had a right to ride free, policemen being permitted to do so by the rules of the company, was entitled to the rights of a passenger though he had paid no fare, when none was demanded and he was ready to pay on demand. *Denison, etc., R. Co. v. Johnson*, 36 Tex. Civ. App. 115, 81 S. W. 780, affirmed in 98 Tex. 614, no op. See, generally, the title STREET RAILROADS.

#### 7. Soldiers Transported under Special Contract with Government.

In an action against a railroad company for wrongful death, the facts that the train on which intestate was riding was a special train of soldiers transferred from another road, and that defendant was transporting the train under a special contract to furnish the government with motive power and a train crew, did not affect plaintiff's right to recover. *Galveston, H. & S. A. Ry. Co. v. Parsley*, 6 Tex. Civ. App. 150, 25 S. W. 64.



### 8. Persons Entering Conveyance of Carrier Intending to Pay for Passage.

**In General.**—It has been held in a number of decisions that the relation of carrier and passenger exists between a carrier and a person who, without having purchased a ticket, enters a conveyance of such carrier, with the bona fide intention and the ability to pay his fare when called upon. *International, etc., R. Co. v. Hassell*, 62 Tex. 256; *Missouri, etc., R. Co. v. Williams*, 91 Tex. 255, 42 S. W. 855, reversing 40 S. W. 350; *Dallas, etc., R. Co. v. Payne*, 98 Tex. 211, 82 S. W. 649, reversing 78 S. W. 1085; *Fordyce v. Beecher*, 2 Tex. Civ. App. 29, 21 S. W. 179; *Missouri, etc., R. Co. v. Simmons*, 12 Tex. Civ. App. 500, 510, 33 S. W. 1096 (see 93 Tex. 691, no op.); *Denison, etc., R. Co. v. Johnson*, 36 Tex. Civ. App. 115, 81 S. W. 780, affirmed in 98 Tex. 614, no op. See, also, *Galveston, etc., R. Co. v. Snead*, 4 Tex. Civ. App. 31, 23 S. W. 277; *St. Louis, etc., R. Co. v. Fussell* (Civ. App.), 97 S. W. 332.

If a person has the money with which to pay his fare upon the defendant's car and, intending to pay the fare and become a passenger, enters the car and takes his place upon that portion of it which was provided for carrying passengers, he thereby becomes a passenger, although the conductor of the car does not reach him in the course of collecting the fares. *Dallas, etc., R. Co. v. Payne*, 98 Tex. 211, 82 S. W. 649, reversing 78 S. W. 1085.

One who enters a passenger car of a railway company in a train which is made up for its usual run, and when the cars are prepared for the reception of passengers (though not drawn up to the station platform), intending to ride in such car to another station, and having the money with which to pay his fare to the conductor, which he may legally do, and intends to do,

is a passenger. *Missouri, K. & T. Ry. Co. v. Simmons*, 12 Tex. Civ. App. 500, 33 S. W. 1096.

Evidence that a person who was on a train at the time of an accident thereto, sitting among the passengers, without any attempt at concealment, was on the train without the knowledge or consent of the conductor, does not show her to have been a trespasser, though at the station, before boarding the train, the conductor had refused her request that she be carried free, as the wife of an employee of the road. *Galveston, H. & S. A. Ry. Co. v. Snead*, 4 Tex. Civ. App. 31, 23 S. W. 277.

**As to allowance of reasonable time to pay fare on demand**, see post, "Allowance of Reasonable Time for Compliance with Demand," V, D, 15, a, (3), (b).

### Persons Taking Passage on Part of Train Not Intended for Passengers.

One who enters the coach of a railroad train without first procuring a ticket as required by the rules of the company, but goes to a part of the train which is not intended for the carriage of passengers, does not become a passenger. *Dallas Rapid Transit Co. v. Payne*, 98 Tex. 211, 82 S. W. 649.

A person who boarded a passenger train, able and intending in good faith to pay his fare, was a passenger, though in his hurry, the train being already in motion, he got on the front platform of an express car, which the conductor could not reach without stopping the train. (Civ. App.) *Missouri, K. & T. Ry. Co. of Texas v. Williams*, 40 S. W. 350, reversed 42 S. W. 855, 91 Tex. 255.

One entering a car with the intention of paying fare when called upon, and occupying a place provided for carrying passengers, becomes a passenger by such act; but not where he takes position in a part of the car not provided for carrying passengers, as

upon the steps or running board of a street car which has unoccupied seats inside. *Missouri, etc., R. Co. v. Williams*, 91 Tex. 255, 42 S. W. 855, reversing 40 S. W. 350, followed in *San Antonio Traction Co. v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015, distinguished. *Dallas, etc., R. Co. v. Payne*, 98 Tex. 211, 82 S. W. 649, reversing 78 S. W. 1085.

The mere fact that a person rides on the platform of a train to avoid paying his fare does not deprive him of the right to become a passenger if he pays the regular fare when demand is made, and commits no breach of the peace; and where, in such case, the conductor of the train, before demanding fare of such person, assaults and ejects him from the train, the company will be liable for any injuries he may sustain. *Fordyce v. Beecher*, 2 Tex. Civ. App. 29, 21 S. W. 179.

Under *Sayles' Civ. St. art. 4258b, § 9*, fixing the rates to be charged by railroads for carrying passengers when the fare is paid to the conductor, one who in good faith boards a passenger train without a ticket, intending to pay his fare to the conductor, becomes a passenger. *Houston & T. C. R. Co. v. Washington (Civ. App.)*, 30 S. W. 719.

#### **9. Persons in Good Faith Attempting to Ride on Invalid Ticket.**

One who entered a train having a ticket which he believed to be good and to entitle him to ride on the train was not a trespasser, and was entitled to be treated as a passenger until he was notified that his ticket was not good and he refused to pay his fare. *Gulf, C. & S. F. Ry. Co. v. Bunn*, 41 Tex. Civ. App. 503, 95 S. W. 640.

#### **10. Persons Entering Wrong Conveyance by Mistake.**

It would seem to be well settled that a person who, by mistake, gets on a passenger train other than the one upon which he intended to take passage, is nevertheless a passenger

upon the train he is on, and the relation of passenger and carrier exists between him and the company. *International, etc., R. Co. v. Gilbert*, 64 Tex. 536, 540; *Gary v. Gulf, etc., R. Co.*, 17 Tex. Civ. App. 129, 42 S. W. 576; *Gulf, etc., R. Co. v. Rather*, 3 Tex. Civ. App. 72, 21 S. W. 951, affirmed in 93 Tex. 685, no op.; *St. Louis, etc., R. Co. v. Pruitt (Civ. App.)*, 79 S. W. 598, affirmed in 98 Tex. 630, no op.

One who, having a ticket, by mistake boards a train of the company going in the opposite direction from his destination, is nevertheless a passenger on that train, and not a trespasser. *Gary v. Gulf, C. & S. F. Ry. Co.*, 42 S. W. 576, 17 Tex. Civ. App. 129.

Where a passenger contracted for a ticket over the route he was travelling on when removed from the train, but by mistake was given a ticket over a different route, when the mistake was discovered the company was not justified in treating the passenger as a trespasser, and refusing him the right to continue his journey by that train, but should have given him a reasonable opportunity, when the train stopped, to purchase other tickets. *Gulf, C. & S. F. Ry. Co. v. Rather*, 3 Tex. Civ. App. 72, 21 S. W. 951.

In *International, etc., R. Co. v. Gilbert*, 64 Tex. 536, 539, the conductor, in response to a question from a woman, whether or not she was on the right train, without looking at her ticket, instructed her to keep her seat. This was held to be negligence, rendering the company liable for her subsequent expulsion from the train.

Generally, where a passenger by mistake boards the wrong train, it is the duty of the railroad to return him to the place where the mistake occurred, or to leave him at some point where he will not be subjected to any serious annoyance, and to return him to the place where he took the wrong train by the first returning train. (Civ.

App.) *St. Louis Southwestern Ry. Co. v. Pruitt*, 79 S. W. 598, writ of error denied (Sup.) 80 S. W. 72, 97 Tex. 487.

Where a passenger informed the conductor of her destination and route, and was told by him that his was the train which she was to take, and he helped her to board the same, but when he saw her ticket, after the train had started, discovered that she was on the wrong train, and compelled her to get off at the next station, in spite of her advanced age, her protests that she had no money, and her information that if he would carry her to a point some 6 miles distant she would be subjected to no inconvenience, as she had friends and relatives there, whereas by being compelled to get off at the next station she was greatly delayed and caused much suffering and anguish, on account of lack of accommodations, hunger, etc., the duty of the railroad was not discharged by causing the passenger to get off at the next station, and permitting her to return without charge to the place where she got on, but it was the railroad's duty to carry her to the station where her friends and relatives were. (Civ. App.), *St. Louis Southwestern Ry. Co. v. Pruitt*, 79 S. W. 598, writ of error denied (Sup.), 80 S. W. 72, 97 Tex. 487.

### C. COMMENCEMENT, DURATION AND TERMINATION OF RELATION.

#### 1. Commencement of Relation.

##### a. In General.

When a person on a train pays his fare to a destination on the company's line, he becomes a passenger. *Houston, etc., R. Co. v. Batchler*, 37 Tex. Civ. App. 116, 83 S. W. 902, affirmed in 101 Tex. 641, no op.

##### b. Persons on Premises of Carrier Awaiting Transportation.

**In General.**—A person who has entered the depot of a railroad company and procured a ticket becomes a pas-

senger. *Houston, etc., R. Co. v. Philio*, 96 Tex. 18, 69 S. W. 994, reversing 67 S. W. 915.

Ordinarily, when one goes to a railroad station to take the next train, he becomes in contemplation of law a passenger, whether he has actually bought a ticket or not, provided he goes within a reasonable time before the schedule time for the departure of the train. *Texas, etc., R. Co. v. Griggs* (Civ. App.), 106 S. W. 411; *Texas, etc., R. Co. v. Jones* (Civ. App.), 39 S. W. 124, affirmed in 93 Tex. 674, no op.

In an action against a railroad company for false imprisonment, plaintiff claimed that he entered defendant's waiting room, and received from its agent a ticket, paying valid silver coin therefor; that the agent thereafter caused the town marshal to arrest plaintiff on the charge of passing counterfeit money; and that such agent, acting with said marshal, falsely imprisoned plaintiff for six hours. Held, that if, before said arrest, plaintiff had gone to defendant's waiting room with the intent to procure a ticket and take passage on defendant's train at the first opportunity, and had placed himself in the care of defendant and its servants, preparatory to taking passage on its train, plaintiff would be a passenger. *St. Louis S. W. Ry. Co. of Texas v. Franklin* (Civ. App.), 44 S. W. 701.

Plaintiff, a married woman, while traveling alone with her baby, was transferred to a station of defendant's railway, over which she had a valid ticket, purchased from a connecting line, and which included her transfer from one road to the other. The station was kept open at all times, both day and night, for the use of passengers; and plaintiff remained there to await her train, which would not arrive for 10 hours, with the assent of defendant's agent. While alone in the waiting room at night, she was as-

saulted by defendant's night agent. Held, that she was a passenger, and that defendant was liable for the act of its employee. *St. Louis S. W. Ry. Co. of Texas v. Griffith*, 12 Tex. Civ. App. 631, 35 S. W. 741.

A woman who enters a railroad station with the intention of becoming a passenger may recover damages for mental suffering caused by abusive language addressed to her by the wife of the station agent, in his hearing, and without his interference. *Texas & P. Ry. Co. v. Jones* (Tex. Civ. App.), 39 S. W. 124.

The presence of a person in the waiting room of a railroad station about train time is notice to the company's agents of his intention to become a passenger. *Texas & P. Ry. Co. v. Jones* (Tex. Civ. App.), 39 S. W. 124.

**Arrival at Station Must Be within Reasonable Time before Schedule Time for Departure of Train.**—To constitute one a passenger by reason of the fact of having gone to a railway station with the intention of taking its next train, whether he has actually bought his ticket or not, he must have gone to the station within a reasonable time before the schedule time for the departure of the train upon which he desires to take passage. *Texas, etc., R. Co. v. Griggs* (Civ. App.), 106 S. W. 411.

If his arrival at the station is not within a reasonable time before the scheduled time for the departure of such train, the carrier, until such reasonable time arrives, owes him no duty save such as it owes to a licensee; that is, to so conduct its business as not to purposely or recklessly injure him. *Texas, etc., R. Co. v. Griggs* (Civ. App.), 106 S. W. 411.

#### c. Persons Boarding Conveyance with Intention of Taking Passage.

**In General.**—When a person is engaged in proper acts in an effort to board the conveyance of a carrier of

passengers, the relation of carrier and passenger may be said to have commenced, and the carrier owes such person the same degree of care as when upon the conveyance of the carrier. *Johnson v. Texas Cent. R. Co.*, 42 Tex. Civ. App. 604, 93 S. W. 433; *San Antonio, etc., R. Co. v. Turney*, 33 Tex. Civ. App. 626, 78 S. W. 256, affirmed in 98 Tex. 631, no op.; *Green v. Houston Elec. Co.*, 40 Tex. Civ. App. 260, 58 S. W. 442. See, also, *Ft. Worth, etc., R. Co. v. Davis*, 4 Tex. Civ. App. 351, 23 S. W. 737; *Gulf, etc., R. Co. v. Butcher*, 83 Tex. 309, 18 S. W. 583; *Houston, etc., R. Co. v. Dotson*, 13 Tex. Civ. App. 73, 38 S. W. 642, affirmed in 93 Tex. 686, no op.; *Texas, etc., R. Co. v. Mayfield*, 23 Tex. Civ. App. 415, 417, 56 S. W. 942, affirmed, no op.; *Texas, etc., R. Co. v. Brown* (Civ. App.), 58 S. W. 44.

A carrier owes the same degree of care to a passenger while he is boarding a train at any point on its premises where its act has made it necessary or proper for him to go as it owes after he has boarded the train. *San Antonio & A. P. Ry. Co. v. Turney*, 78 S. W. 256, 33 Tex. Civ. App. 626.

A woman carrying a child was a passenger while she was in the act of climbing up the steps of the coach with a view of taking passage on the train. *International & G. N. Ry. Co. v. Milliken*, 10 Tex. Civ. App. 663, 32 S. W. 152, affirmed in 93 Tex. 643.

A person in the act of getting on a street car, and before he has got entirely in the car, is a passenger, imposing on the servants in charge of the car the duty of exercising such a degree of foresight as to possible dangers and such a degree of prudence in guarding against them as would be used by very prudent and competent person under similar circumstances. *Green v. Houston Electric Co.*, 89 S. W. 442, 40 Tex. Civ. App. 260.

When a person desiring to become a passenger on a street car stations him-

self at a place where the cars are accustomed to receive passengers, and signals or calls to the motorman of an approaching car to stop the car, and such signal is seen by the motorman, and the car slows up, an acceptance of the offer to become a passenger will be implied from the act of the motorman; and such person is entitled to be regarded as a passenger while in the act of getting on the car, though he attempts to board the car before it comes to a full stop, and irrespective of whether the motorman intended to stop the car for the purpose of allowing him to get on. *Lewis v. Houston Electric Co.*, 88 S. W. 489, 39 Tex. Civ. App. 625.

**Persons Entering Conveyance Prior to Time of Departure.**—Where a coach was placed near the station for persons to go on board in the evening to await the train, which was to leave several hours later in the night, persons taking passage on such train became passengers on entering such car under the direction of the carrier's agent. *Missouri, K. & T. Ry. Co. of Texas v. Byrd*, 89 S. W. 991, 40 Tex. Civ. App. 315.

**Passengers Not Required to Wait for Express Invitation to Enter Car.**—An instruction in an action for personal injuries received while trying to board a train standing ready for passengers, that, if no signal had been given and no invitation extended by a servant of the railroad to passengers to get aboard the train, plaintiff could not recover, was erroneous, as passengers are not required to wait for express invitations before entering a car. *Texas Midland R. R. v. Brown* (Civ. App.), 58 S. W. 44.

## 2. Duration and Termination of Relation.

### a. General Rule as to Duration of Relation.

It may be stated as a general rule that one continues to be a passenger, and is entitled to that high degree of

care due him as such by a carrier of passengers, until he reaches his destination and is given reasonable time and opportunity to disembark with safety. *El Paso, etc., R. Co. v. Boer* (Civ. App.), 108 S. W. 199; *Fanning v. St. Louis, etc., R. Co.*, 38 Tex. Civ. App. 513, 86 S. W. 354, affirmed in 101 Tex. 635, no op.; *Missouri, etc., R. Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496; *El Paso, etc., R. Co. v. Harry*, 37 Tex. Civ. App. 90, 83 S. W. 735; *Ft. Worth, etc., R. Co. v. Kennedy*, 12 Tex. Civ. App. 654, 35 S. W. 335; *Missouri, etc., R. Co. v. Russell*, 8 Tex. Civ. App. 578, 28 S. W. 1042, affirmed in 93 Tex. 668, no op.

The relation of carrier and passenger does not cease unless the train is stopped at the passenger's destination a reasonably sufficient time to enable him to alight therefrom. *Houston, etc., R. Co. v. Easton*, 44 Tex. Civ. App. 95, 97 S. W. 833, affirmed in 102 Tex. 585, no op.

The relation of carrier and passenger does not end until the passenger has left the car. *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264; *St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266.

Where a person on a train pays his fare to a destination on the company's line, he becomes a passenger, and remains such until the journey is ended, and until a reasonable time, to be determined from all the circumstances, has elapsed within which to leave the carrier's premises, without regard to the object of his journey, or his reason for stopping at the station. *Houston & T. C. R. Co. v. Batchler*, 83 S. W. 902, 37 Tex. Civ. App. 116.

A person entitled to passage on a train between two points is entitled to the protection of a passenger from the starting point to the appropriate and usual stopping place at the final destination. *Hardin v. Ft. Worth & D. C. Ry. Co.*, 77 S. W. 431, 33 Tex. Civ. App. 448.

Where a carrier had undertaken to carry plaintiff with the contents of his car to the place where the car was to be unloaded, but left the same at another point on the night the train reached its destination, the train crew promising to return and complete the transportation the next morning, and plaintiff, who was obliged to attend his live stock contained in the car, was injured the next morning while in the car as it was being coupled onto, to complete the transportation, plaintiff's relation as a passenger had not entirely ceased at the time of his injury. *Ft. Worth & D. C. Ry. Co. v. Hardin*, 90 S. W. 679, 41 Tex. Civ. App. 19.

**b. Persons Leaving Conveyance Temporarily at Intermediate Station or Stop.**

It would seem to be well established that a passenger is not required to remain upon a train, from the starting point to the point of destination, and permitted to alight at an intermediate station only for some purpose connected with his journey. *Missouri, etc., R. Co. v. Overfield*, 19 Tex. Civ. App. 440, 47 S. W. 684, affirmed in 93 Tex. 715, no op.; *St. Louis, etc., R. Co. v. Humphreys*, 25 Tex. Civ. App. 401, 62 S. W. 791, affirmed in 94 Tex. 710, no op.; *Texas, etc., Railroad v. Ellison*, 39 Tex. Civ. App. 172, 87 S. W. 213; *Hardin v. Ft. Worth, etc., R. Co.*, 33 Tex. Civ. App. 448, 77 S. W. 431; *Missouri, etc., R. Co. v. Price*, 48 Tex. Civ. App. 210, 106 S. W. 700, affirmed, no op.; *Mercher v. Texas, etc., R. Co. (Civ. App.)*, 85 S. W. 468, affirmed in 101 Tex. 648, no op.; *Galveston, etc., R. Co. v. Mathes (Civ. App.)*, 73 S. W. 411. See, also, *Sanchez v. San Antonio, etc., R. Co. (Civ. App.)*, 27 S. W. 922, affirmed in 88 Tex. 117.

A passenger may temporarily alight from a train at intermediate points, for the time the train remains there,

for any purpose not inconsistent with his character as a passenger. *Missouri, etc., R. Co. v. Overfield*, 19 Tex. Civ. App. 440, 47 S. W. 684, affirmed in 93 Tex. 715, no op. And see cases cited to preceding paragraphs.

His motive in so alighting, whether of business or merely curiosity, is immaterial. *St. Louis, etc., R. Co. v. Humphreys*, 25 Tex. Civ. App. 401, 62 S. W. 791, affirmed in 94 Tex. 710, no op. And see cases cited to preceding paragraphs.

A passenger has the undoubted right to alight at an intermediate station while the train remains there, or to leave it altogether if he desires, and while in the act of alighting is a passenger. *Missouri, etc., R. Co. v. Overfield*, 19 Tex. Civ. App. 440, 441, 442, 47 S. W. 684, affirmed in 93 Tex. 715, no op.

"It would seem clear that the right to alight at a regular intermediate station would not depend upon notice having been given to the conductor that the passenger desired to alight, but that it is an absolute right enjoyed by a passenger." *Galveston, etc., R. Co. v. Mathes (Civ. App.)*, 73 S. W. 411, quoting *Texas, etc., R. Co. v. Goldman (Civ. App.)*, 51 S. W. 275.

Thus it has been held that a traveler on a railroad train loses none of the rights of a passenger in getting off at an intermediate station to deliver a private message to a person on the platform. *Missouri, etc., R. Co. v. Overfield*, 19 Tex. Civ. App. 440, 47 S. W. 684, affirmed in 93 Tex. 715, no op.; *Galveston, etc., R. Co. v. Cooper*, 2 Tex. Civ. App. 42, 20 S. W. 990, affirmed in 85 Tex. 431, no op.; *Hardin v. Ft. Worth, etc., R. Co.*, 33 Tex. Civ. App. 448, 77 S. W. 431.

A passenger may alight, from motives of business or curiosity, from

a train on which he is riding, at a switch track near an intermediate station, where the train stops in order to permit another train to pass, without losing his status and rights as a passenger. *Texas Midland R. R. v. Ellison*, 87 S. W. 213, 39 Tex. Civ. App. 172.

A through passenger leaving the train at an intermediate station may re-enter the train, and, when attempting to do so at a proper time and place and in a proper manner, she must be regarded as a passenger, and entitled to protection as such. *St. Louis & S. W. Ry. Co. v. Humphreys*, 62 S. W. 791, 25 Tex. Civ. App. 401.

Since a passenger is entitled to leave a train at an intermediate station for a purpose not inconsistent with his character of a passenger, an instruction in an action for injuries to a passenger in so doing that defendant owed plaintiff no duty to stop for any length of time at such station, or to have its depot there lighted, or to stop at any intermediate station before reaching plaintiff's destination, was properly refused. *Galveston, H. & S. A. Ry. Co. v. Mathes* (Civ. App.), 73 S. W. 411.

In *St. Louis, etc., R. Co. v. Humphreys*, 25 Tex. Civ. App. 401, 62 S. W. 791, affirmed in 94 Tex. 710, no op., the plaintiff, who was a passenger on defendant's train, left the train, which had stopped for dinner, and went to the postoffice, which was about 100 feet distant from the train, on the side opposite from the depot, to purchase some stamps. After getting the stamps she started to return, when she noticed that the train was in motion. She ran, and in her effort to board it she was injured. She was held to be entitled to the protection due a passenger.

Under the contract of shipment, a person rode in the car to look after and care for the property shipped. The car was temporarily stopped at

a place where it could not be unloaded, and with the understanding that it would be placed at a more convenient place the next morning. The person left the car during the night, and returned to it in the morning. Held, that he had not as a matter of law, ceased to be a passenger. *Hardin v. Ft. Worth & D. C. Ry. Co.*, 77 S. W. 431, 33 Tex. Civ. App. 448.

Where plaintiff left the car in which he had been riding, and walked on defendant's railroad track, without looking for another train that he knew was then due, he can not recover for injuries received by such train striking him, if the trainmen could not, with the exercise of care, have avoided the accident after seeing plaintiff's peril, though the relation of carrier and passenger yet existed, and plaintiff was prevented from hearing the train by the noise of an engine standing near. *Sanchez v. San Antonio & A. P. R. Co.* (Civ. App.), 27 S. W. 922.

#### **c. Person Changing Cars in Prosecution of Journey.**

A person remains a passenger while going from one train to another in the prosecution of his journey. *Bullock v. Houston, etc., R. Co.* (Civ. App.), 55 S. W. 184.

#### **d. Passenger Alighting to Assist in Transfer of His Baggage.**

The fact that a passenger who had considerable baggage on a train for which he had no check alighted from the train to assist in the transfer of that baggage, held not to sever the relation of passenger and carrier, nor to make him a servant of the company, he having the right to identify his property. *Ormond v. Hayes*, 60 Tex. 180.

#### **e. Effect of Arrival at Destination and the Affording of Reasonable Opportunity and Time to Alight. View That Contract of Carriage Has Thereupon Terminated.—A num-**

ber of decisions lay down the rule that the carrier undertakes to transport the passenger safely from the initial point of transportation to the place of destination, to give reasonably sufficient notice of stations, and to afford a reasonable opportunity for the passenger to disembark from the train, and that when the carrier has performed these obligations, its duties and responsibilities under the contract of carriage cease, and it does not thereafter sustain any contractual relation to the person it has carried. *Missouri, etc., R. Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496; *Fanning v. St. Louis, etc., R. Co.*, 38 Tex. Civ. App. 513, 86 S. W. 354, affirmed in 101 Tex. 635, no op.; *Chicago, etc., R. Co. v. Boyles*, 11 Tex. Civ. App. 522, 525, 33 S. W. 247; *St. Louis, etc., R. Co. v. Martin*, 26 Tex. Civ. App. 231, 63 S. W. 1089; *El Paso, etc., R. Co. v. Boer* (Civ. App.), 108 S. W. 199; *Houston, etc., R. Co. v. Cohn*, 22 Tex. Civ. App. 11, 53 S. W. 698.

Ordinarily the duty of a railway conductor as such towards a passenger has ceased when the carrier has transported a passenger in safety to destination, has announced the arrival of the train at the station, and has afforded reasonable time and opportunity for the passenger to leave the cars. *Chicago, etc., R. Co. v. Boyles*, 11 Tex. Civ. App. 522, 525, 33 S. W. 247.

Where a passenger remained on a car after its arrival at his destination, the terminus of the road, for a considerable time, his relation as passenger was terminated. *Kaase v. Gulf, C. & S. F. Ry. Co.*, 92 S. W. 444, 41 Tex. Civ. App. 370.

In an action for injuries received by a passenger in getting off a train at a place beyond the station, at which she had failed to get off when the train stopped, an instruction that if the defendant stopped the train at the station a reasonably sufficient time for a passenger situated as was the

plaintiff's wife to debark therefrom, or if she delayed getting off for any reason, and such was unknown to the defendant, then her contract relation with the defendant ceased at the expiration of such reasonable time, and the defendant was liable only for failure to exercise ordinary care against inflicting injuries on plaintiff's wife, was improperly refused. *St. Louis S. W. Ry. Co. v. Martin*, 63 S. W. 1089, 26 Tex. Civ. App. 231.

Where a carrier has properly performed its obligations to announce and stop a reasonable time at a station for a passenger to alight there, the relation of carrier and passenger ceases and it does not owe him any affirmative obligations at the station beyond his destination, such as keeping the depot warmed. *St. Louis, etc., R. Co. v. Ricketts*, 22 Tex. Civ. App. 515, 518, 54 S. W. 1090.

Where, in an action against a railway for injuries resulting from defendant's failure to stop its train a reasonable length of time to enable plaintiff, a passenger, to get off, the evidence showed that, after the train stopped, plaintiff stood on the platform negotiating with a newsboy for a paper, and made no effort to get off until the train was in motion, and that none of defendant's servants knew of plaintiff's delay in getting off the train, if he did so delay, the refusal of a special charge that if defendant's employees stopped the train a reasonably sufficient time for a passenger situated as was plaintiff to alight therefrom, and plaintiff delayed getting off, and such delay, if any, was unknown to defendant, plaintiff's contract relation with defendant ceased at the expiration of such reasonable time, if any, and defendant could become liable only through failure of its servants to exercise ordinary care, was reversible error. *St. Louis Southwestern Ry. Co. of Texas v. Bryant* (Civ. App.), 92 S. W. 813.



The duty rests upon a passenger to get off a train at the place to which he has contracted for carriage, when reasonable notice has been given and reasonably safe means and opportunity afforded him for the purpose. *Missouri, etc., R. Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496; *Fanning v. St. Louis, etc., R. Co.*, 38 Tex. Civ. App. 513, 86 S. W. 354, affirmed in 101 Tex. 635, no op.; *Houston, etc., R. Co. v. Cohn*, 22 Tex. Civ. App. 11, 53 S. W. 698. See, also, *Texas, etc., R. Co. v. Alexander* (Civ. App.), 30 S. W. 1113; *Missouri, etc., R. Co. v. Kendrick* (Civ. App.), 32 S. W. 42; *St. Louis, etc., R. Co. v. McCullough*, 18 Tex. Civ. App. 534, 45 S. W. 324; *Texas, etc., R. Co. v. Cole*, 63 Tex. 562, 564, 1 S. W. 629.

The obligation does not rest on the carrier to put the passenger off of the train. *Missouri, etc., R. Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496; *Fanning v. St. Louis, etc., R. Co.*, 38 Tex. Civ. App. 513, 86 S. W. 354, affirmed in 101 Tex. 635, no op.

Nor does the law impose upon the carrier the duty of taking notice that a passenger has fallen asleep and cause him to be aroused. *Missouri, etc., R. Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496; *Fanning v. St. Louis, etc., R. Co.*, 38 Tex. Civ. App. 513, 86 S. W. 354, affirmed in 101 Tex. 635, no op.

It is ordinarily the duty of a passenger to use his senses, and take notice of the usual announcement of stations; and if, by reason of being asleep, unknown to the carrier he fails to hear the notice given of the arrival of the train at his place of destination, the carrier is not liable therefor. The carrier no longer owes him any contract duty—the relations of the parties have changed, and the grounds of liability become different. *Missouri, etc., R. Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496.

The employees of a carrier may,

however, resort to whatever means are reasonably necessary to awaken a passenger remaining on a car, sleeping, after arrival at his destination, and to get him off the train, without rendering themselves liable for unlawful assault. *Kaase v. Gulf, etc., R. Co.*, 41 Tex. Civ. App. 370, 92 S. W. 444.

**Passenger Remaining on Car Cut Out at Intermediate Station.**—According to the decision in *Gulf, etc., R. Co. v. Shelton*, 30 Tex. Civ. App. 72, 69 S. W. 653, affirmed in 96 Tex. 301, it would seem that one remaining asleep on a car on arrival at a connection where it was set out, and not hearing notice to leave the car nor being informed that it was to be set out, while other cars went through, had not lost his status.

**Persons Remaining on Train after Reaching Destination Considered as Trespassers.**—A passenger who fails to get off a train when its arrival at his destination is announced, and is carried beyond, becomes a trespasser and the carrier owes him no duty save not to willfully injure him. *Houston, etc., R. Co. v. Cohn*, 22 Tex. Civ. App. 11, 53 S. W. 698.

**View That Relation Continues until Passenger Has Left Carrier's Premises or Has Had Reasonable Time to Do So.**—It has been held in several cases that a passenger on a railway train remains such after alighting therefrom and while on the station premises of the company, for a period of time reasonably necessary to enable him to leave the premises, and is, therefore, entitled to the care and protection due a passenger. *Texas, etc., R. Co. v. Dick*, 26 Tex. Civ. App. 256, 63 S. W. 895, affirmed in 94 Tex. 697, 95 Tex. 688, no op.; *Hardin v. Ft. Worth, etc., R. Co.*, 33 Tex. Civ. App. 448, 77 S. W. 431; *Houston, etc., R. Co. v. Batchler*, 32 Tex. Civ. App. 14, 73 S. W. 981.

The relation of carrier and passen-

ger continues not only until the passenger has left the car, but until he has left the station, or until a reasonable time has been given him to leave the premises, and during such time he is entitled to the protection of the carrier, without regard to the object of his journey or his reason for stopping at such station. *Houston & T. Cent. R. Co. v. Batchler*, 73 S. W. 981, 32 Tex. Civ. App. 14.

A passenger on a railway train remains such after alighting therefrom, and while on the depot premises of the company, for a period of time reasonably necessary to enable him to leave the premises, and is, therefore, entitled to the protection of the company's agents and servants from the assaults of third persons during such time. *Texas & P. Ry. Co. v. Dick*, 63 S. W. 895, 26 Tex. Civ. App. 256.

An arriving passenger is not required to leave a railroad depot instantly, but may remain such time as is, under the circumstances, reasonably necessary to prepare for his departure. *St. Louis Southwestern Ry. Co. of Texas v. Wallace*, 74 S. W. 581, 32 Tex. Civ. App. 312.

An approach to a railway depot on premises belonging to the company constitutes a part of such premises, and the relation of carrier and passenger continues until the passenger has passed beyond such approach. *Gulf, C. & S. F. Ry. Co. v. Glenk*, 9 Tex. Civ. App. 599, 30 S. W. 278.

In an action against a railway company for killing an alighting passenger, an instruction that as soon as decedent and his wife alighted the relation of carrier and passenger ceased and that from that time the company owed them no duty as passenger was erroneous as being too strong and unqualified. *Ormond v. Hayes*, 60 Tex. 180.

**Termination of Relation upon Leaving Premises of Carrier.**—Where a passenger reached his destination, vol-

untarily alighted from defendant's train at the regular station and left the depot and premises of defendant, it owed him no further duty on account of his intoxication. *Rozwadosfskie v. International & Great Northern Ry. Co.*, 1 Tex. Civ. App. 487, 20 S. W. 872.

**Passenger Returning to Train after Alighting Therefrom.**—Where, after a passenger had alighted from a train, he returned to the same for the purpose of using it as a mode of crossing to the other side of the track, he thereby became a trespasser, as to whom the carrier owed no duty except not to injure him after discovering him in a place of peril. *Ratteree v. Galveston, H. & S. A. Ry. Co.*, 81 S. W. 566, 36 Tex. Civ. App. 197.

**Passenger Leaving Train and Boarding Another Temporarily at Meeting Point.**—Where a passenger left her train, and boarded another, at a meeting point, to converse with her sister, she was not a passenger on the latter train, though her conductor, whose authority was limited to his own train, consented to her boarding the other train. *Bullock v. Houston, E. & W. T. Ry. Co. (Civ. App.)*, 55 S. W. 184.

**Termination of Relation by Refusal to Pay Fare.**—As to the rule that the relation of carrier and passenger terminates upon the failure or refusal of the latter to pay his fare on demand, and that the carrier may, in a proper manner, eject such person, see post, "Want of Ticket Pass or Permit, and Nonpayment of Fare," V, D, 15, a, (3).

## II. Power of Carrier to Make and Enforce Reasonable Regulations for the Conduct of Its Business.

### A. IN GENERAL.

A railway company has the right

to make reasonable regulations for the conduct of its business and operation of its trains. *Houston, etc., R. Co. v. Moore*, 49 Tex. 31, 47; *Eddy v. Rider*, 79 Tex. 53, 57, 15 S. W. 113; *Texas, etc., R. Co. v. Hayden*, 6 Tex. Civ. App. 745, 26 S. W. 331; *Gulf, etc., R. Co. v. Moody* (Civ. App.), 30 S. W. 574; *Texas, etc., R. Co. v. Pearl*, 3 App. Civ. Cases, § 4.

**Right Conferred by Statute.**—Article 4484, Sayles' Rev. Stat., gives to railway corporations "the right to regulate the time and manner in which passengers and property shall be transported." *Texas, etc., R. Co. v. Currie*, 33 Tex. Civ. App. 277, 76 S. W. 810, affirmed in 97 Tex. 648, no op.; *Mills v. Missouri, etc., R. Co.*, 94 Tex. 242, 59 S. W. 874, reversing 57 S. W. 291.

**Regulations Must Be Reasonable under the Existing Circumstances.**—Regulations as to the time and manner in which passengers shall be transported will not be enforced by the courts except where they are reasonable, and whether or not they are in any case reasonable is a question to be determined according to all the circumstances of such case. *Texas, etc., R. Co. v. Currie*, 33 Tex. Civ. App. 277, 76 S. W. 810, affirmed in 97 Tex. 648, no op.

**Ejection for Disobedience of Regulations.**—See post, "Violation of Rules of Carrier," V, D, 15, a, (2).

**Liability When Regulations Made and Enforced in Violation of Law.**—A railroad company may make reasonable rules and regulations for the conduct of its business as a carrier, but if made and enforced in violation of law it will be liable to persons injured thereby. *Eddy v. Rider*, 79 Tex. 53, 57, 15 S. W. 113.

## B. DUTY OF PASSENGERS TO CONFORM TO REGULATIONS.

Where a railway company is a com-

mon carrier, it has the right to make reasonable regulations for conducting its passenger business and parties dealing with it must conform to same. *Houston, etc., R. R. v. Moore*, 49 Tex. 31, 47.

Reasonable regulations made by a railroad company for the conduct of its passenger business, are, in the absence of express contract to the contrary binding upon those contracting with such railroads, although ignorant of the existence of such regulations. *Gulf, etc., R. Co. v. Moody* (Civ. App.), 30 S. W. 574.

A person who enters a freight train, knowing it to be such and intending to take passage thereon, is charged with notice that the railroad company is authorized under the law to make reasonable rules and regulations in reference to the carrying of passengers thereon. *Ellis v. Houston, etc., R. Co.*, 30 Tex. Civ. App. 172, 70 S. W. 114.

**Violation of Rules as Shifting Burden of Proof as to Contributory Negligence.**—See post, "As to Contributory Negligence of Plaintiff," VII, F, 2, b, (2).

## C. INSTANCES OF PROPER EXERCISE OF POWER TO MAKE AND ENFORCE REGULATIONS.

**Regulations Establishing Place to Receive Passengers and Designating Coaches for Their Carriage.**—Though the statute permits payment of fares on a train, it is a reasonable regulation for the company to establish places at which to receive its passengers and designate coaches for them to ride in. *Missouri, K. & T. Ry. Co. v. Williams*, 91 Tex. 255, 42 S. W. 855.

"That railway companies have the right to establish stations at which they will receive and discharge passengers and freight, is doubtless true." *Hull v. East Line, etc., R. Co.*, 66 Tex. 619, 620, 2 S. W. 831.

**Regulations as to Time of Starting and Running Passenger Trains.—**

A carrier may adopt reasonable regulations with reference to the time of starting and running its trains for the transportation of passengers fixing the time by public notice. *Texas & Pac. Ry. Co. v. White*, 4 Willson, § 260, 17 S. W. 419.

Where a party insists on traveling on a carrier's trains after the schedule time has been published, to a point where he is informed the train will not stop, he can not recover damages for being carried beyond such point. *Texas & Pac. Ry. Co. v. White*, 4 Willson § 260, 17 S. W. 419.

It was error to refuse defendant's request that the regulation was reasonable, and one which the company had a right to make; that it was sufficient if plaintiff was informed of it by the agent or conductor; that if plaintiff, after such notice, refused to leave the train, he was a trespasser, and was not entitled to recover for the failure to have it stopped at his destination; and that, if he took offense unnecessarily at the language of the conductor, he was not entitled to recover for injury to his feelings. *Texas & P. Ry. Co. v. White*, 4 Willson, Civ. Cas. Ct. App. § 259, 17 S. W. 419; *Lindley v. Texas & P. Ry. Co.*, Id. 421.

In an action against a railroad company for damages for carrying plaintiff past a station, the evidence was that the company had the day before put into effect a new time card, by which its night train each way was no longer scheduled to stop at the said station as theretofore; that the two day trains, however, were unaffected by the change; and that these latter gave ample accommodations for the business at that and other small points along the line. Plaintiff testified that the agent told him when he bought his ticket that the train he was intending to take would not stop

at his station, and that the conductor told him the same thing before it started, and requested him to get off, which he refused to do. The conductor remarked to him that he "was hunting a lawsuit." The train carried him past his station to the one beyond, where he boarded the running train, although informed that it made no stop, and was again carried past to the point from which he started. Notice of the change was posted at the station. Held, that the regulation that one train each way should not stop at all stations was reasonable, within Rev. St., art. 4226, and that inasmuch as it had been published, and plaintiff was informed of it, he was not entitled to recover. *Texas & P. Ry. Co. v. White*, 4 Willson, Civ. Cas. Ct. App. § 259, 17 S. W. 419; *Lindley v. Texas & P. Ry. Co.*, Id. 421.

**Regulation as to Fares.**—See post, "Fares," III, A.

**Regulations Requiring Passengers to Show Ticket or Pass before Entering Train.**—See post, "Right of Carrier to Require Tickets," III, B, 1.

**Regulations as to Transportation of Passengers on Other than Passenger Trains.**—It is well settled that a railroad company may make and enforce a rule forbidding passengers to be carried on freight trains, or if it permits passengers on freight trains, it may, after due notice, require such passengers to provide themselves with a particular kind of ticket. *Houston, etc., R. Co. v. Stell*, 28 Tex. Civ. App. 280, 67 S. W. 537, affirmed in 95 Tex. 687, no op.; *Texas, etc., R. Co. v. Hayden*, 6 Tex. Civ. App. 745, 749, 26 S. W. 331; *San Antonio, etc., R. Co. v. Lynch* (Civ. App.), 40 S. W. 631; *Eddy v. Rider*, 79 Tex. 53, 15 S. W. 113; *Houston, etc., R. Co. v. Moore*, 49 Tex. 31.

It would seem that no regulation could be more reasonable or salutary to the interests of railways and the public as well, than that prohibiting

the carrying of passengers upon freight trains. Such regulation the railway company has the right to demand that its servants shall enforce, and to place them beyond the power of operatives of trains to relax. *Texas, etc., R. Co. v. Hayden*, 6 Tex. Civ. App. 745, 26 S. W. 331.

A passenger who knew it was essential, under the rules of the railroad, that, in addition to his ticket, he have a permit to ride on a freight train, and that he must get the permit before he got on the train, and that the ticket agent had no authority to say he could get it of the conductor, can not, because of such representation of the agent, recover for his ejection by the conductor. *Houston, E. & W. T. Ry. Co. v. Stell*, 67 S. W. 537, 28 Tex. Civ. App. 280.

Where a railroad company's rules required a passenger wishing to ride on a freight train to sign a special permit to be obtained from its ticket agent or conductor, the act of the agent in selling plaintiff a ticket that he might travel on a freight train without mentioning the permit did not create an unconditional contract to carry the plaintiff, as the rule was a reasonable one, which the agent could not abrogate, and plaintiff was bound to know that the company could make reasonable rules regarding transportation of passengers on freight trains. *Ellis v. Houston, E. & W. T. Ry. Co.*, 70 S. W. 114, 30 Tex. Civ. App. 172.

Defendant was operating a freight train, which carried passengers on permits issued by station agents and conductors, and plaintiff was ejected, though he had a ticket, and asked the conductor for a permit. The plaintiff testified that he asked the station agent for a permit, and was told to get it from the conductor, which was denied by the agent. The company introduced a rule by which conductors were only allowed to give

permits at stations where no tickets were sold. The agent had not been furnished with blank permits up to such time, and plaintiff's evidence showed that the conductors had been in the habit of giving permits. Held sufficient, in an action for wrongful ejection, to authorize a submission of an issue whether it was the custom for conductors to furnish permits to passengers after they got on the train. *Houston, E. & W. T. Ry. Co. v. White* (Civ. App.), 61 S. W. 436; *Same v. Jackson*, Id. 440.

Where a railroad had a rule forbidding the issuance of permits by conductors, and a passenger is ejected for want of such a permit, the company is not liable because its conductors have violated such rule, unless it has been so frequently violated as to warrant the conclusion that it is not enforced. *Houston, E. & W. T. Ry. Co. v. White* (Civ. App.), 61 S. W. 436; *Same v. Jackson*, Id. 440.

**As to the rights of persons traveling on freight trains in violation of rules allowing carriage of passengers,** the relaxation or the abrogation of such rule, etc., see ante, "Where Transportation of Passengers Forbidden by Rules of Carrier," I, A, 2, a, (2), (b).

**Regulations as to Through Trains, Stops, etc.**—Where a carrier has provided a daily passenger train service between certain stations, it was entitled to operate a system of fast trains which did not stop, except at the larger cities and towns. *Albin v. Gulf, C. & S. F. Ry. Co.*, 95 S. W. 489, 43 Tex. Civ. App. 170.

A railway company may so arrange the running of its trains that passengers destined for a station may go through without change on some trains, and on others be required to change at an intervening station. *St. Louis S. W. Ry. Co. v. McCullough*, 45 S. W. 324, 18 Tex. Civ. App. 534.

Railways making other and sufficient provisions for local travel may run trains for through passengers not stopping at way stations, or stopping there only to receive and discharge passengers on coupon tickets for passage over their own and other lines. *Gulf, etc., R. Co. v. Moore*, 98 Tex. 302, 83 S. W. 362, reversing 80 S. W. 426. See, also, *Texas, etc., R. Co. v. Bell*, 39 Tex. Civ. App. 412, 87 S. W. 730.

It is the duty of railway companies to stop their passenger trains at each station for a time reasonably long enough for passengers to get off; but the company had a right to run a special train through without stopping at intermediate stations, unless by its conduct it has entitled plaintiff to demand that it should stop at his destination and a charge which assumed that he was entitled to have the train stopped in any event was erroneous. *Missouri, etc., R. Co. v. Byas*, 9 Tex. Civ. App. 572, 29 S. W. 1122.

In an action for personal injuries to a child it appeared that the child's custodian purchased a ticket to a certain station; that the conductor took up the ticket, and afterwards compelled said custodian and the child to get off at a station nine miles from their destination, at 11 o'clock at night; that they passed the night in the station, and were made ill by the exposure; and the evidence was conflicting whether the train usually stopped at said destination. The court charged that a regulation that one of the two trains should not stop at said destination was reasonable, and the company could properly enforce it; and that, if the child and custodian were on the train, there was no right to demand it to stop at said destination, and no recovery could be had. Held that, in the light of this instruction, a further charge that, if the custodian purchased a ticket,

and the conductor took it up, a recovery could be had, was not misleading; nor was a further instruction to find for defendant if the ticket was only to the place where the travelers were put off, and no offer was made to pay fare to the destination, misleading, as implying that it was defendant's duty to accept such fare, and stop at said destination, whether it was a stopping station or not. *Texas & P. Ry. Co. v. Lulam* (Civ. App.), 26 S. W. 430.

In an action against a railroad company for damages for failure to stop a train at a certain place at which there is no station, the plaintiff can not show that such place was treated as a station, by means of a time schedule which on its face shows that it was for the government and information of the employees only, and that the company reserved the right to vary therefrom at pleasure, though it states that the train is due at such place at a certain time. *Beauchamp v. International & G. N. Ry. Co.*, 56 Tex. 239.

It is the duty of a person about to take passage on a railway train to inform himself when, where and how he can go and stop, according to the regulations of the railway company; and if he makes a mistake, not induced by the company, against which ordinary care in this respect would have protected him, he has no remedy against the company for the consequences. *Beauchamp v. I. & G. N. Ry. Co.*, 56 Tex. 239.

**Regulations Confining Passengers to One Seat Each.**—A rule of a railway company confining passengers to one seat each is reasonable, and if a passenger persists in violating it, though other passengers are not inconvenienced, it is conductor's right and duty to eject him, if necessary to the enforcement of the rule. *Gulf, etc., Ry. v. Moody*, 3 Tex. Civ. App. 622, 626, 627, 22 S. W. 1009.

**Regulations with Respect to Baggage, Checks, etc.**—A contract with a railroad company requiring a passenger to surrender an excess-baggage check before he is entitled to his baggage is not repugnant to Rev. St., § 278, prohibiting railroad companies from limiting their common-law liability as a carrier, in view of Rev. St. § 4229, requiring them to check baggage. *Texas M. Ry. Co. v. Willis*, 3 Willson, Civ. Cas. Ct. App. § 72.

**Regulations as to Soliciting Business on Trains for Hotels, Transfer Companies, etc.**—A railway company has the right to exclude from its premises and cars persons going thereon for the purpose of transacting private business, and the privilege of so doing may be granted to one and refused to another without violating any principle of law which governs the conduct of carriers and regulates their duty to the public. *Lewis v. Weatherford, etc.*, R. Co., 36 Tex. Civ. App. 48, 81 S. W. 111, affirmed in 98 Tex. 623, no op.

It is lawful for railroad companies to make rules and regulations prohibiting passengers who have paid their fare from drumming trains for custom for hotels, etc. *Texas, etc.*, R. Co. v. Pearl, 3 App. Civ. Cases, § 4.

A carrier may make a regulation giving one individual the exclusive right to solicit on its trains the transfer business of its passengers. *Lewis v. Weatherford, M. W. & N. W. Ry. Co.*, 81 S. W. 111, 36 Tex. Civ. App. 48.

The action of a railway company in permitting the agents of only one transfer and hack company to solicit business on its trains is not violative of the anti-trust statute as being an unauthorized restriction in the free pursuit of any business. *Lewis v. Weatherford, etc.*, R. Co., 36 Tex. Civ. App. 48, 81 S. W. 111, affirmed in 98 Tex. 623, no op.

**Regulations as to Locking Rear**

**Doors of Rear Coaches at Stations.**—

Where plaintiff attempting to enter the rear door of the rear coach in defendant's train, found it locked and was compelled to remain on the platform, resulting in injury, and the evidence showed it to be a rule of the company to keep such door locked at stations, and that such rule was reasonable and known to plaintiff, it was not proper to submit the issue whether defendant was negligent in not having the door unlocked. *Missouri, K. & T. Ry. Co. of Texas v. Brown* (Civ. App.), 39 S. W. 326.

In view of the instruction submitting the issue as to plaintiff's knowledge of such rule, it was error to further charge that neither the law, pleadings, nor evidence raised the issue as to want of notice on the part of plaintiff, and that it was immaterial whether he had such notice or not. *Missouri, K. & T. Ry. Co. of Texas v. Brown* (Civ. App.), 39 S. W. 326.

It appearing that plaintiff was aware of the rule, it was error to submit the question whether it had been in force a sufficient length of time to become generally known. *Missouri, K. & T. Ry. Co. of Texas v. Brown* (Civ. App.), 39 S. W. 326.

### III. Fares, Tickets and Special Contracts.

#### A. FARES.

##### 1. Statutory Regulation of Rate.

The rate of fare which may be charged for carriage of passengers is fixed by the Texas statutes at three cents per mile. *Mills v. Missouri, etc.*, R. Co., 94 Tex. 242, 59 S. W. 874, reversing 57 S. W. 291; *Eddy v. Rider*, 79 Tex. 53, 15 S. W. 113; *Andrews v. Ft. Worth, etc.*, R. Co. (Civ. App.), 25 S. W. 1040.

##### 2. Right to Charge in Excess of Statutory Rate in Case of Train Fares.

**In General.**—The statutory provision

fixing the rate of passenger fare at three cents per mile contains a proviso that where the fare is paid to the conductor, the rate shall be four cents per mile, except from stations where no tickets are sold. *Mills v. Missouri, etc., R. Co.*, 94 Tex. 242, 59 S. W. 874, reversing 57 S. W. 291; *Eddy v. Rider*, 79 Tex. 53, 15 S. W. 113; *Fordyce v. Manuel*, 82 Tex. 527, 18 S. W. 657; *Missouri, etc., R. Co. v. Williams*, 91 Tex. 255, 42 S. W. 855, reversing 40 S. W. 350; *Missouri, etc., R. Co. v. Simmons*, 12 Civ. App. 500, 33 S. W. 1096 (see 93 Tex. 691, no op.).

**Right as Dependent on Opportunity to Purchase Ticket.**—See post, "Duty of Carrier to Afford Opportunity to Purchase Ticket," III, B, 2.

### 3. Exaction of Excessive Fare.

#### a. As Ground for Damages.

**In General.**—Exaction of excessive fare, by railway company, is ground for damages, especially if made under threats of ejection if not paid. *Southern Pac. Co. v. Patterson*, 7 Tex. Civ. App. 451, 459, 27 S. W. 194.

The allowance of exemplary damages for the exaction of an unlawful fare by a railroad company is proper where it is a flagrant evasion of statutory obligations, and oppressive of the public. *Galveston, H. & S. A. Ry. Co. v. Patterson* (Civ. App.), 46 S. W. 848.

A railroad company granted to a bridge company its right of way across a stream, and the bridge company built a bridge thereon, which was used by the railroad company. Held, that the bridge company could not lawfully charge passengers on the railroad company's trains a toll of 50 cents for crossing the bridge, when that was more than the railroad company was allowed by law to charge. *Southern Pac. Co. v. Patterson*, 7 Tex. Civ. App. 451, 27 S. W. 194; *Galveston, H. & S. A. Ry. Co. v. Patterson* (Civ. App.), 46 S. W. 848.

Where unlawful tolls over a bridge

of which a railroad company had the use were collected by a person employed by the bridge company, and the railroad company permitted the exaction thereof, and assisted in their collection, the railroad company is liable to a passenger who paid the employee of the bridge company under threat of ejection if he refused; and such liability is not affected by the fact that on such passenger's mileage ticket was written, "Not good over" that bridge. *Southern Pac. Co. v. Patterson*, 7 Tex. Civ. App. 451, 27 S. W. 194.

In an action for damages by a passenger wronged by the demand for and collection of an unlawful fare on a railroad, it is immaterial what reason he gave in objecting to the payment of such fare. *Galveston, H. & S. A. Ry. Co. v. Patterson* (Civ. App.), 46 S. W. 848.

**Pleading in Action for Damages for Such Exaction.**—A petition alleging that plaintiff was a passenger on defendant's railroad, which extended over a bridge, and that 50 cents, an extortionate and unlawful charge, was exacted from him for crossing the bridge by one acting under the authority of defendant, states a cause of action, and it is immaterial that plaintiff assigned an erroneous reason—that his mileage ticket, though reciting it was not good over said bridge, had been taken up for the entire distance of his trip including the bridge—for the unlawfulness of the charge. *Galveston, H. & S. A. Ry. Co. v. Patterson* (Civ. App.), 46 S. W. 848.

#### b. As Authorizing Recovery of Penalty.

Article 4258, Rev. Stat., imposing a penalty for overcharging passenger fares, is repealed by necessary implication by the act of April 10, 1883. *Etter v. Missouri Pac. R. Co.*, 2 App. Civ. Cases, §§ 58, 59.



The word forfeit in § 4258, Rev. Stat., signifies a penalty or punishment for violation of a law, and a suit to recover under said section is a suit for a penalty. *Etter v. Missouri Pac. R. Co.*, 2 App. Civ. Cases, §§ 58, 62.

The right of the plaintiff under art. 4258 to recover the penalty for an overcharge of passenger fares, although suit was brought before the act of April 10, 1883, was enacted, is not a vested right which the legislature can not divest. *Etter v. Missouri Pac. R. Co.*, 2 App. Civ. Cases, §§ 58, 61.

Plaintiff's right to recover the penalty for an overcharge of passenger fares, although the injury occurred and his suit therefor was instituted before the repeal of the statute imposing such penalty, is lost after such repeal. *Etter v. Missouri Pac. R. Co.*, 2 App. Civ. Cases, §§ 58, 60; *Gulf, etc., R. Co. v. Lott*, 2 App. Civ. Cases, § 63.

#### 4. Anti-Pass Act of March 26, 1907.

The anti-pass act (Acts March 26, 1907; Laws 1907, p. 93, c. 42), prohibiting carriers from carrying persons or property free of charge, etc., is prospective in its operation, and does not operate to destroy or impair the obligations of contracts lawfully made prior to its passage. *Gulf, etc., Ry. Co. v. Wells-Fargo Express Co.* (Civ. App.); 108 S. W. 174, affirmed in 110 S. W. 41.

### B. TICKETS, RECEIPTS FOR FARE, AND PASSES.

#### 1. Right of Carrier to Require Tickets.

The statutes of Texas do not forbid railroad companies, if they comply with the rules of law intended to secure for passengers the proper facilities for getting tickets, to require them to do so as a condition of receiving them upon trains. *Mills v. Missouri, etc., R. Co.*, 94 Tex. 242, 59 S. W. 874, reversing 57 S. W. 291.

"Whether or not one may take passage without a ticket, therefore, depends upon the question whether or not the carrier has, by a reasonable regulation, required the purchase of one as a prerequisite to the undertaking to carry." *Mills v. Missouri, etc., R. Co.*, 94 Tex. 242, 59 S. W. 874, reversing 57 S. W. 291.

A railroad company may stipulate that passengers shall purchase tickets before entering the cars, or be charged a higher rate than that fixed by statute. *Eddy v. Rider*, 79 Tex. 53, 57, 15 S. W. 113.

In order that a regulation requiring passengers to obtain tickets before boarding trains shall operate so as to deprive a particular passenger of a right to travel on a train without a ticket such opportunities and facilities must have been afforded the passenger for procuring a ticket as the law required to allow him to comply with the regulation and a railroad can not defeat the right to a ticket by its failure to comply with the law intended to secure it and at the same time refuse admission to the train, but a passenger, if unable to secure a ticket by reason of the acts of the railroad, is entitled to travel without a ticket upon payment of the regular fare. *Mills v. Missouri, Kansas & T. Ry. Co. of Texas*, 94 Tex. 242, 59 S. W. 874.

As to the power of railroad companies to require particular kind of tickets for passage on freight trains, see ante, "Instances of Proper Exercise of Power to Make and Enforce Regulations," II, C.

**Requirement That Ticket Shall Be Displayed and Examined before Entering Train.**—A rule of a railroad company requiring conductors to station their brakemen and train operator on station platforms and have them examine tickets, allowing no one to board the train without a ticket or pass, is not in conflict with section 9, Act April 10, 1883 (Gen.

Laws 18th Leg., p. 7). *International & G. N. R. Co. v. Goldstein*, 2 Willson, Civ. Cas. Ct. App. § 274.

Plaintiff had a ticket which entitled him to travel on defendant's railroad. He proceeded to board the train, and was requested by the brakeman to show his ticket. He declined to show his ticket, but exhibited money to the brakeman, boarded the train, and took a seat in a car. Before the train started, the brakeman again requested him to show his ticket, and again he refused to do so, and again exhibiting money, saying that the money was good for his fare. The brakeman then proceeded to eject plaintiff from the train, but while in the act of ejecting him he exhibited his ticket, and was at once released. At the time he boarded the train he knew of the rule adopted by the company requiring passengers to show tickets before entering the cars. Held, the rule being a reasonable one, and being known to plaintiff, it was his duty to obey it; and the company, on his refusal, having a right to eject him, without unnecessary force or violence, if, under these circumstances, he sustained injuries, he is not entitled to recover for them, notwithstanding he exhibited money sufficient to pay his fare. *International & G. N. R. Co. v. Goldstein*, 2 Willson, Civ. Cas. Ct. App. § 275.

**Ignorance of Rule, and Nonobservance by Employees as Affecting Right to Eject for Want of Ticket.**—A rule of a railroad company requiring passengers on accommodation trains to procure tickets does not justify the ejection of a passenger who was ignorant of the rule, who had been often permitted by the train hands to ride on the payment of a cash fare to them, and who could not have secured a ticket in time to board the train, by reason of the ticket agent's failure to seasonably open the office. *Eddy v. Rowell* (Civ. App.), 28 S. W. 875.

## **2. Duty of Carrier to Afford Opportunity to Purchase Ticket.**

### **a. In General.**

In order that a railroad company may charge a higher rate than that fixed by statute, reasonable opportunity must be afforded to the intending passenger to purchase a ticket. *Eddy v. Rider*, 79 Tex. 57, 15 S. W. 113; *Mills v. Missouri*, etc., R. Co., 94 Tex. 242, 59 S. W. 874, reversing 57 S. W. 291; *Fordyce v. Manuel*, 82 Tex. 527, 18 S. W. 657.

Under Rev. St., art. 4238, declaring the intersection of two railroads to be a depot where the companies must receive passengers, and article 4226, requiring passengers to be carried to and from such junctions on payment of the legal fares, and Sayles' Civ. St., art. 4258b, § 9, requiring ticket offices to be open half an hour prior to the departure of trains, and authorizing a charge of only three cents a mile by the conductor if the offices are not so open, a company is liable for the ejection of a passenger from a freight train, who gets on at a junction where there is no ticket office, notwithstanding its rule that passengers without tickets can not ride on such trains. *Eddy v. Rider*, 79 Tex. 53, 15 S. W. 113.

A passenger, who was unable to procure a ticket because of the absence of the ticket agent, is not bound to pay the extra fare charged for failure to buy a ticket to avoid ejection from the train. *Gulf, C. & S. F. Ry. Co. v. Sparger* (Tex. Civ. App.), 39 S. W. 1001.

### **b. Question as to Reasonable Opportunity One for Jury.**

Where a carrier has established a regulation requiring passengers to procure tickets before entering its trains, in an action by a passenger, who had not procured a ticket, to recover for injuries sustained in attempting to board a moving train, evidence that he went to the ticket office to secure a

ticket shortly before the train started, and saw no one in the office, and afterwards went again to the office, finding the agent out, and that the agent attended to mail and express, and was in his office except when he left to attend to a previous train, presents a question for the jury,—whether such carrier failed to allow such passenger an opportunity to get a ticket, giving him the right to enter such train without a ticket. Judgment (Civ. App.), 57 S. W. 291, reversed. *Mills v. Missouri, K. & T. Ry. Co. of Texas*, 59 S. W. 874, 94 Tex. 242, 55 L. R. A. 497.

**c. Statute Requiring Ticket Offices to Be Open for Half an Hour Prior to Departure of Train.**

**Provision Stated and Construed.—**

It is expressly required by statute in Texas that railroad companies shall be required to keep their ticket offices open half an hour prior to the departure of trains. *Sayles' Civ. Stat.*, art. 4258b, § 9. *Mills v. Missouri, etc.*, R. Co., 94 Tex. 242, 252, 59 S. W. 874, reversing 57 S. W. 291; *Fordyce v. Manuel*, 82 Tex. 527, 18 S. W. 657; *Eddy v. Rider*, 79 Tex. 53, 15 S. W. 113; *Missouri Pac. R. Co. v. McClanahan*, 66 Tex. 530, 531, 1 S. W. 576; *Missouri, etc.*, R. Co. v. *Gist*, 31 Tex. Civ. App. 662, 73 S. W. 857, affirmed in 97 Tex. 641, no op.; *Gulf, etc.*, R. Co. v. *Fox* (Sup.), 6 S. W. 569; *Gulf, etc.*, R. Co. v. *Dyer* (Civ. App.), 95 S. W. 12; *International, etc.*, R. Co. v. *Lister* (Civ. App.), 72 S. W. 107.

The statute requiring railway ticket offices to be kept open for half an hour before the departure of trains, is a limitation, when the office is not so kept open, both on the right to charge more than three cents per mile to a passenger without a ticket and on its right to prevent passengers without tickets from boarding the train. *Mills v. Missouri, etc.*, R. Co., 94 Tex. 242, 252, 253, 59 S. W. 874, reversing 57 S. W. 291.

In an action against a railroad company to recover damages for injuries sustained by plaintiff in attempting to board a moving train, defendant claimed that plaintiff, not having a ticket, had no right, under its rules, to board its train, and plaintiff attempted to justify his attempt by claiming that defendant's ticket office was not open as required by law. Held, that an instruction that it was defendant's duty to keep its ticket office continuously open for half an hour before the "arrival of trains and until departure thereof" was erroneous, as imposing upon defendant a greater burden than that imposed by law; *Batts' Civ. St. art. 4542* (the only statute on the subject), only requiring railway ticket offices to be kept open for half an hour prior to the "departure" of trains. *Missouri, K. & T. Ry. Co. of Texas v. Mills*, 65 S. W. 74, 27 Tex. Civ. App. 245.

This error was not cured either by the subsequent instruction that if, "during the half hour before the departure of the train," plaintiff applied at the ticket office for a ticket, and failed to get it because of the absence of the ticket agent, he was entitled to enter the train without a ticket, or by the instruction that plaintiff had "an entire half hour before the train arrived and took its departure," since the former instruction corrects the error only by implication, and the latter is susceptible of construction in harmony with the error. *Missouri, K. & T. Ry. Co. of Texas v. Mills*, 65 S. W. 74, 27 Tex. Civ. App. 245.

*Sayles' Ann. Civ. St. 1897*, art. 4542, requires railroad ticket offices to be kept open half an hour before the departure of each train, and provides that, on failure to do so, not more than three cents per mile shall be charged. Held, that whether a passenger applied for a ticket, or used any diligence whatever in an attempt to procure one, the ticket office not having been kept

open for such time, the conductor had no authority to collect more than three cents per mile. *Gulf, C. & S. F. Ry. Co. v. Dyer*, 95 S. W. 12, 43 Tex. Civ. App. 93.

Gen. Laws 18th Leg. 70, requires railroads to keep open their ticket offices for one-half hour before the departure of trains, and allows them to collect extra fare from those who fail to purchase tickets at offices thus kept open. They can not demand this extra fare when they fail to observe this statute, even though the passenger did not apply for his ticket during the specified time; and, if they eject one thus refusing to pay extra fare, they are liable for damages. *Missouri Pac. Ry. Co. v. McClanahan*, 66 Tex. 530, 1 S. W. 576.

Where a person intending to become a passenger on a train failed to apply for a ticket in time to have gotten it had the agent been in the office, the absence of the agent from the office was not a denial of any right of the passenger and would not entitle him to admission to the train without a ticket. *Mills v. Missouri, Kansas & T. Ry. Co. of Texas*, 94 Tex. 242, 59 S. W. 874, distinguishing *Missouri Pac. R. Co. v. McClanahan*, 66 Tex. 530, 1 S. W. 576.

**Office Must Not Only Be Open but Person Present to Sell Tickets.**—The provision of Rev. St. art. 4542 requiring railroads to keep their ticket offices open for an hour prior to the departure of trains and upon failure to do so they shall not charge more than three cents per mile is for the benefit of persons intending to take passage and means not only that the office itself shall be open but that someone shall be there to sell tickets. *Mills v. Missouri, Kansas & T. Ry. Co. of Texas*, 94 Tex. 242, 59 S. W. 874.

Where a passenger who has gone to a railroad ticket office to purchase his ticket in ample time to do so is unable to buy a ticket, and is compelled

to go on the train without one, because, although the ticket office is open, as required by Sayles' Civ. St. art. 4258b, § 9, there is no one in the office to sell tickets, the ticket agent being busy unloading baggage, such passenger has a right to travel on the train without paying the additional fare allowed by statute to be exacted from passengers without tickets. *Fordyce v. Manuel*, 82 Tex. 527, 18 S. W. 657.

Where a passenger who had not procured a ticket sues for injuries sustained in attempting to board a moving train, he may state, in an action for his injuries, that, if the agent had been in the office when he applied for a ticket, he would have had time to catch the train before it moved, as bearing on the question whether he was denied an opportunity of getting a ticket. Judgment (Civ. App.) 57 S. W. 291, reversed. *Mills v. Missouri, K. & T. Ry. Co. of Texas*, 59 S. W. 874, 94 Tex. 242, 55 L. R. A. 497.

**Failure to Allow Reasonable Time for Purchase after Opening Office as Negligence.**—Failure to allow reasonable time, after opening a ticket office, to purchase tickets and board the cars, is negligence. *Gulf, C. & S. F. R. Co. v. Fox* (Sup.) 6 S. W. 569.

Failure of a railroad company to keep its ticket office open 30 minutes before the departure of a passenger train, as required by the statute, is negligence per se. *International & G. N. R. Co. v. Lister* (Civ. App.), 72 S. W. 107.

Plaintiff went into defendant's station to purchase a ticket just before the departure of a train, but found the office closed. He then attempted to board the train without a ticket, but was told by the conductor to go and get one. Before he returned, the train had started, and he was injured in attempting to board it while in motion. Held, that defendant was guilty of negligence if the train was started without giving plaintiff a reasonable time to

purchase a ticket and to return to the train, as *Sayles' Ann. Civ. St.* 1897, art. 4542, expressly requires a railroad to keep its ticket office open 30 minutes before the departure of a train, and it was the duty of the conductor to wait for plaintiff after having sent him away. *Missouri, K. & T. Ry. Co. of Texas v. Gist*, 73 S. W. 857, 31 Tex. Civ. App. 662.

**Pleading in Action for Damages for Nonobservance of Statute.**—A petition alleging that, by reason of defendant's failure to keep its ticket office open 30 minutes before train time, plaintiff's wife was separated from plaintiff, and suffered embarrassment and humiliation, from which she subsequently became ill, was not objectionable on the ground that such allegations with reference to damages were vague, indefinite, and uncertain. *International & G. N. R. Co. v. Lister* (Civ. App.), 72 S. W. 107.

### 3. Nature of Ticket.

#### a. Ticket Considered as a Contract.

##### (1) In General.

A railroad ticket constitutes, *prima facie*, the contract between railroad and passenger. *International, etc., R. Co. v. Best*, 93 Tex. 344, 55 S. W. 315; *Mexican Cent. R. Co. v. Goodman* (Civ. App.), 43 S. W. 580; *Missouri, etc., R. Co. v. Williams*, 91 Tex. 255, 42 S. W. 855, reversing 40 S. W. 350.

**Evidence of Right to Transportation between Designated Points.**—Contract of a railroad company with a passenger is to carry him to his point of destination. *Missouri Pac. R. Co. v. Foreman*, 73 Tex. 311, 314, 11 S. W. 326.

Ordinarily, when a passenger buys his ticket and takes his seat on the cars, there is an implied agreement in the part of the railroad company to carry him in safety to his journey's end, the consideration for the agreement being the price of the ticket. *Handley v. Houston, etc., R. Co.*, 2 Posey 282.

A railroad ticket read: "I. G. Ry. Special Excursion Ticket. Going Cou-

pon. One First-Class Passage from Austin, Tex., to San Antonio, Tex. Rate sold, \$1.50." It stated passengers would not be allowed to stop off, and had the stamp of the Austin ticket office, with date. Held, that it embodied a contract entitling the holder to transportation from Austin to San Antonio. *International & G. N. R. Co. v. Ing*, 68 S. W. 722, 29 Tex. Civ. App. 398.

The ticket was *prima facie* evidence of a right to carriage from Austin to San Antonio. *International & G. N. R. Co. v. Ing*, 68 S. W. 722, 29 Tex. Civ. App. 398.

A receipt for stage fare, signed by the contractor, is an instrument in writing within the meaning of art. 1443. The receipt read as follows: "Received of N. Dulany \$42.00, his stage fare for three seats from Navasota to Waco. Sawyer & Co. per W. B. Bates. Houston, February 24, 1860." The legal purport of this contract is, that the carriers agreed to convey three passengers by stage-coach from Navasota to Waco; and they further promise to provide careful drivers, of reasonable skill and good habits, for the journey, and not to overload the coach with either passengers or baggage, and to take care that the weight is suitably adjusted, so that the coach should not be top-heavy. *Pas. Dig.*, art. 452, note 329. *Sawyer v. Dulany*, 30 Tex. 479.

#### An Undertaking to Carry Passenger to Destination and Let Him Off There.

—The sale of a ticket to a passenger amounts to a contract to carry him to his destination and let him off at that place, though it be merely a flag station. *Missouri, etc., R. Co. v. Glass*, 46 Tex. Civ. App. 126, 102 S. W. 447; *San Antonio, etc., R. Co. v. Dykes* (Civ. App.), 45 S. W. 758.

A railroad company is conclusively presumed to know of its undertaking to carry a passenger to, and stop at, a flag station, when he buys a ticket therefor, and boards the proper train, regardless of the conductor's neglect of

his duty to call for his ticket, and so inform himself of the passenger's destination. *San Antonio & A. P. Ry. Co. v. Dykes* (Civ. App.), 45 S. W. 758.

Where a railroad agent at the regular ticket office sells a ticket good only on a special train which is in charge of a third person, whose name is signed to the ticket, but of whose contract with the carrier the purchaser is ignorant, such sale constitutes a contract of transportation binding on the carrier. *Eddy v. Harris*, 78 Tex. 661, 15 S. W. 107, 22 Am. St. Rep. 88; *Same v. Searcy* (Sup.) 15 S. W. 108; *Same v. Farrar*, Id.; *Same v. Jones*, Id.; *Same v. Nelson*, Id.; *Same v. Lewis*, Id.; *Same v. Henly*, Id.; *Same v. Foster*, Id.; *Same v. Robinson*, Id.; *Same v. Johnson*, Id.; *Same v. Watson*, Id.; *Same v. Turner*, Id.; *Same v. Carter*, Id.

**Ticket Only Entitles to Carriage According to Custom of Road.**—By his ticket a passenger acquires only the right to be carried according to the custom of the road. He has the right to go to the place named in his ticket on any train that usually carries passengers to that place, but he can not insist on being carried out of the customary course of the road. *Beauchamp v. I. & G. N. Ry. Co.*, 56 Tex. 239.

A railroad company is not liable to a passenger for failure to stop at any particular station, unless the passenger shows an express or implied contract to so stop. *Beauchamp v. International*, etc., R. Co., 56 Tex. 239, 245.

### (2) Laws Governing Construction of Contract.

A contract for the carriage of a passenger and his baggage to his destination in Mexico and return, made by the initial carrier in Texas, is governed by the laws of this state. *Mexican Nat. R. Co. v. Ware* (Civ. App.), 60 S. W. 343.

### (3) Admissibility of Evidence Aliunde to Vary Terms.

Evidence aliunde can not be received

to vary the terms of a contract printed on a railroad ticket. *Missouri, etc., R. Co. v. Murphy* (Civ. App.), 35 S. W. 66.

A railroad ticket containing a condition that it shall not be good for return passage, unless the ticket holder identifies himself to the satisfaction of the company's agent and unless signed and stamped by such agent, is a written contract, which can not be altered or varied by parol evidence. *Abram v. G. C. & S. F. Ry. Co.*, 83 Tex. 61, 18 S. W. 321.

As to admissibility of evidence to show real contract, see post, "Conclusiveness of Ticket or Pass as to Actual Contract," III, B, 3, a, (4).

### (4) Conclusiveness of Ticket or Pass as to Actual Contract.

**In General.**—A ticket or pass, its form being prescribed by the carrier, does not in all cases determine the passenger's right to transportation nor prevent an inquiry into the actual contract between him and the carrier's agent. *Gulf, etc., R. Co. v. Copeland*, 17 Tex. Civ. App. 55, 42 S. W. 239; *Gulf, etc., R. Co. v. Halbrook*, 12 Tex. Civ. App. 475, 33 S. W. 1028; *St. Louis, etc., R. Co. v. Mackie*, 71 Tex. 491, 494, 9 S. W. 451; *Gulf, etc., R. Co. v. Rather*, 3 Tex. Civ. App. 72, 21 S. W. 951, affirmed in 93 Tex. 685, no op.; *Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. 399; *Galveston, etc., R. Co. v. Kinnebrew*, 7 Tex. Civ. App. 549, 27 S. W. 631; *Missouri Pac. R. Co. v. Martino*, 2 Tex. Civ. App. 634, 18 S. W. 1066, 21 S. W. 781; *Texas, etc., R. Co. v. Dennis*, 4 Tex. Civ. App. 90, 23 S. W. 400, affirmed in 93 Tex. 674, no op.; *Mexican Cent. R. Co. v. Goodman* (Civ. App.), 43 S. W. 580.

"While the ticket is usually the evidence of the contract between the carrier and passenger, yet what is contained therein or omitted therefrom is not in all cases to be considered as conclusive of the rights of the passenger. 2 Beach Law of Rys., §§ 869, 870. If the car-

rier by mistake fails to deliver what the passenger purchased, or fails to furnish the passenger with a ticket evidencing his rights secured by the contract really entered into, it must correct this mistake when the emergency requires, and grant to the passenger the privilege and right actually purchased. The carrier will not under such circumstances be permitted to complain of the condition of the passenger which it by its wrongful acts has forced upon him. *I. & G. N. R. Co. v. Gilbert*, 64 Tex. 536, 541." *Gulf, etc., R. Co. v. Rather*, 3 Tex. Civ. App. 72, 21 S. W. 951, affirmed in 93 Tex. 685, no op.

Where a contract for the transportation of a passenger is actually made and the passenger informs the conductor as to the terms of the contract, the carrier is bound by the contract, as it was in fact made, whether the conductor endeavored or not to investigate the truth of the passenger's statement as to its terms. *Gulf, C. & S. F. Ry. Co. v. Halbrook*, 12 Tex. Civ. App. 475, 33 S. W. 1028.

A statement by plaintiff, who intended to take passage on a train, made to the agent of the carrier, that he desired a ticket to a particular destination, did not in itself, constitute a contract of carriage unless there was an agreement or understanding between plaintiff and such agent that plaintiff should have the desired transportation. *Gulf, C. & S. F. Ry. v. Halbrook*, 12 Tex. Civ. App. 475, 33 S. W. 1028.

Where a plaintiff stated to defendant's ticket agent the character of ticket he desired in respect to time limit but the agent gave him, by mistake, a ticket containing a lesser limit of time, and plaintiff, before taking passage on the train, discovered the error and demanded a corrected ticket, which demand was refused, plaintiff was entitled to take passage on the train and to recover for a wrongful ejection, and defendant could not claim that whatever breach of con-

tract there was occurred when the railroad agent refused to issue a corrected ticket and that plaintiff had no right to increase the damages by attempting to ride on a defective ticket. *Gulf, C. & S. F. Ry. Co. v. Halbrook*, 12 Tex. Civ. App. 475, 33 S. W. 1028.

In an action for ejecting a passenger riding on an overdue return ticket, where the issue was as to whether the return trip could be made within 30 days, as claimed by plaintiff, under oral agreement with the agent before purchase, or had to be made within 10 days, as recited in the ticket, a charge to find for defendant if 10 days was found to be a reasonable time was erroneous. *Gulf, C. & S. F. Ry. Co. v. Halbrook*, 12 Tex. Civ. App. 475, 33 S. W. 1028.

**Admissibility of Evidence to Show Real Contract.**—Evidence is admissible to show what the contract really was, and it is not considered that in receiving it the terms of a written contract expressed by the ticket are varied, when by mistake or otherwise it does not show that the passenger is entitled to be carried as contracted for. *Galveston, etc., R. Co. v. Kinnebrew*, 7 Tex. Civ. App. 549, 27 S. W. 631.

Where a ticket agent, who has authority to sell both limited and unlimited tickets over a connecting line, gives a passenger a ticket which he takes without reading, and which recites on its face that it is limited, evidence that the passenger contracted for a ticket which would allow him stop-over privileges is admissible, though the ticket also recites that no agent has authority to change the conditions thereof. *Galveston, H. & S. A. Ry. Co. v. Kinnebrew*, 7 Tex. Civ. App. 549, 27 S. W. 631.

Where, in an action for injuries to a passenger traveling on a pass, there was sufficient proof that the pass had been lost and that plaintiff was unable to produce it, parol evidence of the pro-

visions thereof was admissible. *International, etc., R. Co. v. Lynch* (Civ. App.), 99 S. W. 160, affirmed in 102 Tex. 585, no op.

As to right of passenger to assume that ticket furnished complies with actual contract, see post, "Right of Purchaser to Assume That Ticket Furnished Complies with Actual Contract," III, B, 5, a, (3).

As to liability of carrier in damages for furnishing ticket not in accordance with actual contract, see post, "Liability of Carrier in Damages for Furnishing Tickets Other than Those Contracted for," III, B, 5, a, (4).

**(5) Necessity for Plaintiff to Prove Execution and Issuance of Ticket by Carrier.**

Where, in an action against a railroad for wrongful ejection from a train, the complaint alleged that plaintiff's ticket was issued by defendant, and the proof showed the ticket was purchased from a person who was not shown to be an agent of the defendant, defendant not having pleaded non est factum, it was not necessary for plaintiff to prove that defendant executed and issued the ticket. *International & G. N. R. Co. v. Ing*, 68 S. W. 722, 29 Tex. Civ. App. 398.

**b. Transferability.**

In the absence of constitutional or statutory prohibition, or a stipulation to the contrary on the face thereof, a railroad passenger ticket is transferable, and entitles the holder thereof to the rights of the original purchaser. *International & G. N. R. Co. v. Ing*, 68 S. W. 722, 29 Tex. Civ. App. 398.

Batts' Ann. Civ. St. tit. 94, c. 12a, attempts to regulate the sale of railroad tickets, and under certain circumstances prohibits any one save a duly appointed agent from making such sales; but provides that it "shall not apply to any person holding a ticket on which it is not printed that it is a penal offense for him or her to sell, barter or transfer the ticket

for consideration." Held, that a ticket not having the printed notice is assignable. *International & G. N. R. Co. v. Ing*, 68 S. W. 722, 29 Tex. Civ. App. 398.

As to validity of prohibitions in tickets against their transfer, see post, "Prohibition of Transfer," III, B, 4, a, (3).

**4. Conditions.**

**a. Right to Impose and Enforce.**

**(1) Stipulations as to Continuous Passage.**

**In General.**—A limitation in a passenger's ticket that it must be used on the day on which it is dated is valid. *Texas & N. O. R. Co. v. Powell*, 13 Tex. Civ. App. 212, 35 S. W. 841.

**Construction of Provision.**—A regulation by a railroad that passengers shall not stop over on the route without obtaining stop-over checks is valid. *Breen v. Texas & Pac. R. Co.*, 50 Tex. 43.

A railroad ticket "good for one first-class continuous passage, on and from date stamped on back," limits the ticket to a right of passage to begin on the day of its date. Judgment, *Texas & N. O. R. Co. v. Demilly* (Civ. App. 1897), 41 S. W. 147, affirmed. *Demilly v. Texas & N. O. R. Co.*, 42 S. W. 540, 91 Tex. 215.

A railroad ticket containing a stipulation that it is "good for a continuous passage on and from the date stamped on the back" is limited to use upon the day it was dated, and such further time as is necessary to complete the continuous passage. *Texas & N. O. R. Co. v. Powell*, 13 Tex. Civ. App. 212, 35 S. W. 841.

**Breaking of Journey as Forfeiting Right to Further Transportation.**—

Cases may arise in which by accident, misfortune, fault of the carrier, or the misconduct of the employees of a carrier of passengers, continuous transit may be interrupted without fault on part of the passenger, and in such



cases the passenger may be entitled to resume his journey, and to be transported as though no interruption had occurred. *Gulf, etc., R. Co. v. Henry*, 84 Tex. 678, 19 S. W. 870.

Where plaintiff's ticket entitled him only to a continuous passage over defendant's railroad, he had no right to take a train running only to an intermediate point and take passage therefrom on another train that could take him to his destination, even though the latter train was the one he should have taken in the first instance, the voluntary breaking of his journey forfeiting his right to enter the second train on his original contract of passage. *Gulf, C. & S. F. Ry. Co. v. Henry*, 84 Tex. 678, 19 S. W. 870, 16 L. R. A. 318.

The purchaser of a limited through ticket for continuous passage is under obligation to inform himself by what train he can make the continuous passage contemplated within the time limited by the ticket. *Gulf, Colorado & Santa Fe Ry. Co. v. Henry*, 84 Tex. 678, 19 S. W. 870.

Where a holder of a limited ticket has been delayed by reason of accident, fault of carrier or misconduct of carrier's servants, he may resume his journey as if no interruption had occurred; aliter where caused by his own carelessness. *Gulf, etc., R. Co. v. Henry*, 84 Tex. 678, 684, 19 S. W. 870.

The act of a conductor in permitting a passenger holding a ticket for continuous passage to remain on the train which went only a part of the distance did not entitle the passenger to passage on another train for the remainder of the distance. *Gulf, Colorado & Santa Fe Ry. Co. v. Henry*, 84 Tex. 678, 19 S. W. 870.

A railroad ticket, signed by the purchaser, restricted his right to a continuous trip, going or returning, and expressly provided that no agent or employee had power to modify the contract. A conductor on the road in-

formed the passenger that he could stop off at an intermediate point, and wrote on the ticket to that effect. On resuming his journey, the passenger was ejected because of the fact that the trip was not continuous. Held, that the railroad company is not liable. *International & G. N. R. Co. v. Best*, 55 S. W. 315, 93 Tex. 344.

Individual check, given by conductor on collecting ticket, is not evidence of right to continue ride between points indicated on another train, passenger having stopped over at intermediate station. *Breen v. Texas, etc., R. Co.*, 50 Tex. 43, 46, 47.

#### (9) Limitation as to Time for Which Valid.

**In General.**—Common carriers have the right to place upon tickets issued by them for passage a limitation as to the time within which the ticket must be used. *Texas, etc., R. Co. v. Powell*, 13 Tex. Civ. App. 212, 35 S. W. 841 (see 89 Tex. 663). And see *Gulf, etc., R. Co. v. Riney*, 41 Tex. Civ. App. 398, 92 S. W. 54.

A ticket limited as to time can not be used after the expiration of such time. *Texas & P. Ry. Co. v. McDonald*, 2 Willson, Civ. Cas. Ct. App. § 163.

**Ejection of Passengers Attempting to Ride on Expired Ticket.**—See post, "Where Ticket or Pass Invalid," V, D, 15, a, (4).

**Time Fixed Must Be Reasonable.**—The time limited on a railroad ticket, within which a trip must be completed, must, in order to be binding, allow sufficient time for a person using ordinary diligence to accomplish the trip. *Gulf, C. & S. F. Ry. Co. v. Wright*, 10 Tex. Civ. App. 179, 30 S. W. 294.

A railway offering excursion tickets good for a limited time to induce purchasers to visit a distant place for a specific purpose should allow a reasonable time to accomplish the pur-

pose. *Texas, etc., R. Co. v. Dennis*, 4 Tex. Civ. App. 90, 94, 95, 23 S. W. 400, affirmed in 93 Tex. 674, no op.

A passenger purchasing a limited ticket for a specified trip at a reduced rate is entitled to assume that the limitation is reasonable and that sufficient time is given to make the trip contemplated. *Texas & P. Ry. Co. v. Dennis*, 4 Tex. Civ. App. 90, 23 S. W. 400.

The conduct of a conductor in requiring the fare of a passenger failing to comply with an unreasonable time limitation binds the company. *Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463, 469, 21 S. W. 399.

**Test as to Reasonableness of Limitation.**—Whether the time in which a ticket is to be used is reasonable, is ascertained from all the facts and circumstances existing at the time the contract was made and the time the ticket should be used. From these facts the jury must determine whether the limitation imposed was reasonable, and if the journey could, by ordinary diligence upon the part of the passenger, be accomplished within that period. *Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. 399.

A time fixed in which the ticket may be used, less than is sufficient to accomplish that purpose, would be a limitation of time imposed which could not be reasonable under the circumstances. *Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. 399.

"If from the facts and circumstances existing at the time the contract of carriage was entered into, as to the connections and movements of the trains over the several lines of road, and reasonable changes that were likely to be made in the schedules of the movements of trains, and from the natural and usual difficulties that are likely to be met by a traveler over the route, and that are of such a

character that the carrier selling the ticket is likely to contemplate, the time agreed upon is not sufficient to accomplish the journey, it can then be said that the limitation imposed is unreasonable. 2 Woods Ry. Law, 1403, 1406." *Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. 399.

**Reasonableness of Time Question for Jury.**—Defendant railroad sold plaintiff's wife an excursion ticket, good on the return trip for three days after a certain date named. The ticket was refused by the conductor, more than the three days having expired. The ticket provided that defendant, in selling it, acted as agent, and was not responsible beyond its own line. The court charged that, if the ticket was presented after the date named for its expiration, it was invalid, and the conductor was justified in ejecting the holder, on refusal to pay fare, unless defendant or one of the connecting lines caused the delay in presenting the ticket. Held, that this was error, for defendant had the right to limit its liability to its own line, but the limit fixed within which the journey must be completed must, to be binding, be a reasonable one, and whether the three days was such a reasonable time should have been submitted to the jury. *Gulf, C. & S. F. Ry. Co. v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. 399.

**Construction of Limitations as to Time.**—A condition of a ticket stating that it is not good for return passage unless the holder identifies himself to the agent of the connecting road at M. "on or before January 20, 1888, and, when officially signed \* \* \* by said agent, this ticket shall be good only three days after such date," means that the journey is to be completed within the three days, and not merely commenced within that time. *Gulf, C. & S. F. Ry. Co.*

*v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. 399.

A round trip ticket between S. and G. limited to four days from date of issuance having been purchased by plaintiff for his wife, and she having left G. in time to return to S. within the time limit of the ticket, there was a delay so that she missed the train connecting at F. for S. There was another train leaving F. on that day, but it did not run through to S., and she waited until the next day, her ticket having expired the day before, when she took the train running through from F. to S. Held, that she was not bound to take the train which would not carry her through to S., and was entitled to ride from F. to S. on her ticket on the day she presented it. *Stevens v. Wichita Valley Ry. Co.*, 100 S. W. 807, 45 Tex. Civ. App. 196.

**Right of Purchaser Using Due Diligence to Return Trip after Expiration of Time.**—An auction sale of land in a distant city had been advertised by the owners of the land. A railroad company placed excursion tickets to the city and return in the hands of its agents, good for a certain limited time, at reduced rates. Held, that a purchaser of one of those tickets, who used all diligence after the sale to make the return trip, could not be lawfully expelled from one of the railroad company's trains, though the limited time had expired. *Texas & P. Ry. Co. v. Dennis*, 4 Tex. Civ. App. 90, 23 S. W. 400.

A railway excursion ticket issued by the principal defendant, and good for passage to G., a point on a connecting line, and return, recited on its face that it was "good for return passage commencing on the date punched in column 'Date of Identification,' to point purchased, within number of days punched in 'Return Transit Limit' on back of ticket." On the back of the ticket there was

a column marked "Final Limit," March 23 being punched therein, but the column not being referred to in the ticket in any way. There was also a column marked "Return Transit Limit Column," and referred to in the ticket on the back and face, in which one day was punched. The passenger holding the ticket presented it to the ticket agent at G., was identified, signed a return contract, and the ticket was accepted and punched March 23 in the "Date of Identification Column" by the agent. The return contract recited that the passenger agreed to use the ticket "to original starting point within number of days punched in 'Return Limit Column.'" The passenger commenced her return trip on the 23d, reaching the connecting point of the two lines on the 24th, and presented the ticket on a train of the principal defendant leaving there at about 10 p. m. the same day. Held, that the ticket was good though the train did not reach the original starting point until 2 a. m. on the 25th. *Rutherford v. St. Louis S. W. Ry. Co. of Texas*, 67 S. W. 161, 28 Tex. Civ. App. 625.

**Effect of Explanation to Conductor as to Unreasonableness of Limitation.**—An explanation to the conductor, by one presenting an expired ticket, of facts showing that the limitation was unreasonable, is equivalent to an explanation to the carrier itself. *Gulf, C. & S. F. Ry. Co. v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. 399.

A carrier's conductor has no higher right to expel a passenger from a train because of the alleged expiration of his ticket than the carrier itself has, so that an instruction that the conductor in all cases is required to look to the ticket alone in dealing with the passenger is erroneous. *Texas & P. Ry. Co. v. Dennis*, 4 Tex. Civ. App. 90, 23 S. W. 400.

**Provisions as to Extension of Time.**—A provision on a railroad ticket

that it shall be good for one day only, unless the holder shall deposit the return half thereof with the company's agent before expiration, and have it extended, is reasonable. *Missouri, K. & T. Ry. Co. of Texas v. Murphy* (Civ. App.), 35 S. W. 66.

**Evidence in Actions for Refusal of Tickets on Ground of Expiration.—**

In an action against a railway company for refusing an excursion ticket presented by a passenger, on the ground that it had expired, testimony as to the difference between the excursion rate and the regular fare should be excluded as immaterial. *Rutherford v. St. Louis S. W. Ry. Co. of Texas*, 67 S. W. 161, 28 Tex. Civ. App. 625.

Testimony by plaintiff as to statements made by defendant's ticket agent when the ticket was purchased as to the movements of trains over the route covered by the ticket, and the advice of the agent to purchase over those lines, was admissible, without the facts being pleaded, to show whether defendant had the opportunity to know if the time agreed on in which the ticket should be used was unreasonable, and diligence on the part of the purchaser. *Gulf, C. & S. F. Ry. Co. v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. 399.

**Evidence as to Waiver of Conditions.**—See post, "Waiver or Modification of Conditions," III, B, 4, c.

**Application of Statute of Limitations to Tickets Containing No Provision as to Time of Use.**—A first-class railroad ticket, making no provision as to time of use, is subject to the statute of limitations, beginning to run from its date of issue; so that one boarding a train and claiming a right of passage by virtue only of such a ticket, 14 years after its issue, is a trespasser, and may be ejected. *Cassiano v. Galveston, H. & S. A. Ry. Co.* (Civ. App.), 82 S. W. 806, affirmed in 98 Tex. 611, no op.

**(3) Prohibition of Transfer.**

**In General.**—A carrier selling a ticket at a reduced rate, under an agreement that it shall not be transferred, may take it up when presented by a transferee. *Levinson v. Texas & N. O. Ry. Co.* (Civ. App.), 43 S. W. 1032.

Where a railroad company's ticket provided that it is not transferable and that if presented by another purchaser, it can be taken up and fare collected, after such original purchaser had used it, the railway company could take it when presented by another and refuse to surrender it. *Levinson v. Texas, etc., R. Co.*, 17 Tex. Civ. App. 617, 618, 42 S. W. 901.

An agreement between carriers and associations and citizens of a city, binding the carrier to make special low rates to and from the city for certain occasions and sell nontransferable excursion tickets therefor, does not contravene the state or federal anti-trust laws, the purpose of the carriers in making the tickets nontransferable not being illegal, but to maintain the legal rate as to persons not purchasing excursion tickets. *Lytle v. Galveston, etc., R. Co.*, 100 Tex. 292, 99 S. W. 396.

**Injunction against Sale of Non-transferable Tickets.**—Where a railroad has sold tickets at a reduced rate for a particular occasion, good for a return trip, but nontransferable, and have so advised the public, the company has the right to enjoin dealing in the return tickets. *Lytle v. Galveston, H. & S. A. Ry. Co.* (Civ. App.), 100 S. W. 199.

A railroad company is not entitled to an injunction against dealing in nontransferable railway tickets which may thereafter be issued as occasion may arise. *Lytle v. Galveston, etc., R. Co.* (Civ. App.), 100 S. W. 199.

"The material questions involved in this suit were certified to the supreme court, and a full statement of the

case is contained in the opinion in which the answers are given. *Lytle v. Galveston, etc., R. Co.*, 100 Tex. 292, 99 S. W. 396. The supreme court held: 'When a railroad company has determined upon selling tickets at a reduced rate for a particular occasion, good for a return trip, but nontransferable and have so advised the public and placed such tickets upon sale, then, in our opinion the company has the right to enjoin dealing in the return tickets. In such a case there is a live issue and a threatened injury which is imminent; but, when tickets of the character designated are not upon sale, to enjoin dealing in such as may thereafter be issued, as occasions may arise, savors of action appropriate to the legislative branch rather than to the judicial department of the state government. It seems to us that the railroad companies have an adequate and complete remedy by enjoining dealing in tickets which are on the market for sale, without interference as to those that have not been, but may thereafter be, offered for sale.' The judgment of the district court will be reformed so as to apply only to such tickets as were on the market for sale at the time the judgment was rendered, and as reformed will be affirmed." *Lytle v. Galveston, etc., R. Co.* (Civ. App.), 100 S. W. 199.

**(4) Requirement of Identification, Signature and Stamping in Case of Round-Trip Ticket.**

In consideration of issuing a round-trip ticket at a reduced rate, the carrier may insert as a condition of the ticket that it shall not be good for a return passage unless the ticket holder shall identify himself as the original purchaser to the satisfaction of the carrier's agent at the point of destination, and unless the ticket is signed and stamped by said agent.

*Abram v. Gulf, C. & S. F. Ry. Co.*, 83 Tex. 61, 18 S. W. 321.

A condition on a return excursion ticket sold by a railroad company at a reduced fare requiring the holder to identify herself as the original purchaser by writing her signature on the back thereof, and, if this is not satisfactory to the validating agent, to produce other proofs of her identity, is reasonable and valid. *Reed v. Texas & N. O. R. Co.* (Civ. App.), 50 S. W. 432.

Where ticket to H. and return stipulates that, to be good for return, it must be first signed and stamped by company's agent at H., and passenger knows of this, and signing and stamping was not done, and he did not ask that it be, he can not complain of refusal to accept it for passage, though the agent at ticket office to whom he showed it said at the time that it was all right. *Houston & T. C. Ry. Co. v. Arey*, 44 S. W. 894, 18 Tex. Civ. App. 457.

**(5) Prohibition as to Detachment of Ticket from Stub.**

Where a railroad ticket bore the words, "not good if detached," the conductor properly rejected it when presented detached from the stub. *Houston & T. C. R. R. Co. v. Ford*, 53 Tex. 364.

**(6) Requirement of Signature of Name on Request.**

Purchaser of a railroad ticket, knowing it was conditioned that he should sign his name thereto when requested by conductor, who refuses to sign when so requested, and is ejected from the train, can not recover, although the agent sold him the ticket after he refused to sign it. *Ketcheson v. Southern Pac. Co.*, 19 Tex. Civ. App. 288, 290, 291, 46 S. W. 907, affirmed in 93 Tex. 712, no op.

**(7) Limitation of Use of Ticket to Particular Train.**

A carrier is entitled to limit the

use of an excursion ticket sold at a reduced rate to any particular train or trains. *England v. International & G. N. R. Co.*, 73 S. W. 24, 32 Tex. Civ. App. 86.

**(8) Reservation in Pass of Right to Cancel Same at Any Time.**

Where a pass issued by a railroad company to a prospective employee contained a stipulation reserving the right to cancel the pass at any time, plaintiff could not recover because it was cancelled and taken up by one of defendant's conductors while plaintiff was en route on the trip for which the pass was issued. *St. Louis Southwestern Ry. Co. of Texas v. Hill* (Civ. App.), 103 S. W. 227.

**(9) Limitation of Liability.**

See post, "Limitation of Liability for Negligence," V, K.

**b. Necessity for Assent by Purchaser.**

**(1) Assent Presumed in Absence of Fraud or Deception.**

A purchaser of a railway ticket is presumed to know the contents of the printed contract thereon, limiting the time of its use. *Missouri, etc., R. Co. v. Murphy* (Civ. App.), 35 S. W. 66, 67.

Where no fraud or unfair means of deception have been resorted to by a carrier in selling a round-trip ticket containing a condition that it shall not be good for a return passage unless the ticket holder shall identify himself as the original purchaser to the satisfaction of the carrier's agent at the point of destination, and unless the ticket is signed and stamped by said agent, the assent of the ticket holder to the condition will be conclusively presumed, although he may not have signed the ticket; and the ticket holder may be ejected from a train for failure to comply with such a condition, though he may offer proof of identification to the conductor. *Abram v. Gulf, C. & S. F. Ry. Co.*, 83 Tex. 61, 18 S. W. 321.

If the passenger accept an ex-

cursion ticket containing a condition that it can not be used on return passage unless the manner of identification specified has been complied with, and has opportunity to know its condition, uses it, and the carrier has resorted to no unfair means of deception, his assent to the same will be conclusively presumed. To bind the purchaser it is not indispensable that he sign the contract where it binds the company. *Abram v. Gulf, etc., R. Co.*, 83 Tex. 61, 18 S. W. 321, citing *Gulf, etc., R. Co. v. McGown*, 65 Tex. 640, 643.

A ticket which is a mere token containing no such contract does not come under the rule, and a mere notice on the back of the ticket has been held not to be a contract; but where the stipulation is in the body of the ticket it becomes a part of the contract. *Abram v. Gulf, etc., R. Co.*, 83 Tex. 61, 18 S. W. 321.

When a contract for transportation contains a limitation on the back, in order to bind the holder thereof it must be shown that he read or knew of such limitation at the time he accepted the contract. *San Antonio & A. P. Ry. Co. v. Newman*, 43 S. W. 915, 17 Tex. Civ. App. 606.

One who has received from a railway company a pass with conditions thereon, and who has used it to procure free passage, must be held to have consented to its conditions, as fully as though he had signed the pass. *G., C. & S. F. Ry. Co. v. McGown*, 65 Tex. 640.

**(2) Effect of Fraud by Carrier's Agent.**

**In General.**—The carrier being chargeable with the misrepresentations or mistakes of its agents, the purchaser may show that the real contract was different from the one signed, if he signed it by reason of some fraud or unfair means of deception practiced by the agent. *Mexican, Cent. R. Co. v. Goodman* (Civ. App.), 43 S. W. 580, citing *Abram v. Gulf, etc., R. Co.*, 83

Tex. 61, 65, 18 S. W. 321; *Missouri Pac. R. Co. v. Martino*, 2 Tex. Civ. App. 634, 642, 18 S. W. 1066, 21 S. W. 781.

**Pleading and Proof of Fraud in Imposition of Condition.**—If a ticket holder claims fraud by a carrier in imposing certain conditions precedent to carriage on his ticket, he must allege such facts in an action for wrongful ejection, to render evidence thereof admissible. *Abram v. G. S. & S. F. Ry. Co.*, 83 Tex. 61, 18 S. W. 321.

### c. Waiver or Modification of Conditions.

#### (1) In General.

A provision in a railroad ticket requiring identification of the holder as an original purchaser though valid, may be waived. *G., C. & S. F. Ry. Co. v. Kuenhle*, 4 Willson, § 249, 16 S. W. 177.

A railway company may waive a condition in a shipping contract requiring the owner in charge of a racehorse to ride in the caboose, and such waiver may be in writing or by parol without any additional consideration. *Missouri, etc., R. Co. v. Cook*, 8 Tex. Civ. App. 376, 380, 27 S. W. 769, affirmed in 93 Tex. 690, no op.

#### (2) Power of Agent to Waive or Modify.

**General Rule.**—A passenger agent can not waive the conditions of a ticket which is accepted by the purchaser on condition that no employee can change its stipulations. *Reed v. Texas & N. O. R. Co.* (Civ. App.), 50 S. W. 432.

A passenger is bound to know the provisions of his ticket contract and has no right to rely upon the conductor's assurance contrary to its provisions. *International, etc., R. Co. v. Best*, 93 Tex. 344, 348, 55 S. W. 315.

Where a round-trip ticket expressly stated that no stopover would be allowed on return, the holder has no right of action against the company, because the conductor gave a stopover check and he was later ejected from

the train. *International, etc., R. Co. v. Best*, 93 Tex. 344, 347, 348, 55 S. W. 315.

Where a railroad ticket provided that it should be signed by the purchaser, who should also, when requested, sign his name for identification, and that the agent selling it had no authority to alter or waive any of its terms, one who purchased such ticket at a reduced rate in consideration of a compliance with its terms, of which he was made acquainted, is thereby bound, notwithstanding an alleged waiver by said agent of his signing; and, when ejected from a train because of his refusal to sign the ticket or pay full fare, he can not recover, except for the use of excessive force in ejecting him. *Ketcheson v. Southern Pac. Co.*, 46 S. W. 907, 19 Tex. Civ. App. 288.

Where a passenger presents to a conductor a round-trip ticket, which by its terms expired more than 24 hours previous thereto, and is ejected for failure to pay fare, he can not, in an action against the railroad company for damages, show that it was agreed between him and defendant's agent, when he purchased the ticket, that if, on the return trip, he boarded one of defendant's trains at a distant city, before the ticket expired, the ticket would be good to the station where it was purchased. *Gulf, C. & S. F. Ry. Co. v. Daniels* (Civ. App.), 29 S. W. 426.

In an action against a railway company for personal injury to plaintiff while in charge of a car of horses, etc., being shipped by him, testimony that four successive conductors in charge of the train did not object to his riding in the car, and at least three knew that he was so riding, was sufficient to show a waiver of a provision of the contract of shipment requiring him to ride in the caboose; there being no showing of want of the conductor's authority to permit him to ride in the car. (Civ. App. 1907) *Chicago, R. I. & P. Ry. Co. v. Burns*, 104 S. W. 1081, affirmed (Sup. 1908) 107 S. W. 49, 100 Tex. 329.

Railway conductors, being placed in charge of trains with apparent authority to control their movements and operation, may make reasonable arrangements as to freight and passengers transported under their direction. (Civ. App. 1907) Chicago, R. I. & P. Ry. Co. v. Burns, 104 S. W. 1081, affirmed (Sup. 1908) 107 S. W. 49, 100 Tex. 329.

**Effect of Representations by Ticket Agent as to Necessity for Compliance with Conditions.**—Where defendant's ticket agent sold a ticket to plaintiff's daughter with full knowledge that it was to be used by plaintiff, representing that if it was executed by the daughter it could be used by plaintiff and that it was not necessary for plaintiff to sign it herself and have it made to suit her description, defendant was liable for refusal of its train employees to honor the ticket. Southern Pac. Co. v. Bailey (Civ. App.), 91 S. W. 820, affirmed in 101 Tex. 659, no op.

A carrier is bound to accept a ticket providing that it must be signed by the person intending to use it, though tendered by the wife whose husband signed it in his own name, where it was sold the husband for the wife by an agent, who told the husband that his wife's signature was unnecessary, and that he could sign it. Mexican Cent. R. Co. v. Goodman (Civ. App.), 43 S. W. 580.

**(3) Necessity for Pleading Facts Showing Waiver.**

See post, "In Actions for Ejection," VII, F, 2, d.

**(4) Question of Waiver One for Jury.**

In suit against carriers for personal injuries sustained while riding in car with plaintiff's racehorse, where there is evidence showing that both shipping agent and conductor had waived stipulation requiring the shipper to ride in the caboose, the court properly refused instructions withdrawing such issue from the jury. Missouri, etc., R. Co. v. Cook, 8 Tex. Civ. App. 376, 382, 27 S. W. 769, affirmed in 93 Tex. 690, no op.

**(5) Presumptions and Proof of Waiver.**

**Burden of Proof of Waiver.**—Where a railway company contracts to ship a horse and in the contract requires the owner in charge of the horse to ride in the caboose, the burden of proof of a waiver of such condition is upon the shipper in an action to recover for injuries received while riding in the car with the horse. Missouri, K. & T. Ry. Co. v. Cook, 8 Tex. Civ. App. 376, 27 S. W. 769.

**Admissibility of Evidence as to Waiver.**—In an action for personal injuries received by a shipper while riding in a stock car with a horse shipped by him, evidence of a custom on the part of defendant's conductors in permitting shippers of live stock to ride in the car with the stock is admissible to show a waiver by defendant of a stipulation in the shipment contract requiring plaintiff to ride in the caboose. Missouri, K. & T. Ry. Co. of Texas v. Cook, 12 Tex. Civ. App. 203, 33 S. W. 669.

A contract for the shipment of a horse required plaintiff to ride in the caboose. Thereafter he exhibited to defendant's agent who made the contract with him a passenger ticket to the same point, and asked if that entitled him to ride with the horse. The agent said it did. Held, that the statement of the agent was admissible, not as varying the terms of the contract, but to show a waiver thereof. Missouri, K. & T. Ry. Co. v. Cook, 8 Tex. Civ. App. 376, 27 S. W. 769.

In an action for injuries while riding on a stock train, defendant pleaded the contract on which plaintiff was shipping his stock, and showed that it stipulated that plaintiff would remain in the caboose while the train was in motion, and that his failure to observe the regulation should be prima facie evidence of negligence on his part. Plaintiff pleaded that defendant through its conductor waived the contract, and



had authority to do so. Held, that evidence that it was customary for shippers of stock to ride on the engine was admissible as showing that the conductor had authority to waive the contract. (Civ. App.) *Missouri, K. & T. Ry. Co. of Texas v. Avis*, 91 S. W. 877, 41 Tex. Civ. App. 72, judgment affirmed 93 S. W. 424.

**5. Right of Purchaser of Ticket to Rely on Contract with Carrier's Agent.**

**a. Where Ticket Purchased from Authorized Ticket Agent Acting within Scope of Authority.**

**(1) General Rule as to Carrier's Liability for Misrepresentation or Mistake of Agent.**

The carrier is chargeable with the misrepresentations or mistakes of its agents. *Mexican Cent. R. Co. v. Goodman* (Civ. App.), 43 S. W. 580.

**(2) Representations as to Running of Trains, Stops, etc.**

While it is the duty of a person purchasing a railroad ticket to inform himself as to the movement of trains, yet if he possesses no knowledge on that subject, he may rely on information received from the ticket agent, whom the company authorizes to contract for transportation. *Gulf, C. & S. F. Ry. Co. v. Moorman* (Civ. App.), 46 S. W. 662, affirmed in 93 Tex. 685, no op.

A railroad station agent, with authority to sell tickets over its line, has authority to furnish information to persons desiring to purchase tickets over the road he represents as to the best route for the intending purchaser to travel to reach his destination, rendering the railroad company liable for all damages proximately caused to such purchaser by the agent's misdirection. *St. Louis, etc., R. Co. v. White*, 99 Tex. 359, 89 S. W. 746, reversing 86 S. W. 71.

Plaintiff, desiring to make a journey with his wife, who was in delicate

health, inquired of defendant's ticket agent as to the best route, and was directed to take the route they traveled, for which the agent sold plaintiff tickets. They were out four days and three nights and made four changes, during one of which the wife was injured while alighting from a car. There was another route over which he could have gone and reached the destination in much less time and with less changes. Held, that plaintiff was entitled to recover against defendant compensation for any injury resulting to his wife from any negligence of defendant on its own line, and on account of her having to make a greater number of changes of trains than she would have otherwise been compelled to have made, and for any injury she sustained in necessarily being on the way longer than if she had taken the other route, excluding any delays that may have occurred from a failure of the trains over other railroads to be run on schedule time. *St. Louis, etc., R. Co. v. White*, 99 Tex. 359, 89 S. W. 746, reversing 86 S. W. 71.

Statement of a ticket agent selling a limited excursion ticket are admissible against a railway company on a question of passenger's knowledge of the movement of trains and of reasonableness of limited time. *Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463, 468, 21 S. W. 399.

Where at the time plaintiff bought his ticket there was an express agreement between him and defendant's agent that he might travel to V. on the train which he took, action will lie for his being put off, before arriving at V., on the ground that the train did not stop at that station. Judgment (Civ. App.) 80 S. W. 426, reversed. *Gulf, C. & S. F. Ry. Co. v. Moore*, 83 S. W. 362, 98 Tex. 302.

A person purchasing a return ticket from a station porter, who was frequently in charge of the ticket office,

with the knowledge of the ticket agent, on an agreement that a certain train should stop at that place, is entitled to rely on his authority to make the agreement, and the company will be bound thereby. *Gulf, C. & S. F. Ry. Co. v. Moorman* (Civ. App.), 46 S. W. 662, affirmed in 93 Tex. 685, no op.

A petition alleged that plaintiff's wife purchased a round-trip railroad ticket to a certain town; that, in reliance on the promises of the selling agent that a train she was to take at a junction would stop at her destination, she boarded such train, but was forced to leave it by representations of the trainmen that it would not so stop. Plaintiff's evidence followed the pleading. Held, that the pleadings and evidence presented a case based on the conversation with the agent, and that, therefore, an instruction permitting a recovery on the contract as contained in the ticket, regardless of the conversation, was erroneous. *International & G. N. R. Co. v. Kilgo* (Civ. App.), 71 S. W. 556.

Evidence considered, and held insufficient to warrant a peremptory instruction to find that a railroad agent, in selling a ticket, had promised that a certain train would stop at the purchaser's point of destination. *International & G. N. R. Co. v. Kilgo* (Civ. App.), 71 S. W. 556.

A ticket agent selling tickets to a theatrical troupe, with knowledge that they were engaged to give a performance at their place of destination thereby makes a special contract of carriage, and the railroad company is bound to use diligence to transport the troupe to meet their engagement. *Missouri Pac. Ry. Co. v. Curtis*, 3 Willson, Civ. Cas. Ct. App. § 311.

**(3) Right of Purchaser to Assume That Ticket Furnished Complies with Actual Contract.**

**General Rule.**—A passenger, having

paid for a railway ticket, had a right to assume that the ticket delivered to her conformed to her contract with the company. *Texas & P. Ry. Co. v. Wynn*, 97 S. W. 506, 44 Tex. Civ. App. 29.

A passenger may, in the absence of actual notice to the contrary, assume that the carrier has furnished him with a ticket correctly stating the terms of the contract actually made, and is not bound to inspect the ticket to see that the carrier has performed its duty. *Gulf, C. & S. F. Ry. Co. v. Copeland*, 42 S. W. 239, 17 Tex. Civ. App. 55.

**Negligence of Passenger in Not Discovering Mistake a Question for Jury.**

—Where a passenger contracted for a ticket over the route he was traveling on when removed from the train, but by mistake was given a ticket over a different route, but, for want of time, he did not examine it before boarding the train, which was about to leave, nor before reaching the station where the change of cars is made for the route called for by the ticket, the question as to whether he was negligent in failing to discover the mistake in the ticket before his right to ride was questioned by the conductor was for the jury to determine from all the facts and surrounding circumstances. *Gulf, C. & S. F. Ry. Co. v. Rather*, 3 Tex. Civ. App. 72, 21 S. W. 951.

**(4) Liability of Carrier in Damages for Furnishing Tickets Other than Those Contracted for.**

Where plaintiff called and paid for first-class tickets for himself and family, but the company's agent, through mistake, gave him second-class tickets, and plaintiff and family were compelled to ride in second-class cars, plaintiff is entitled to recover damages. *St. Louis, etc., R. Co. v. Mackie*, 71 Tex. 491, 495, 9 S. W. 451.

Plaintiff purchased tickets from defendant's agent as first class, but when presented to the conductor it was dis-

covered that they were second class, and plaintiff was removed from the first-class car. Held, that his right of action was not affected by the conductor's offer to let him remain if he would pay one cent a mile in addition to what he had paid for his tickets, or by the rule of defendant that the conductor could only look to the ticket, and had no right to inquire if plaintiff was entitled to a first-class passage. *St. Louis, A. & T. Ry. Co. v. Mackie*, 71 Tex. 491, 9 S. W. 451.

Where a railroad company's agent, through his own fault, sells a passenger a ticket to the wrong place, and the passenger, on discovering the mistake, uses due care in selecting a route from the place of discovery to the desired destination, the company is liable for damages, though he selects a route which causes him more discomfort than another, which he might have selected, would have caused him. *Texas & P. Ry. Co. v. Armstrong* (Tex. Civ. App.), 41 S. W. 833.

Where an agent sells a passenger the wrong ticket, the conductor's action in evicting the passenger renders the railway liable. *Gulf, etc., R. Co. v. Rather*, 3 Tex. Civ. App. 72, 77, 21 S. W. 951, affirmed in 93 Tex. 685, no op.

The passenger had the right to stand on his contract with the ticket agent, and, if he was not furnished with a ticket evidencing his rights secured by the contract entered into, the company should have corrected the mistake, and was liable for ejecting him from the train. *Gulf, C. & S. F. Ry. Co. v. Rather*, 3 Tex. Civ. App. 72, 21 S. W. 951.

Where a railroad ticket agent orally agreed to sell to plaintiff a return-trip ticket good for 30 days, received the money therefor, and delivered the ticket, and plaintiff soon afterwards found that it was limited to 10 days, and demanded a change in the ticket or a return of the money, but was refused, the company could not defend

an action for ejecting plaintiff's wife while subsequently riding on the return coupon after 10 days, but within 30, on the ground that the breach of the contract, if any, took place when the agent refused to change the ticket or return the money, and that the subsequent attempt to ride on the return coupon was at the passenger's risk. *Gulf, C. & S. F. Ry. Co. v. Halbrook*, 12 Tex. Civ. App. 475, 33 S. W. 1028.

**(5) Liability of Carrier for Failure of Agent to Furnish Permit to Purchaser of Ticket.**

Where a passenger requests a permit to ride on a certain train when he purchases a ticket, and is told by the agent that the conductor will give him one, the company is liable for his ejection by the conductor for the failure to have such permit, since the duty to furnish the permit is a part of the contract of carriage. *Houston, E. & W. T. Ry. Co. v. White* (Civ. App.), 61 S. W. 436; *Same v. Jackson*, Id. 440.

**(6) Liability of Carrier for Money Deposited with Agent for Purchase of Ticket.**

Plaintiff paid the price of an emigrant ticket to a ticket agent of defendant railroad company, as directed by another agent, who informed plaintiff that the former agent would send the money to him, and that he would forward the ticket to plaintiff's brother in a distant state. The former agent absconded, retaining the money paid by plaintiff. Other agents of defendant had furnished similar tickets under similar circumstances. Held, that defendant was liable for the price of the ticket. *International & G. N. R. Co. v. Johnson*, 1 White & W. Civ. Cas. Ct. App. § 354.

**(7) Right and Duty of Carrier to Correct Mistakes of Agent.**

Railroad held entitled to correct a mistake of an agent advising a passenger that a train taken by him

stopped at certain points. *St. Louis, etc., R. Co. v. Wallace*, 32 Tex. Civ. App. 312, 74 S. W. 581.

The train connecting with that taken by plaintiff was not scheduled to stop at his destination, but he was informed by defendant's agent at the starting point that it was the proper train to take. Held, that defendant had the right to correct the mistake, and that, if plaintiff remained on the train after being informed of such mistake, and after a request to get off at the preceding station, defendant was not liable for damages resulting from its failure to have the depot at plaintiff's destination open. *St. Louis Southwestern Ry. Co. of Texas v. Wallace*, 74 S. W. 581, 32 Tex. Civ. App. 312.

"In *I. & G. N. R. Co. v. Hassell*, 62 Tex. 256, Hassell bought a ticket from Jacksonville to Elkhart, and was directed by the agent who sold the ticket to get on a through train which did not stop at Elkhart. The conductor of the train discovered the mistake of the agent and requested Hassell to leave the train at Palestine. Hassell refused to do so, and the conductor put him off. It was held that the company had a right to eject him at any regular station at which the train stopped. Applying this rule to the case in hand, the conclusion is reached that although the agent of the company at Fort Worth told Wallace and his family they could travel on the through train to Omaha, the company had a right to correct the mistake and to require them to leave the train at any regular station." *St. Louis, etc., R. Co. v. Wallace*, 32 Tex. Civ. App. 312, 74 S. W. 581.

#### **b. Where Act of Agent beyond Scope of His Authority.**

**In General.**—It is the duty of a railroad ticket agent to sell tickets to passengers upon the payment of the fare charged for the desired transportation. This is the obvious, as well as the clearly established purpose of his

agency, and his implied authority will be limited to acts incident thereto, and of a like nature. *Texas, etc., R. Co. v. Smith*, 38 Tex. Civ. App. 4, 84 S. W. 852.

**Statement That Passenger Having Lost Ticket Could Travel without It.**—The statement of a railroad ticket agent to a passenger who had lost her ticket that the conductor would make it all right, and that she could travel without it, was not binding on the carrier. *Texas & P. Ry. Co. v. Smith*, 84 S. W. 852, 38 Tex. Civ. App. 4.

**Unauthorized Issue of Permit.**—In an action against a railroad for damages for ejection from a train of a passenger who had obtained permit from agent to ride on a freight train, where proof was conclusive that the agent had no authority to issue the permit, it is error for the court to submit to the jury as an issuable fact and ground of recovery, the question whether or not the agent had authority to issue the permit in question. *Ft. Worth, etc., R. Co. v. Peterson*, 24 Tex. Civ. App. 548, 549, 60 S. W. 275.

**Waiver of Conditions.**—See ante, "Power of Agent to Waive or Modify," III, B, 4, c, (2).

**Effect of Knowledge by Plaintiff of Agent's Want of Authority.**—An instruction not clearly showing that the knowledge of an agent's want of authority in selling plaintiff his ticket would alone defeat recovery for wrongful ejection held erroneous. *Mexican Cent. R. Co. v. Goodman* (Civ. App.), 43 S. W. 580.

A charge that there could be a recovery though a certain person intended to defraud defendant railway company in selling plaintiff tickets that defendant had refused to accept, unless plaintiff knew that such person had acted with intent to defraud defendant, and had participated in it, or knew that such person had acted as defendant's agent, without authority so to do, was erroneous,

in that the jury might have been led to believe that plaintiff's knowledge of want of authority was not alone sufficient to defeat a recovery. *Mexican Cent. Ry. Co. v. Goodman* (Civ. App.), 43 S. W. 580.

The T. Ry. Co., whose line ran from F. to E., was authorized by defendant company, whose line ran from E. to M., to sell tickets from F. through E. to M. at a less rate than defendant's regular fare from E. to M. Plaintiff, a citizen of E., applied to T.'s agent at E. for tickets from F. through E. to M., and asked him if he could not telegraph to F. for them. Soon afterwards he bought two tickets from the agent, who had not telegraphed for them, but had made them up in his office in E. They indicated a journey from F. to M., stamped "Exchanged," indicating that they were given at E. in exchange for others that were surrendered by the holder at E. Held, that the court could not assume that plaintiff knew the tickets were issued without authority and fraudulently. *Mexican Cent. Ry. Co. v. Goodman* (Civ. App.), 43 S. W. 580.

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that he was perpetrating a fraud on defendant by issuing the same, so as to justify the purchaser's expulsion from the train. *Mexican Cent. Ry. Co. v. Goodman* (Civ. App.), 55 S. W. 372.

**c. Where Ticket Purchased from Other than Carrier's Authorized Agent.**

One purchasing a railroad ticket of a person who at most occupied to the railroad company the relation of special agent, does so at his peril. *Houston, & T. C. R. R. Co. v. Ford*, 53 Tex. 364.

A. purchased a ticket over the H. Railroad from the general ticket agent of another company, who by the custom existing among railroads, had the right to sell tickets of a prescribed form, but not tickets such as he sold to A., who on presenting his ticket, and refusing to pay fare, was ejected from the cars. Held, that the railroad company was not liable for damages. *Houston & T. C. R. Co. v. Ford*, 53 Tex. 364.

**6. Liability of Carrier for Contracts for Excursion Tickets.**

**In General.**—One who has sold a large number of excursion tickets to a third person is entitled to damages for the failure of the railway company to comply with its contract to convey an unlimited number of excursionists for a certain fare. *Houston & T. C. Ry. Co. v. Hill*, 70 Tex. 51, 7 S. W. 659.

A railroad company is liable on a contract made by its general passenger agent to sell a block of excursion tickets at a certain rate. *Houston, etc., R. Co. v. Hill*, 63 Tex. 381, 384.

The company can not limit its liability in damages pro tanto, for a breach of the contract, by an offer to carry 15 passengers at the rate agreed on, especially when such offer is accompanied with a condition that all other rights under the contract be relinquished. *Houston & T. C. Ry. Co. v. Hill*, 70 Tex. 51, 7 S. W. 659.

**Measure and Elements of Damages for Breach.**—Plaintiff suing on breach of contract to provide him with excursion tickets which he was to sell can not recover conjectural profits. *Houston, etc., Ry. Co. v. Hill*, 63 Tex. 381, 387.

A contract was made with a general passenger agent for the transportation of excursionists over the railroad for which he was agent for a specified rate. No limit to the number of passengers was prescribed. Before the time when the performance of the contract was to begin the company repudiated it and notified the person contracting with the passenger agent of that fact. Held in a suit by such person for the breach of the contract he was entitled to recover such damages as were incidental to and caused by the breach of contract and which might be reasonably supposed to have entered into the contemplation of the parties at the time of the making of the contract. *Houston & T. C. Ry. Co. v. Hill*, 63 Tex. 381.

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transporting excursionists whom he had agreed to take on the faith of the contract and the amount he would have expended had the contract been observed but conjectural profits not based on actual agreements with those desiring to make the excursion and with no definite knowledge of how many tickets could have been sold under the original contract or for what profit could form no legal basis for a recovery. *Houston & T. C. Ry. Co. v. Hill*, 63 Tex. 381.

Plaintiff is entitled to the net profits on all tickets he would have sold. *Houston & T. C. Ry. Co. v. Hill*, 70 Tex. 51, 7 S. W. 659.

**Evidence in Action for Damages.**—It is proper for plaintiff to prove that he sold witness a large number of tickets at an advanced price. *Houston & T. C. Ry. Co. v. Hill*, 70 Tex. 51, 7 S. W. 659.

#### 7. Liability for Delay in Honoring Order for Tickets.

Where a railroad company issued an order for tickets, which was not honored for over ten days because the agent to whom the order was directed did not before that time receive notice to furnish the tickets, the delay was unreasonable, and the company liable for damages caused thereby. *St. Louis Southwestern Ry. Co. of Texas v. Culver* (Civ. App.), 86 S. W. 628.

#### 8. Statutory Provisions as to Redemption of Unused Tickets and Prohibiting Sale Thereof.

**Provision Stated, Construed and Applied.**—Article 4560 of the Revised Statutes provides that, "It shall be the duty of all railroad companies in this state \* \* \* to provide for the redemption, from the holder thereof, of the whole, or any parts or coupons of any ticket or tickets which they or any of their duly authorized agents may have sold, if for any reason the holder has not used and does not desire to use the same, upon the following

terms: If neither the ticket nor any part thereof has been used by the holder, he shall be entitled to receive the full amount he paid therefor, and where the ticket has been used in part, the holder thereof shall be entitled to receive the remainder of the price paid for the whole ticket, after deducting therefrom the tariff rate between the points for which the portion of the said ticket was actually used." *Ft. Worth, etc., R. Co. v. Cushman*, 92 Tex. 623, 50 S. W. 1009.

Rev. St. 1895, art. 4560d, providing for the redemption of unused tickets and for the fining of one selling an unused railroad ticket, "provided that the provisions of this chapter shall not apply to any person holding a ticket upon which is not plainly printed that it is a penal offense" to sell the same, and that any railroad company which shall refuse to redeem any ticket shall forfeit not less than \$100, does not authorize such forfeiture by a railroad company where said printed notice is not on the ticket. *Donalson v. Gulf, C. & S. F. Ry. Co.* (Civ. App.), 45 S. W. 391.

Rev. Stat. 1895, art. 4560d, requiring railroad companies to redeem unused tickets, held to apply only to tickets issued by railroads in the state for passage from and to points within the state. *Missouri, etc., R. Co. v. Fookes* (Civ. App.), 40 S. W. 858.

Under Rev. St. art. 4560d, providing that if no part of a railroad passenger ticket be used the holder shall be entitled to receive the full amount paid therefor, and if only part is used he shall be entitled to the remainder of the price after deducting the tariff rate between the points for which part of the ticket was actually used, the words "tariff rate" mean the regular rate, which is to be deducted from the price of an excursion ticket sold at reduced rates and only partially used. *Ft. Worth & D. C. Ry. Co. v. Cushman*, 50 S. W. 1009, 92 Tex. 623.

A railroad company is not bound to redeem a passenger ticket once used by the purchaser over the trip for which it was bought, under Act 1893, providing for the redemption of tickets and parts of tickets unused. *Levinson v. Texas & N. O. Ry. Co.*, 43 S. W. 901, 17 Tex. Civ. App. 617.

Plaintiff purchased a ticket on November 10th from L. to W. and return, good for one day only, but which provided that the holder might have the same extended by depositing it with the agent at W. before its expiration. This plaintiff failed to do, and on November 30th presented the return half of the ticket, which the conductor had refused to accept, to the company's agent at L., and demanded one-half the amount which he had paid for the round-trip ticket, but was refused. Held, that plaintiff was not entitled to recover the penalty provided by Gen. Laws 1893, p. 97, for the refusal of a railroad company to redeem unused tickets, or part thereof, if presented within ten days after the right to use the same has expired by limitation, plaintiff's right having expired on November 11th. *Missouri, etc., R. Co. v. Murphy* (Civ. App.), 35 S. W. 66.

**Evidence in Action for Penalty for Violation of Statute.**—A railroad company against whom suit is brought to recover a penalty for failure to redeem an unused portion of a ticket is not estopped by statements of its agents made after plaintiff's right to redeem his ticket had expired. *Missouri, etc., R. Co. v. Murphy* (Civ. App.), 35 S. W. 66.

In action for penalty for failure to redeem an unused railway ticket, an advertising circular issued by the company is inadmissible to vary the terms of the contract which are set forth in the ticket. *Missouri, etc., R. Co. v. Murphy* (Civ. App.), 35 S. W. 66, 67.

Where, in an action against a carrier for refusal to redeem a ticket as required by *Batts' Ann. St. arts. 4560a,*

4560b, it appeared that plaintiff tendered her ticket for redemption to defendant's agent at a regular ticket office within the state; that the agent refused to redeem the same, whereupon she purchased another ticket from him, which was accepted by defendant's conductor for plaintiff's transportation; and that such agent sold tickets to others, and was at the ticket window in the ticket office at the time plaintiff presented her ticket for redemption—such evidence was sufficient to establish that the person to whom the ticket was presented for redemption was defendant's agent. (Civ. App. 1904) *Texas & P. Ry. Co. v. Mahaffey*, 81 S. W. 1047, reversed (1905) 84 S. W. 646, 98 Tex. 392.

**Statute Held Unconstitutional.**—The law imposing a penalty on a railroad company for failing to redeem an unused railroad ticket, Act of May 2, 1903, § 5, is so connected in purpose with § 3 of the same act making the unauthorized sale of railroad tickets a penal offense, that, when § 3 is held unconstitutional, § 5 must also be held invalid. *Texas, etc., R. Co. v. Mahaffey*, 98 Tex. 392, 84 S. W. 646, reversing 81 S. W. 1047, citing *Jannin v. State*, 42 Tex. Civ. App. 631, 51 S. W. 1126, 62 S. W. 419. See the title STATUTES.

#### IV. Care Required of Carrier.

##### A. AS TO PASSENGERS.

###### 1. Degree of Care Required.

###### a. General Rule Stated, Construed and Applied.

###### (1) Rule Stated.

**Requirement of "Highest" or "Utmost" Care.**—While carriers of passengers are not insurers of the safety of their passengers, yet it has been often held that they are bound to exercise the "highest" or "utmost" degree of care that can reasonably be exercised to secure the safety of their passengers. *Houston, etc., R. Co. v.*

*Gorbett*, 49 Tex. 573, 581; *Gallagher v. Bowie*, 66 Tex. 265, 17 S. W. 407; *St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266; *Texas Cent. R. Co. v. Burnett*, 80 Tex. 536, 538, 16 S. W. 320; *Missouri Pac. R. Co. v. Long*, 81 Tex. 253, 16 S. W. 1016; *Gulf, etc., R. Co. v. Smith*, 87 Tex. 348, 353, 28 S. W. 520, reversing 26 S. W. 644; *St. Louis, etc., R. Co. v. Parks*, 97 Tex. 131, 76 S. W. 740, reversing 73 S. W. 439; *Houston, etc., R. Co. v. Keeling*, 102 Tex. 521, 120 S. W. 847; *Texas Cent. R. Co. v. Stuart*, 1 Tex. Civ. App. 642, 20 S. W. 962, affirmed in 93 Tex. 673, no op.; *Texas, etc., R. Co. v. Davidson*, 3 Tex. Civ. App. 542, 21 S. W. 68; *Galveston, etc., R. Co. v. Snead*, 4 Tex. Civ. App. 31, 34, 23 S. W. 277; *Gulf, etc., R. Co. v. Brown*, 4 Tex. Civ. App. 435, 23 S. W. 618; *San Antonio, etc., R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752, affirmed in 93 Tex. 719, no op.; *Dillingham v. Wood*, 8 Tex. Civ. App. 71, 27 S. W. 1074; *Missouri, etc., R. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905; *International, etc., R. Co. v. Mulliken*, 10 Tex. Civ. App. 663, 32 S. W. 152, affirmed in 93 Tex. 643, no op.; *Ft. Worth, etc., R. Co. v. Kennedy*, 12 Tex. Civ. App. 654, 656, 35 S. W. 335; *Gulf, etc., R. Co. v. Brown*, 16 Tex. Civ. App. 93, 40 S. W. 608 (see 93 Tex. 684, no op.); *Houston, etc., R. Co. v. Greer*, 22 Tex. Civ. App. 5, 53 S. W. 58; *Ft. Worth, etc., R. Co. v. Rogers*, 24 Tex. Civ. App. 382, 60 S. W. 61, affirmed in 94 Tex. 695, no op.; *St. Louis, etc., R. Co. v. Johnson*, 29 Tex. Civ. App. 184, 68 S. W. 58, affirmed in 95 Tex. 685, no op.; *International, etc., R. Co. v. Thompson*, 34 Tex. Civ. App. 67, 77 S. W. 439, affirmed in 98 Tex. 622, no op.; *Missouri, etc., R. Co. v. Mitchell*, 34 Tex. Civ. App. 394, 79 S. W. 94; *Missouri, etc., R. Co. v. Flood*, 35 Tex. Civ. App. 197, 79 S. W. 1106, affirmed in 98 Tex. 625, no op.; *International, etc., R. Co. v. Clark*, 36 Tex. Civ. App. 195, 81 S. W. 821, affirmed in 98 Tex. 620, no op.;



International, etc., R. Co. *v.* Shuford, 36 Tex. Civ. App. 251, 81 S. W. 1189, affirmed in 98 Tex. 621, no op.; Citizens R. Co. *v.* Sinclair, 36 Tex. Civ. App. 266, 81 S. W. 329; El Paso, etc., R. Co. *v.* Harray, 37 Tex. Civ. App. 90, 83 S. W. 735; Missouri, etc., R. Co. *v.* Byrd, 40 Tex. Civ. App. 315, 89 S. W. 991, affirmed in 101 Tex. 648, no op.; Moore *v.* Northern Texas, etc., R. Co., 41 Tex. Civ. App. 583, 95 S. W. 652; Galveston, etc., R. Co. *v.* Young, 45 Tex. Civ. App. 430, 100 S. W. 993, affirmed in 102 Tex. 583, no op.; International, etc., R. Co. *v.* Huguen, 45 Tex. Civ. App. 326, 100 S. W. 1000, affirmed in 102 Tex. 585, no op.; Gilmore *v.* Houston, etc., Co., 46 Tex. Civ. App. 315, 102 S. W. 168; Levy *v.* Campbell (Sup.), 19 S. W. 438; Atchison, etc., R. Co. *v.* Frier (Civ. App.), 22 S. W. 6; Campbell *v.* Cornelius (Civ. App.), 23 S. W. 117; Atchison, etc., R. Co. *v.* Worley (Civ. App.), 25 S. W. 478; Ft. Worth, etc., R. Co. *v.* Stone (Civ. App.), 25 S. W. 808; San Antonio, etc., R. Co. *v.* Long (Civ. App.), 26 S. W. 114, reversed on another point 87 Tex. 148; Texas, etc., R. Co. *v.* Buckalew (Civ. App.), 34 S. W. 165; Ft. Worth, etc., R. Co. *v.* Enos (Civ. App.), 50 S. W. 595, affirmed in 92 Tex. 577; Missouri, etc., R. Co. *v.* Scarborough (Civ. App.), 51 S. W. 356, affirmed in 93 Tex. 715, no op.; Martin *v.* St. Louis, etc., R. Co. (Civ. App.), 56 S. W. 1011; Texas, etc., R. Co. *v.* Brown (Civ. App.), 58 S. W. 44; Houston, etc., R. Co. *v.* George (Civ. App.), 60 S. W. 313; Trinity Val. R. Co. *v.* Stewart (Civ. App.), 62 S. W. 1085; Citizens' R. Co. *v.* Craig (Civ. App.), 69 S. W. 239, affirmed in 97 Tex. 628, no op.; Arrington *v.* Texas, etc., R. Co. (Civ. App.), 70 S. W. 551; Knauff *v.* San Antonio, etc., Co. (Civ. App.), 70 S. W. 1011; Contreareas *v.* San Antonio Traction Co. (Civ. App.), 83 S. W. 870; Hardin *v.* Ft. Worth, etc., R. Co. (Civ. App.), 100 S. W. 995; International, etc., R. Co. *v.* Tasby, 45 Tex. Civ. App. 416, 100

S. W. 1030; Hartley *v.* Pecos Val., etc., R. Co. (Civ. App.), 103 S. W. 1123; Texas, etc., R. Co. *v.* Griggs (Civ. App.), 106 S. W. 411; Ft. Worth, etc., R. Co. *v.* Spear (Civ. App.), 107 S. W. 613; Rapid Transit R. Co. *v.* Strong (Civ. App.), 108 S. W. 394; Herring *v.* Galveston, etc., R. Co. (Civ. App.), 108 S. W. 977; Galveston, etc., R. Co. *v.* Herring, 102 Tex. 100, 113 S. W. 521; St. Louis, etc., R. Co. *v.* McAnellia (Civ. App.), 110 S. W. 936.

Carriers must use the utmost care, skill, and vigilance to carry passengers safely. (Tex. Civ. App. 1902) Knauff *v.* San Antonio, etc., Co. (Civ. App.), 70 S. W. 1011.

Common carriers of passengers are required to do all that human sagacity and foresight can do under the circumstances, in view of the character and mode of conveyance adopted, to prevent accidents to passengers, and are responsible for any—even the slightest—negligence. (Tex. 1885) Ft. Worth & D. C. Ry. Co. *v.* Stingle, 2 Willson, Civ. Cas. Ct. App. § 706.

It is the duty of a carrier to use the highest degree of practical care, diligence, and skill, consistent with its mode of transportation, to protect a passenger from injury. Atchison, etc., R. Co. *v.* Worley (Civ. App.), 25 S. W. 478, citing Atchison, etc., R. Co. *v.* Frier (Civ. App.), 22 S. W. 6, 7; Boyles *v.* Texas, etc., R. Co. (Civ. App.), 86 S. W. 936.

The case of an injury to a passenger by a collision of trains requires the application of the rule of the highest degree of care. (Civ. App.) Ft. Worth & N. O. Ry. Co. *v.* Enos, 50 S. W. 595, modified, K. & T. Ry. Co. *v.* Enos, 50 S. W. 928, 92 Tex. 577.

**Reason for Rule.**—The law exacts of carriers the highest degree of care, but this is not founded upon the permission of railroads to exercise the right of eminent domain and on their receiving land grants. Campbell *v.* Cornelius (Civ. App.), 23 S. W. 117, 118.

The duty of the carrier to exercise extreme care results from the contract of carriage, express or implied. *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 3 S. W. 705.

The duty of a carrier to exercise a high degree of care to avoid injury to passengers arises from the hazardous character of its business and the fact that human life is imperiled by it, and not alone from a contract of carriage, express or implied. *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 479, 3 S. W. 705.

"The degree of care required is fixed by the existence of the relation of carrier and passenger, by the character of the danger to which the passenger is exposed, and by the exclusive control by the carrier of the agencies by which the danger can be averted. Where the life and health of a passenger is at stake, the care to be exercised is such as would have been used by very cautious and prudent persons." *St. Louis, etc., R. Co. v. Campbell*, 30 Tex. Civ. App. 35, 69 S. W. 451, affirmed in 97 Tex. 645, no op.

**Limitation of Rule Requiring Highest Degree of Care.**—The rule imposing upon a carrier of passengers the highest degree of care, must be confined to those means and measures of safety which the passenger must of necessity trust wholly to the carrier, and is restricted to the period during which the carrier may be said to be the bailee of the person of the passenger. *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264.

## (2) Test as to Exercise of Proper Degree of Care.

**In General.**—The general rule laid down by the Texas courts for determining whether or not a carrier of passengers has exercised due care, is, whether or not such carrier has exercised such a high degree of foresight as to possible dangers and such a high degree of care in guarding against them, as would be used by very

cautious, prudent, and competent persons, skilled in the particular business, under similar circumstances. *International, etc., R. Co. v. Halloren*, 53 Tex. 46, 53; *Allen v. Galveston City R. Co.*, 79 Tex. 631, 632, 15 S. W. 498; *International, etc., R. Co. v. Welch*, 86 Tex. 203, 24 S. W. 390; *Gulf, etc., R. Co. v. Butcher*, 83 Tex. 309, 18 S. W. 583; *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 544, 20 S. W. 766; *Fordyce v. Chancey*, 2 Tex. Civ. App. 24, 21 S. W. 181; *Texas, etc., R. Co. v. Davidson*, 3 Tex. Civ. App. 542, 21 S. W. 68; *Dillingham v. Wood*, 8 Tex. Civ. App. 71, 27 S. W. 1074; *Dallas, etc., R. Co. v. Randolph*, 8 Tex. Civ. App. 213, 27 S. W. 925; *Missouri, etc., R. Co. v. Russell*, 8 Tex. Civ. App. 578, 28 S. W. 1042, affirmed in 93 Tex. 668, no op.; *Gulf, etc., R. Co. v. Shields*, 9 Tex. Civ. App. 652, 656, 28 S. W. 709, 29 S. W. 652, affirmed in 93 Tex. 685, no op.; *Ft. Worth, etc., R. Co. v. Kennedy*, 12 Tex. Civ. App. 654, 656, 35 S. W. 335; *Galveston, etc., R. Co. v. Long*, 13 Tex. Civ. App. 664, 36 S. W. 485; *Houston, etc., R. Co. v. Dotson*, 15 Tex. Civ. App. 73, 80, 38 S. W. 642, affirmed in 93 Tex. 686, no op.; *Gulf, etc., R. Co. v. Brown*, 16 Tex. Civ. App. 93, 40 S. W. 608 (see 93 Tex. 684, no op.); *Gary v. Gulf, etc., R. Co.*, 17 Tex. Civ. App. 129, 42 S. W. 576; *Missouri, etc., R. Co. v. Edling*, 18 Tex. Civ. App. 171, 45 S. W. 406, affirmed in 93 Tex. 734, no op.; *St. Louis, etc., R. Co. v. McCullough*, 18 Tex. Civ. App. 534, 536, 45 S. W. 324; *International, etc., R. Co. v. Williams*, 20 Tex. Civ. App. 587, 50 S. W. 732, affirmed in 93 Tex. 644, no op.; *McCarty v. Houston, etc., R. Co.*, 21 Tex. Civ. App. 568, 575, 54 S. W. 421; *Houston, etc., R. Co. v. Greer*, 22 Tex. Civ. App. 5, 53 S. W. 58; *St. Louis, etc., R. Co. v. Ball*, 28 Tex. Civ. App. 287, 66 S. W. 879; *St. Louis, etc., R. Co. v. Campbell*, 30 Tex. Civ. App. 35, 69 S. W. 451, affirmed in 97 Tex. 645, no op.; *Chicago, etc., R. Co. v. Buie*, 31 Tex. Civ. App. 654, 73 S. W.

853, affirmed in 97 Tex. 628, no op.; Houston Elec. Co. v. Nelson, 34 Tex. Civ. App. 72, 77 S. W. 978; International, etc., R. Co. v. Clark, 36 Tex. Civ. App. 195, 81 S. W. 821, affirmed in 98 Tex. 620, no op.; El Paso, etc., R. Co. v. Harry, 37 Tex. Civ. App. 90, 83 S. W. 735; Texas, etc., R. Co. v. Storey, 37 Tex. Civ. App. 156, 83 S. W. 852, affirmed in 101 Tex. 663, no op.; Denison, etc., R. Co. v. Freeman, 38 Tex. Civ. App. 152, 85 S. W. 55; Houston, etc., R. Co. v. Copley, 38 Tex. Civ. App. 568, 87 S. W. 219, affirmed in 101 Tex. 641, no op.; Missouri, etc., R. Co. v. Byrd, 40 Tex. Civ. App. 315, 89 S. W. 991, affirmed in 101 Tex. 648, no op.; St. Louis, etc., R. Co. v. Parks, 40 Tex. Civ. App. 480, 90 S. W. 343, affirmed in 101 Tex. 656, no op.; Davis v. Galveston, etc., R. Co., 42 Tex. Civ. App. 55, 93 S. W. 223; Missouri, etc., R. Co. v. Schroeder, 44 Tex. Civ. App. 47, 100 S. W. 808, affirmed in 102 Tex. 588, no op.; Galveston, etc., R. Co. v. Fink, 44 Tex. Civ. App. 544, 99 S. W. 204, affirmed in 102 Tex. 583, no op.; San Antonio, etc., Co. v. Flory, 45 Tex. Civ. App. 233, 100 S. W. 200, affirmed in 102 Tex. 592, no op.; International, etc., R. Co. v. Hugen, 45 Tex. Civ. App. 326, 100 S. W. 1000, affirmed in 102 Tex. 585, no op.; Galveston, etc., R. Co. v. Morrison, 46 Tex. Civ. App. 186, 102 S. W. 143, affirmed in 102 Tex. 582, no op.; Dallas, etc., St. R. Co. v. Pettit, 47 Tex. Civ. App. 354, 105 S. W. 42; Missouri, etc., R. Co. v. Dunbar, 49 Tex. Civ. App. 12, 108 S. W. 500; Gulf, etc., R. Co. v. Stricklin (Civ. App.), 27 S. W. 1093; Texas, etc., R. Co. v. Orr (Civ. App.), 31 S. W. 696, affirmed in 93 Tex. 741, no op.; San Antonio, etc., R. Co. v. Lynch (Civ. App.), 55 S. W. 517; St. Louis, etc., R. Co. v. Byers (Civ. App.), 70 S. W. 558; St. Louis, etc., R. Co. v. Pruitt (Civ. App.), 79 S. W. 598, affirmed in 98 Tex. 630, no op.; S. C., 97 Tex. 487, 80 S. W. 72; Tyler v. Texas, etc., R. Co. (Civ. App.), 79 S.

W. 1075; Norton v. Galveston, etc., R. Co. (Civ. App.), 108 S. W. 1044; Flory v. San Antonio, etc., Co. (Civ. App.), 89 S. W. 278; Ft. Worth, etc., R. Co. v. Stingle, 2 App. Civ. Cases, §§ 704, 706.

If such care is shown, or if the lack of it does not appear, liability is not established. Houston Elec. Co. v. Nelson, 34 Tex. Civ. App. 72, 77 S. W. 978; Tyler v. Texas, etc., R. Co. (Civ. App.), 79 S. W. 1075; Davis v. Galveston, etc., R. Co., 42 Tex. Civ. App. 55, 93 S. W. 223; Houston, etc., R. Co. v. Greer, 22 Tex. Civ. App. 5, 53 S. W. 58; St. Louis, etc., R. Co. v. Ball, 28 Tex. Civ. App. 287, 66 S. W. 879.

The degree of care required of a carrier towards its passengers is proportionate to the nature and risks of the business, and is such as would ordinarily be exercised by persons of great care and prudence under similar circumstances. Texas & P. Ry. Co. v. Davidson, 3 Tex. Civ. App. 542, 21 S. W. 68; (1894) Dallas Consol. Traction Ry. Co. v. Randolph, 8 Tex. Civ. App. 213, 27 S. W. 925; (1894) Dillingham v. Wood, 8 Tex. Civ. App. 71, 27 S. W. 1074; (1895) Texas & P. Ry. Co. v. Orr (Civ. App.), 31 S. W. 696.

Street car companies are carriers of passengers, and held to the highest care and skill, in preventing injuries to passengers, which prudent men would exercise under like circumstances. (Tex. Civ. App. 1904) El Paso Electric Ry. Co. v. Harry, 83 S. W. 735, 37 Tex. Civ. App. 90. See, also, International, etc., R. Co. v. Hugen, 45 Tex. Civ. App. 326, 100 S. W. 1000, affirmed in 102 Tex. 585, no op.; International, etc., R. Co. v. Tasby 45 Tex. Civ. App. 416, 100 S. W. 1030; Gilmore v. Houston, etc., Co., 46 Tex. Civ. App. 315, 102 S. W. 168; Citizens' R. Co. v. Craig (Civ. App.), 69 S. W. 239, affirmed in 97 Tex. 628, no op.; Allen v. Galveston City R. Co., 79 Tex. 631, 15 S. W. 498. And see, generally, the title STREET RAILROADS.

The duty devolves on carriers to protect their passengers from weather by the use of such means as would be dictated by the utmost care that would be used by very prudent persons to that end. *Missouri, K. & T. Ry. Co. of Texas v. Byrd*, 89 S. W. 991, 40 Tex. Civ. App. 315.

Defendant allowed a drunken man in its car with a sack containing a jug of alcohol and some matches. The jug broke, and its contents were thrown over the floor of the car, and the alcohol ignited, and plaintiff was burned. Held, that in protecting plaintiff from such an injury defendant was required to exercise such a high degree of foresight and prudence as would be used by very cautious, prudent, and competent persons under similar circumstances. *Gulf, C. & S. F. Ry. Co. v. Shields*, 9 Tex. Civ. App. 652, 28 S. W. 709.

**"All Possible Care" or "Greatest Possible Care" Not Required.**—It is sometimes said to be the duty of the carrier to provide for the safety of its passengers as far as human care and foresight will go. *International, etc., R. Co. v. Thompson*, 34 Tex. Civ. App. 67, 77 S. W. 439, affirmed in 98 Tex. 622, no op.; *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325.

It is not, however, a correct statement of the law to say that a passenger carrier is bound to "use all possible care" to provide for the safe conveyance of passengers. *International, etc., R. Co. v. Welch*, 86 Tex. 203, 24 S. W. 390; *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. 766; *Texas Pac. R. Co. v. Bucklew*, 3 Tex. Civ. App. 272, 22 S. W. 994.

A carrier is held only to the utmost care that can be exercised under the circumstances, not to the greatest possible care. *International, etc., R. Co. v. Welch*, 86 Tex. 203, 24 S. W. 390; *Gulf, etc., R. Co. v. Higby* (Civ. App.), 26 S. W. 737, affirmed in 93 Tex. 662, no op.; *Fordyce v. Chancey*, 2 Tex. Civ. App. 24, 21 S. W. 181.

The care which a carrier owes to its passenger is of a very high degree, but is not the utmost care that human imagination can conceive. (Tex. Civ. App. 1899) *McCarty v. Houston & T. C. R. Co.*, 54 S. W. 421, 21 Tex. Civ. App. 568.

A railroad's duty to its passengers is to exercise that high degree of care and prudence that would be used by very cautious, prudent, and competent persons under like circumstances; but it was not error to refuse to use the expression "highest degree of care," in instructions. *Williams v. International & G. N. R. Co.*, 67 S. W. 1085, 28 Tex. Civ. App. 503.

In *International, etc., R. Co. v. Welch*, 86 Tex. 203, 205, 24 S. W. 390, Justice Brown condemned a charge requiring the greatest possible care in regard to the duties or railroad companies to their passengers, but distinguished such care from utmost care. "Utmost care," he says, "means the greatest care, and falls short of the expression used in the charge ('the greatest possible care'), in this, that it (the utmost care) is understood to apply to the surroundings as matters then stood and could be foreseen; but all possible care has a broader and more unlimited meaning. The word possible, as used in this connection, means 'capable of being done.'"

**Proper Care Dependent on Facts and Circumstances of Particular Occasion.**—The amount of care is that which would be suggested to cautious, prudent persons, skilled in the particular business, by the facts and circumstances surrounding the particular occasion. *Dallas, etc., R. Co. v. Randolph*, 8 Tex. Civ. App. 213, 27 S. W. 925.

Where a passenger sued a carrier to recover for injuries resulting from a collision, it appearing that the passenger train had stopped forty minutes before the flagman was sent to warn a freight train, which the conductor on the passenger train knew was com-

ing, and the freight train did not receive the flagman's signal in time to avoid the collision, defendant was guilty of negligence. *Gulf, etc., R. Co. v. Brown*, 16 Tex. Civ. App. 93, 95, 40 S. W. 608 (see 93 Tex. 684, no op.).

Defendant was not relieved of negligence by the fact that the flagman went back as far as usual, the conditions in the particular case regulating his duty in that respect. *Gulf, C. & S. F. Ry. Co. v. Brown* (Tex. Civ. App.), 40 S. W. 608, 16 Tex. Civ. App. 93.

**Instructions as to Degree of Care Held Correct.**—An instruction that a railroad company, in transporting passengers for hire, is bound to exercise the highest degree of care, and explaining what is meant by ordinary care, is without prejudice to defendant. *Texas & P. Ry. Co. v. Buckalew* (Civ. App.), 34 S. W. 165.

Where a freight train on which plaintiff was riding as a passenger broke in two, and through the negligence of the train operatives a collision resulted, in which plaintiff was injured, it was proper to charge that, while railroad companies are not insurers of the safety of their passengers, they are required to use the utmost care to provide for their safety. *Ft. Worth & D. C. Ry. Co. v. Rogers*, 60 S. W. 61, 24 Tex. Civ. App. 382.

The duty of a carrier to a passenger being to exercise the highest degree of care, it could not complain of the failure of the court to define "negligence," as relating to its duty. *Gulf, C. & S. F. Ry. Co. v. Brown*, 4 Tex. Civ. App. 435, 23 S. W. 618.

An instruction that a carrier owed to a passenger the "utmost care" for his safety was not objectionable; such care being no more than the highest degree of care which a carrier is bound to exercise. Certified questions (Civ. App. 1908), 112 S. W. 808, answered. *Houston, etc., R. Co. v. Keeling*, 102 Tex. 521, 120 S. W. 847.

In an action against a railroad company for personal injuries caused by the sudden motion of defendant's train while plaintiff was alighting therefrom, after being carried past the station to which he had paid his fare, without fault on his part, it is not error to charge that the law requires a railroad in transporting passengers to use the highest degree of practical care, diligence, and skill that is consistent with that mode of transportation, for the protection of passengers from injury. *Atchison, T. & S. F. Ry. Co. v. Frier* (Civ. App.), 22 S. W. 6.

A charge that "carriers of persons are required to do all that human care, vigilance and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accidents to passengers," does not exact, of a carrier a higher degree of care than the law imposes. *Ft. Worth, etc., R. Co. v. Stone* (Civ. App.), 25 S. W. 808.

In an action for injuries to a passenger, alleged to be due to the negligence of defendant's employees, the court properly instructed that the negligence meant the failure to use the utmost care that would be used by a very prudent person under like circumstances. *Contreras v. San Antonio Traction Co.* (Civ. App.), 83 S. W. 870.

Plaintiff's wife having been thrown down and injured by the sudden starting of the train while she was trying to get off, there was no error in a charge that, in providing for the safety of passengers, it was the duty of the company "to use such means and foresight as persons of the greatest care and prudence would usually use in similar cases." *Texas & P. Ry. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

An instruction that railway companies are not insurers of the safety of their passengers, but are required to exercise the highest degree of care that very cautious persons would ex-

ercise under similar circumstances, was not objectionable as requiring the greatest care which would have been exercised by the most skillful and careful individuals to be found in the class named. *St. Louis S. W. Ry. Co. of Texas v. Byers* (Civ. App.), 70 S. W. 558.

In an action against a street railroad company for injuries to a passenger, an instruction that "It is the duty of a street car driver to be skillful and prudent and cautious to see that his passengers are not injured in his car, and in case a passenger on the car is injured, by the negligence of the driver, the company is liable in damages for such injury. Negligence in a car driver is the want of such care and prudence as skillful, prudent and careful car drivers observe under similar circumstances," held proper as against the objection that it defined the duties of the driver rather than of the car company. *Allen & Wife v. Galveston City Ry. Co.*, 79 Tex. 631, 15 S. W. 498.

In an action against a street railway company for injuries to a passenger, a charge that defendant should have exercised such "reasonable care and diligence as a prudent person would exercise in the management of his own affairs" is proper. *Houston City St. Ry. Co. v. Ross* (Civ. App.) 28 S. W. 254.

In an action by a passenger for injuries received in a collision, the evidence showed that an "angle cock" in the air brake was turned, which prevented the engineer from setting the brakes; that, if the engineer had whistled for brakes, any employee could have pulled the conductor's cord, which would have set the brakes on the entire train back of where the air was cut off, and would have stopped the train within 300 or 350 feet. The court charged that if those operating the train, after discovering the brakes did not work, failed to use such care

to stop the train as persons of ordinary prudence would have exercised, their failure was negligence; that, if they used such care, defendant was not liable, though plaintiff was injured by the collision. Held, that the charge was correct. *Missouri, K. & T. Ry. Co. v. Edling*, 45 S. W. 406, 18 Tex. Civ. App. 171.

An instruction, in an action for injury to a passenger from derailment of a train, that defendant could not be held liable for the consequences of an accident against which it could not have guarded by the exercise of "that high degree of care and foresight which very prudent persons under the same circumstances would have exercised," correctly states the measure of duty of the carrier. *Davis v. Galveston, H. & S. A. Ry. Co.*, 93 S. W. 222, 42 Tex. Civ. App. 55.

It was not reversible error to charge that, if the wreck was accidentally caused by some defect which defendant could not have foreseen by the exercise of that high degree of care which "any" cautious person in the same business is accustomed to use in similar cases to prevent danger, then the plaintiff can not recover. *Houston, E. & W. T. Ry. Co. v. Greer*, 53 S. W. 58, 22 Tex. Civ. App. 5.

In an action for injuries to a passenger by an alleged defect in a seat, it was not error to charge that negligence is the failure to exercise such care as an ordinarily prudent person would exercise under the same or similar circumstances, and that ordinary care is that degree of care that an ordinarily careful person would exercise under the same or similar circumstances; such definitions being followed by a correct exposition of the law applicable to the facts of the case. *Boyles v. Texas & P. Ry. Co.* (Civ. App.), 86 S. W. 936.

In an action for injuries received while trying to board a train, an instruction that it was the duty of the

servants of the railroad, in handling the train, when the safety of the passengers was involved, to use the care that very prudent persons would have used under the circumstances, is correct. *Texas Midland R. R. v. Brown* (Civ. App.), 58 S. W. 44.

In an action against a railroad company for injuries to plaintiff's wife, happening on her alighting from a train on its stopping a second time after having hastily left her station, it is proper to instruct that it became the duty of the trainmen to exercise that high degree of care which very cautious, prudent, and competent persons would exercise under the same circumstances to enable her to alight in safety, and that a failure to exercise such care, operating as a proximate cause of the injuries, would entitle the plaintiff to recovery. *Martin v. St. Louis S. W. Ry. Co. of Texas* (Civ. App.), 56 S. W. 1011.

An instruction that railroad companies are not insurers of the safety of their passengers, but are bound to exercise the highest degree of care to secure their safety, and must exercise that degree of foresight as to possible dangers to their passengers, and that high degree of prudence in guarding against them, as would be used by very cautious, prudent, and competent persons under similar circumstances, is not erroneous, as it requires of the carrier no more than the highest degree of care, in reference to possible dangers that the passenger may be exposed to, and does not require it to foresee any and all possible dangers. *Missouri, K. & T. Ry. Co. of Texas v. Scarborough* (Civ. App.), 51 S. W. 356, affirmed in 93 Tex. 715, no op.

The court having properly instructed that negligence on the part of a street-car driver is the want of such care as a reasonably skillful and prudent street-car driver would observe under like circumstances, and that if, by failure to exercise such prudence, a passenger is injured, the company is liable, it

was proper to refuse to further instruct that it is the duty of the driver to be skillful and prudent and cautious to see that passengers are not injured; that in case of injury to a passenger by the negligence of a driver the company is liable; and that negligence in a car driver is the want of such care and prudence as skillful, prudent, and careful drivers observe under similar circumstances. *Durnett v. Gulf City Railway & Real-Estate Co.* (Civ. App.), 37 S. W. 336.

The issue being whether, if plaintiff was leaning against the car door, the porter knew that fact, or had reason to anticipate it, and whether the porter in closing the door used proper care, the jury should have been told that, if they believed that plaintiff was leaning against the door, and at the time it was opened the porter knew or had reason to anticipate that plaintiff was so leaning, and that when the door was opened the plaintiff started to fall, and the porter closed the door to prevent such falling, and in so closing the door used the care that an ordinarily careful and prudent person would have used under the circumstances, then plaintiff could not recover. *St. Louis S. W. Ry. Co. v. Ball*, 66 S. W. 879, 28 Tex. Civ. App. 287.

**Instructions as to Degree of Care Held Erroneous or Misleading.**—A charge which uses the term "proper care" in defining care in a case where the highest degree of care is required is erroneous. *Missouri, K. & T. Ry. Co. of Texas v. Mitchell*, 79 S. W. 94, 34 Tex. Civ. App. 394.

In an action against a street railroad for injuries to a passenger, an instruction that defendant owed the duty "to exercise that high degree of care for the reasonable personal safety of passengers which a prudent person would use," etc., was improper by reason of the use of the word "reasonable." *Moore v. Northern Texas Traction Co.*, 41 Tex. Civ. App. 583, 95 S. W. 652.

In an action for injuries to a passenger while attempting to alight, a requested instruction that if defendant's conductor gave the signal for the train to move under the belief that the passenger had departed from the train, and if, in doing so, he acted as a reasonably prudent person would have acted under the same circumstances, the jury should find for the defendant, was erroneous, as making the question of negligence depend on the conductor's belief, and as requiring only ordinary care, instead of the care required of carriers of passengers. *St. Louis Southwestern Ry. Co. v. Harrison*, 73 S. W. 38, 32 Tex. Civ. App. 368.

A special charge stated that defendant carrier owed plaintiff, a passenger, the utmost care for his safety, while in the main charge it was stated that defendant owed plaintiff a high degree of care to prevent injury in the operation of the train. Held, that such instructions attempting to define the carrier's duty by the use of an adjective were objectionable in the absence of instruction defining the "utmost" or "highest" degree of care as that which such prudent and skillful carriers employ. *Houston, etc., R. Co. v. Keeling*, 102 Tex. 521, 120 S. W. 847.

In an action for injuries received while alighting from defendant's street car, a charge that, if defendant's employees exercised a high degree of care for plaintiff's safety which a very cautious, prudent, and careful person would have exercised under such circumstances, plaintiff could recover, was properly refused, since the degree of care required is that which a cautious, prudent, and "competent" person would have used. *Rapid Transit Ry. Co. v. Strong* (Civ. App.), 108 S. W. 394.

In an instruction defining defendant's duty to be the exercise of "that high degree of care and skill which \* \* \* persons generally in their line of business are accustomed to use under similar circumstances," the use of the

words "generally" and "accustomed" is disapproved. *Malone v. Texas & P. Ry. Co.*, 109 S. W. 430, 49 Tex. Civ. App. 398.

An instruction that a railroad company owes to its passengers the duty to use the highest degree of care in transporting them which a person of the highest degree of care and prudence would use under like circumstances was objectionable as constituting such a repetition on the question of degree of care required to be used as was calculated to mislead the jury. *International & G. N. R. Co. v. Hubbs*, 82 S. W. 1062, 37 T. C. A. 77.

In an action against a railroad company for injuries to a passenger, an instruction that defendant was required to use the highest degree of care and diligence that human judgment and foresight are capable of is erroneous. (1893) *Fordyce v. Chancey*, 2 Tex. Civ. App. 24, 21 S. W. 181; (1894) *Gulf, C. & S. F. Ry. Co. v. Stricklin* (Civ. App.), 27 S. W. 1093; (1894) *Gulf, C. & S. F. Ry. Co. v. Shields*, 9 Tex. Civ. App. 652, 28 S. W. 709.

It was error to charge that carriers are held to the greatest possible care for the safety of their passengers. They are not insurers of the absolute safety of their passengers, but are required to provide for their safe conveyance as far as human care and foresight will go; "and their duty extends to the providing of good and sufficient material, the employment of skilled engineers, correct methods in the original construction, inspection, and subsequent maintenance in repair of its road, embankments," etc., "and of the engines and cars which it uses, and the speed of its trains, \* \* \* and a failure of duty in any of these respects renders defendants liable."—since such charge imposed too great care on defendants as carriers of passengers. *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. 766.

In an action against a carrier by a



passenger to recover for injuries received in jumping from a car in order to avoid a collision with an engine on another track at a railway crossing, the court instructed the jury that it was the duty of the carrier to have prudent and competent employees to manage and operate its cars and that it was the duty of such employees to use reasonable and proper care and prudence in the management, running and operation of the cars so as to carry with safety those who ride on the same. Held, that the charge is objectionable as it seems to prescribe a higher degree of care than that imposed by law, as the law simply imposes on the carrier that high degree of care which cautious, prudent persons skilled in the particular business would commonly use under like circumstances. *Dallas Traction Co. v. Randolph*, 8 Tex. Civ. App. 213, 27 S. W. 925.

In an action for an injury to a passenger while alighting, an instruction that defendant in its provisions for the alighting of its passengers was not required to make such provision as to insure her safety, that the measure of duty in this respect was to use that high degree of care that prudent persons would under like circumstances have used, and, unless the jury believe that defendant "failed to use the degree of care as above stated" in the provision it had made for the alighting of passengers, they should find for defendant, was properly refused; the words "fail to use the degree of care as above stated" being confusing and making the liability of defendant dependent on the fact that it failed to use a high degree of care. *Missouri, K. & T. Ry. Co. of Texas v. Dunbar*, 108 S. W. 500, 49 Tex. Civ. App. 12.

An instruction that it is the duty of defendant railway company to exercise a high degree of care in the carriage of its passengers, that the degree of care required is proportionate to the nature and risk of the business, and is such as would ordinarily be exercised

by persons of great care and prudence under similar circumstances, was followed by the charge that defendant is required to use ordinary care to provide railings around platforms of its cars which are reasonably safe for the purposes for which they are used. Held, that the instructions were contradictory as to the degree of care required, and ground for reversal. *Parvin v. International & G. N. R. Co.* (Civ. App.), 54 S. W. 638.

### (3) Degree of Care as Affected by Mode of Conveyance.

**In General.**—The degree of care required of a railroad company in transporting passengers is not affected by the character of the train upon which the passenger is carried. *Missouri, etc., R. Co. v. Schroeder*, 44 Tex. Civ. App. 47, 100 S. W. 608, affirmed in 102 Tex. 588, no op.; *Chicago, etc., R. Co. v. Buie*, 31 Tex. Civ. App. 654, 73 S. W. 853, affirmed in 97 Tex. 628, no op.; *Dillingham v. Wood*, 8 Tex. Civ. App. 71, 27 S. W. 1074; *Herring v. Galveston, etc., R. Co.* (Civ. App.), 108 S. W. 977, writ of error denied by supreme court, 113 S. W. 521; *Mullen v. Galveston, etc., R. Co.* (Civ. App.), 92 S. W. 1000, affirmed in 101 Tex. 650, no op.; *Trinity Val. R. Co. v. Stewart* (Civ. App.), 62 S. W. 1085; *Mexican Cent. R. Co. v. Lauricella* (Civ. App.), 26 S. W. 301, affirmed in 87 Tex. 277.

There is no distinction made by the law of Texas as to the degree of care necessary to be used by railway companies in the transportation of passengers, whether on freight, mixed, or passenger trains. *Dillingham v. Wood*, 8 Tex. Civ. App. 71, 27 S. W. 1074.

The law, which has but one standard, exacts this degree of care of all carriers of passengers alike, whatever may be the means of transportation employed. *Chicago, etc., R. Co. v. Buie*, 31 Tex. Civ. App. 654, 73 S. W. 853, affirmed in 97 Tex. 628, no op.; *Hardin v. Ft. Worth, etc., R. Co.*, 33 Tex. Civ. App. 448, 77 S. W. 431.

Whatever the character of the train when the company undertakes to carry one as a passenger, it assumes the duty towards him of exercising a high degree of care in its operation, so as not to injure him. *Trinity Val. R. Co. v. Stewart* (Civ. App.), 62 S. W. 1085.

If a railroad company permits one paying fare to ride on a freight train, he becomes a passenger, and is entitled to the same degree of care as though the train were a passenger train. *International & G. N. Ry. Co. v. Irvine*, 64 Tex. 529.

In an action against a railroad company for personal injuries received while a passenger on defendant's freight train, there was evidence that plaintiff was ordered out of the caboose, and, with defendant's knowledge, was riding on a buggy on a flat car, and that the train was derailed on account of the negligence of defendant's employees, seriously injuring him. Held, that a verdict for plaintiff was supported by the evidence. *Mexican Cent. Ry. Co. v. Lauricella* (Civ. App.), 26 S. W. 301.

As to increased risks incident to mode of conveyance, see post, "Assumption of Risks Ordinarily or Usually Incident to Mode of Transportation," V. D. 6, d, (4).

#### (4) Degree of Care as Dependent upon Age, Sex, or Physical Condition of Passenger.

**In General.**—While the duty of the carrier to all passengers is the same in degree, the amount of care may vary with the age, sex, or bodily infirmity of the passenger, and the carrier is not entitled to a charge that it owes no greater duty to a female passenger than to a male one. *St. Louis, A. & T. Ry. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266.

A railroad company owes care toward old, feeble and decrepit passengers proportionate to their disability. *East Line, etc., R. Co. v. Rushing*, 69 Tex. 306, 315, 6 S. W. 834; *St.*

*Louis, etc., R. Co. v. Ferguson*, 26 Tex. Civ. App. 460, 64 S. W. 797, affirmed in 95 Tex. 685, no op.; *Pecos, etc., R. Co. v. Williams*, 34 Tex. Civ. App. 100, 78 S. W. 5. And see *Driess v. Frederick*, 73 Tex. 460, 11 S. W. 493.

"We think that circumstances involving the consideration of age, sex, or physical infirmity may bring that within the scope of the conductor's duty toward a passenger which would otherwise be beyond the limit of such obligation. *Hutchinson on Carriers*, § 670; *St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266." *Chicago, etc., R. Co. v. Boyles*, 11 Tex. Civ. App. 522, 33 S. W. 247.

The duty of care which a railroad company owes to members of the public is dependent on the relation between itself and the person injured and may be affected by the mental or physical incapacity of such person and in some cases by the circumstances under which the injury is inflicted. *Mexican Nat. Ry. Co. v. Crum*, 6 Tex. Civ. App. 702, 25 S. W. 1126.

**Instances Demanding Exercise of Care Proportionate to Condition of Passengers.**—In an action against a carrier for wrongful treatment of plaintiff and her invalid daughter, the court properly instructed that it was the duty of the carrier's servants to exercise such a degree of care as would reasonably insure the safety of the passengers in view of their physical condition, and a failure to discharge the duty was negligence. *Gulf, C. & S. F. Ry. Co. v. Coopwood* (Civ. App.), 96 S. W. 102, affirmed in 101 Tex. 639, no op.

In an action against a carrier for injuries to a passenger while alighting from a train, a requested instruction that, if the defendant stopped its train long enough to enable a passenger of ordinary strength and activity to alight, the jury should find for defendant, unless its employees operating the train knew that the person injured could not alight from the

train as could an ordinary passenger, was properly refused, since the carrier was chargeable with notice that people of other than ordinary strength and activity might become passengers on their trains, and it was its duty to stop its trains at stations for a time reasonably sufficient to enable all passengers destined for that point to alight in safety, and not merely to stop long enough to enable those passengers of ordinary strength and activity and those of them whom it had been notified were lacking in such strength and activity to alight there. *Ft. Worth & D. C. Ry. Co. v. Spear* (Civ. App.), 107 S. W. 613.

A switch engine was run against a car from which plaintiff was attempting to alight, throwing him across the seats, and inflicting injuries. Plaintiff had not been in good health, and defendant complained that its liability was made to depend, in the instruction, on whether the force of the engine was sufficient to throw plaintiff down, instead of a person of ordinary physical ability. Held, that railroad companies are presumed to know that persons in feeble health travel on their trains, and must exercise care accordingly, and, in the absence of a request for a special instruction, the general instruction was correct. *East Line & R. R. Ry. Co. v. Rushing*, 69 Tex. 306, 6 S. W. 834.

If a passenger was suffering from some disability such as deafness which was known to the company's train employees a greater degree of care and attention was due her than those not affected. *Texas Midland R. v. Terry*, 27 Tex. Civ. App. 341, 65 S. W. 697.

Where a passenger is subject to a physical infirmity, such as hardness of hearing, it is only where this is known to carrier or its servants in charge of the train that such passenger is entitled to a greater degree of care and attention than those not so affected. *Texas, etc., Railroad v. Terry*, 27 Tex. Civ. App. 341, 65 S. W. 697.

Plaintiff, totally helpless, was lifted on defendant's train by the conductor, who well knew her condition, and was told that he would have to help her off, which he agreed to do. At destination, the conductor, lifting plaintiff in his arms, started towards the door, and, regardless of her warning, carried her through the door in great haste, striking her arm against the door facing, and breaking it. Held, that the company, voluntarily accepting a passenger whose helplessness was known to it, was negligent in failing to furnish such care as would reasonably insure her safety, and was liable for damages proximately flowing from such negligence. *International & G. N. R. Co. v. Gilmer*, 45 S. W. 1028, 18 Tex. Civ. App. 680.

A railway company is liable for an injury to a passenger, who is physically weak because of a recent operation, due to the negligence of its servants in delaying its train without reasonable excuse for three hours, and in failing to notify the passenger of the delay or to exercise proper care for her safety or comfort, though such negligence would not have injured an ordinary passenger, and the company or its agents had no knowledge of the passenger's condition. *Gulf, C. & S. F. Ry. Co. v. Redeker*, 100 S. W. 362, 45 Tex. Civ. App. 312.

Where a porter on a train who was acting also as a brakeman was informed that a passenger, because of a recent surgical operation, was weak and debilitated, and would require special care and attention, this was sufficient notice to the railway company of the condition of the passenger. *Gulf, C. & S. F. Ry. Co. v. Redeker*, 100 S. W. 362, 45 Tex. Civ. App. 312.

A female passenger, carrying a child, boarded a train in the morning, with a reasonable expectation of reaching her destination by noon, according to the carrier's schedule. The train was delayed in consequence of a wreck. The train subsequently stopped at a

station where an eating house was maintained not far from the tracks. Held, that the carrier was not released from failure to procure food for the passenger by the fact that the food was within reasonable reach of the average passenger, unless by exercising care she could have procured food. *Texas & N. O. R. Co. v. Harrington*, 98 S. W. 653, 44 Tex. Civ. App. 386.

The duty of a carrier, when its train is on time, to give opportunity to its passengers to procure food at regular eating stations is discharged when it exercises care to furnish an opportunity to those in ordinary physical condition to procure food for themselves, and it is not ordinarily its duty to convey food to infirm passengers. *Texas & N. O. R. Co. v. Harrington*, 98 S. W. 653, 44 Tex. Civ. App. 386.

**Intoxication of Passenger as Affecting Degree of Care Required.**—Partial intoxication does not excuse want of ordinary care and prudence on the part of a passenger, and a carrier need exercise no higher degree of care towards a person partially intoxicated than is required in case of sober persons. *Missouri Pac. Ry. Co. v. Evans*, 71 Tex. 361, 9 S. W. 325, 1 L. R. A. 476.

Where a passenger requires assistance on account of helpless condition of intoxication while the relation of passenger exists, it seems the railroad company would be negligent if it refused it. *Rozwadosfskie v. International, etc., R. Co.*, 1 Tex. Civ. App. 487, 492, 20 S. W. 872.

Carrier is only liable for wanton or willful neglect on the part of its employees of the duty of caring for the safety of a passenger who is intoxicated, even to the extent of insensibility. *Missouri Pac. R. Co. v. Evans*, 71 Tex. 361, 369, 9 S. W. 325.

**b. As Distinguished from Care Required of Carriers of Goods.**

**In General.**—Carriers of passengers are only liable for negligence, and are

not insurers of the safety of their passengers, further than can be required by the exercise of the degree of care already mentioned. *International, etc., R. Co. v. Halloren*, 53 Tex. 46; *International, etc., R. Co. v. Welch*, 86 Tex. 203, 24 S. W. 390; *International, etc., R. Co. v. Clark*, 36 Tex. Civ. App. 195, 51 S. W. 821, affirmed in 98 Tex. 620, no op.; *St. Louis, etc., R. Co. v. Harrison*, 32 Tex. Civ. App. 368, 73 S. W. 38, affirmed in 97 Tex. 645, no op.; *Gary v. Gulf, etc., R. Co.*, 17 Tex. Civ. App. 129, 42 S. W. 576; *St. Louis, etc., R. Co. v. McCullough*, 18 Tex. Civ. App. 534, 45 S. W. 324; *St. John v. Gulf, etc., R. Co. (Civ. App.)*, 80 S. W. 235. And see cases cited ante, "Test as to Exercise of Proper Degree of Care," IV, A, 1, a, (2).

The carrier does not warrant the safety of the passenger as a carrier does that of goods carried by him. *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325; *Albright v. Penn*, 14 Tex. 290.

"There is a well-established distinction between the liabilities of the carriers of passengers and the carriers of goods. The former are not liable for injuries to passengers which could not be guarded against by human care and foresight. The latter are insurers, and the fact that a loss could not have been avoided by any human vigilance will be to them no protection." *Albright v. Penn*, 14 Tex. 290.

As to the liability of carriers of goods as insurers, see the title CARRIERS OF GOODS, ante, p. 502.

**Instructions Objectionable as Imposing Liability as Insurer.**—While a railroad company owes a very high degree of care to its passengers, to protect them from injury, yet the company is not an insurer of their safety; and it is error to instruct the jury that if a train in which a passenger was traveling left the track, and was derailed, and the passenger was injured thereby, the company would be liable

for such injuries as were the direct and proximate result of such accident, unless the derailment could not have been guarded against by human skill and foresight, and was caused by a defect unknown to the company. *Texas & P. Ry. Co. v. Buckelew*, 3 Tex. Civ. App. 272, 22 S. W. 994.

In an action for an injury to a passenger it is error to charge that the want of the exercise of proper care to transport passengers safely is negligence for which the carrier is liable, as the charge is susceptible of the construction that the failure to exercise a degree of care which will actually result in the safe carriage of passengers is negligence for which the carrier would be liable. *International & G. N. R. C. v. Underwood*, 64 Tex. 463.

In a suit by a passenger for personal injuries caused by the wrecking of a train, it is reversible error to charge that, while railroad companies are not insurers of the safety of their passengers, still they are required to use the utmost care, "and to provide for the safety of their passengers," and the failure to use such care is negligence. *Houston, E. & W. T. Ry. Co. v. Greer*, 53 S. W. 58, 22 Tex. Civ. App. 5.

In an action by a passenger for personal injuries, a charge that "It is the duty of the defendant to exercise proper care to transport its passengers safely and the want of such care is deemed in law negligence for which the defendant is liable" was error because susceptible of the construction that failure to exercise a degree of care which will result in the safe carriage of passengers is negligence for which the carrier would be liable. *I. & G. N. Ry. Co. v. Underwood*, 64 Tex. 463.

A charge that railway companies, in carrying passengers, do not become insurers of their safety, and are not liable for injuries which result from an accident produced by a latent defect in machinery or roadbed, which could

not have been foreseen or guarded against by due care, and, if the wreck was accidentally caused by some unexplained defect which could not have been provided against by defendants by the exercise of such care as reasonably cautious persons would have exercised under the circumstances, plaintiff could not recover, is correct, with a further explanation as to what prudence and care reasonably cautious persons would have exercised under the circumstances. *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. 766.

## **2. Duty to Exercise Care Continues until Passenger Discharged.**

The duty of a carrier of passengers to exercise the degree of care exacted of it by law for the passengers safety, continues until the contract of carriage is complete, and terminated by delivery of the passenger at the terminus of his journey uninjured. *El Paso, etc., R. Co. v. Harry*, 37 Tex. Civ. App. 90, 83 S. W. 735. See ante, "Commencement, Duration and Termination of Relation," I, C.

If a railway company furnishes, though without charge, transportation to a civil officer, to a point which he may designate as necessary to the discharge of an official duty, the same liability which it assumes to transport him safely to the place he first designated, will attach to the company for his safe carriage to any point beyond, to which he deems it necessary to go for the proper performance of his duty, and to which its servants having charge of him as a passenger, voluntarily transport him. *International & Great Northern R. Co. v. Cock*, 68 Tex. 713, 5 S. W. 635.

## **B. AS TO PERSONS OTHER THAN PASSENGERS.**

### **1. General Rule as to Persons upon Premises or Conveyance of Carrier by Invitation.**

Where one is on the premises or conveyance of a carrier of passengers by invitation, express or implied, the

carrier is under obligation to exercise ordinary care for the safety of such person. *Mexican Nat. R. Co. v. Crum*, 6 Tex. Civ. App. 702, 25 S. W. 1126; *Galveston, etc., R. Co. v. Matzdorf* (Civ. App.), 107 S. W. 882.

In *Mexican Nat. R. Co. v. Crum*, 6 Tex. Civ. App. 702, 25 S. W. 1126, in which case a child of tender years was injured while standing in the door of a freight car belonging to appellant, the defendant company, it was held that the degree of care to be exercised by said company depended upon the circumstances under which the child came there. If he was in the car at the invitation, either express or implied, of the servants of the appellant, it was the duty of the appellant and its servants to exercise ordinary care towards the child to prevent him from being injured, and to abstain from doing any act which would reasonably result in his injury, taking into consideration his tender years.

Though a person boarding a train to assist another and her children to board and procure seats for them is not entitled to that high degree of care that the railroad company owes a passenger, the railroad company is charged with the duty of exercising ordinary care for his safety. *Missouri, K. & T. Ry. Co. of Texas v. Hibbitts*, 109 S. W. 228, 49 Tex. Civ. App. 419.

**2. As to Licensees.**

The duty which a carrier owes to a licensee upon its premises is merely to so conduct its business as not to purposely or recklessly injure him. *Texas, etc., R. Co. v. Griggs* (Civ. App.), 106 S. W. 411; *Missouri, etc., R. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905; *Gulf, etc., R. Co. v. Shelton*, 30 Tex. Civ. App. 72, 69 S. W. 653, affirmed in 96 Tex. 301; *Bullock v. Houston, etc., R. Co.* (Civ. App.), 55 S. W. 184.

While a railroad company does not owe a licensee riding on its train that high degree of care which it is required to exercise towards passengers,

it owes him the duty of exercising ordinary care for his safety and protection from injury at the hands of its agents and servants. *Gulf, etc., R. Co. v. Walters*, 49 Tex. Civ. App. 71, 107 S. W. 369. And see *Texas, etc., R. Co. v. McGilvary* (Civ. App.), 29 S. W. 67 (see 93 Tex. 741, no op.).

One who is on the cars of a railway company, not as a passenger, but simply through the favor or courtesy of the company, may recover damages for injuries to his or her person, caused by the negligence of the servants of the company. *Campbell v. Harris*, 4 Tex. Civ. App. 636, 23 S. W. 35, affirmed in 93 Tex. 637, no op., citing *Missouri Pac. R. Co. v. White*, 80 Tex. 202, 15 S. W. 808; *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. 288; *Prince v. International, etc., R. Co.*, 64 Tex. 144.

In *Mexican Nat. R. Co. v. Crum*, 6 Tex. Civ. App. 702, 25 S. W. 1126, it was held that if the child injured while standing in the door of a freight car was there merely with the consent and knowledge of appellant's servants in control of the cars, and engaged in transferring freight, a different rule for measuring the company's duty would obtain, than in case of an invitation.

Mere permission or acquiescence of appellant or its servants in his being in the car would create no duty on the part of the appellant except to refrain from acts wilfully and knowingly injurious to him. *Mexican Nat. R. Co. v. Crum*, 6 Tex. Civ. App. 702, 25 S. W. 1126.

It is the duty of a railroad company to exercise at least ordinary care for the safety of a person who is lawfully on a handcar. *International, etc., R. Co. v. Prince*, 77 Tex. 560, 14 S. W. 171.

A railway company owed to the employee of an independent contractor permitted to ride on its gravel train between his home and a gravel pit where he labored only the duty of or-

dinary care against injury. *Lovett v. Gulf, etc., R. Co.*, 97 Tex. 436, 79 S. W. 514, affirming 74 S. W. 570.

Where a passenger was rightfully on the train, though in the wrong coach, he could not be regarded as a trespasser, and the company was charged with at least ordinary care to prevent injuring him after his situation was discovered. (*Civ. App.* 1902) *Gulf, C. & S. F. Ry. Co. v. Shelton*, 69 S. W. 653, 70 S. W. 359, affirmed (1903) 72 S. W. 165, 96 Tex. 301.

Ordinarily, when one goes to a railroad's station to take the next train, he becomes in contemplation of law a passenger, whether he has actually bought a ticket or not, provided he goes within a reasonable time before the schedule time for the departure of the train, and, where his arrival is not within such reasonable time, the carrier owes him no duty, save such as it owes to a licensee. *Texas Midland R. R. v. Griggs* (*Civ. App.*), 106 S. W. 411.

A street railroad owes a child of tender years and immature judgment the duty of exercising ordinary care to prevent him from going into a place of danger on its car. (*Civ. App.*), *Denison & S. Ry. Co. v. Carter*, 79 S. W. 320. Judgment reversed 82 S. W. 782, 98 Tex. 196, 107 Am. St. Rep. 626.

The doctrine in respect to things attractive to children is inapplicable to the mere act of allowing children to get upon cars fitted up and used for the conveyance of all classes of persons, old and young, experienced and inexperienced, and actionable negligence must consist in a want of proper care in guarding the safety of those entering the vehicles in getting on or off or in traveling on them. *Denison & S. Ry. Co. v. Carter*, 98 Tex. 196, 82 S. W. 782.

### 3. As to Trespassers.

With regard to trespassers upon its conveyance or premises, it would seem that the carrier owes such persons no

duty save not to wilfully injure them. *Houston, etc., R. Co. v. Cohn*, 22 Tex. Civ. App. 11, 53 S. W. 698. And see *Handley v. Houston, etc., R. Co.*, 2 Posey 282.

In *Mexican Nat. R. Co. v. Crum*, 6 Tex. Civ. App. 702, 25 S. W. 1126, it was held that if the child was injured while upon the car of the defendant was not upon such car at the invitation of the company, or by its permission, he was an intruder, and in that event he was not entitled to recover except for injuries knowingly and wilfully inflicted.

One riding on a freight train, against the company's rules, is a trespasser and the company owes him no duty save not to wilfully or wantonly injure him. *St. Louis, etc., R. Co. v. Mayfield*, 35 Tex. Civ. App. 82, 79 S. W. 365, affirmed, no op.

Where the presence of a trespasser on the train was not known to the employees, and he was there without invitation, express or implied, and in violation of the rules of the railroad company, it was not liable for his death, though occasioned by a collision of trains resulting from the gross negligence of its employees, and though the deceased was riding in a safe place on the train. *Crawleigh v. Galveston, etc., R. Co.*, 28 Tex. Civ. App. 260, 67 S. W. 140, affirmed in 95 Tex. 676, no op.

In *Ratteree v. Galveston, etc., R. Co.*, 36 Tex. Civ. App. 197, 81 S. W. 566, affirmed in 98 Tex. 629, no op., it was held that when appellant left the train, appellee owed him no duty except to give him a safe way in which to leave the premises of the railway company; and if he returned to the train after having once disembarked therefrom, for the purpose of using it as a mode of crossing to the other side of the track, he was a trespasser, and appellee owed him no duty, except not to hurt him if it discovered him in a place of peril.

It was proper to charge that if deceased was a trespasser, and riding where a person of ordinary prudence would not have ridden, defendant was not liable, unless it knew of his position, and could have prevented the accident by ordinary care. *Southerland v. Texas, etc., R. Co.* (Civ. App.), 40 S. W. 193, affirmed in 93 Tex. 739, no op.

An adult, having the ordinary intelligence of a full-blooded negro, gave the fireman 50 cents to let him ride on the pilot of the locomotive, and while so riding, against the railroad company's rules, was injured by collision with a hand car. Held, that the company was not liable. *Rucker v. Missouri Pac. Ry. Co.*, 61 Tex. 499.

A complaint alleging that plaintiff procured one P., about to become a passenger on defendant's train, to transport his baggage; that it was defendant's custom to permit persons to assist passengers, with their baggage, into it trains; and that plaintiff assisted P. to enter defendant's train with plaintiff's baggage, and, while leaving the car, was injured by the careless and wanton conduct of defendant, in causing the locomotive to run into the car,—was demurrable, since plaintiff was a trespasser, and defendant was bound to abstain from injuring him only after being aware of his danger. *Andrews v. Ft. Worth, etc., R. Co.* (Civ. App.), 25 S. W. 1040.

In an action against a railroad company to recover damages for injuries sustained in attempting to board a moving train, an instruction that, though plaintiff were a trespasser, it was the duty of defendant's servants to assist plaintiff, without any reference to his being in imminent and known peril, held erroneous. *Missouri, etc., R. Co. v. Mills*, 27 Tex. Civ. App. 245, 65 S. W. 74.

**Degree of Care in Ejecting Trespassers.**—See post, "Degree of Care Required in Ejection," V, D, 15, d, (2).

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#### 4. As to Persons Failing to Alight in Reasonable Time after Reaching Destination.

Generally, as to status of such persons, see ante, "Effect of Arrival at Destination, and the Affording of Reasonable Opportunity and Time to Alight," I, C, 2, e.

Where a passenger fails to get off a train when its arrival at his destination is announced, and he is carried beyond, he becomes a trespasser, and the railroad owes him no duty except not to willfully injure him. *Houston & T. C. R. Co. v. Cohn*, 53 S. W. 698, 22 Tex. Civ. App. 11.

Where a train has stopped at a passenger's destination a reasonably sufficient time for him to alight, the carrier's duty toward such passenger, in starting its train, is only to use ordinary care not to injure him, and a charge imposing on the carrier that degree of care which "a very cautious person" would have exercised was error. *St. Louis Southwestern Ry. Co. of Texas v. Turner*, 77 S. W. 255, 33 Tex. Civ. App. 604.

Where one was pushed from a platform of a railroad car by the carrier's porter, such act, as a matter of law, constituted a failure to exercise ordinary care for such person's safety, to which degree of care he was entitled, although his relation as passenger had terminated. *International & G. N. R. Co. v. Hugen*, 100 S. W. 1000, 45 Tex. Civ. App. 326.

#### C. LIABILITY OF CARRIER AS DEPENDENT ON EXERCISE OF PROPER CARE.

##### 1. Want of Proper Care as Negligence Imposing Liability on Carrier.

**In General.**—A failure on the part of a carrier of passengers to exercise the requisite degree of care to secure the safety of its passengers is negligence, rendering the carrier liable for injuries, which are the proximate result of such failure. *International, etc., R. Co. v. Halloren*, 53 Tex. 46; Inter-



national, etc., *R. Co. v. Mulliken*, 10 Tex. Civ. App. 663, 32 S. W. 153, affirmed in 93 Tex. 643, no op.; International, etc., *R. Co. v. Tasby*, 45 Tex. Civ. App. 416, 100 S. W. 1030; *Levy v. Campbell* (Sup.), 19 S. W. 438; *Martin v. St. Louis, etc., R. Co.* (Civ. App.), 56 S. W. 1011; *St. Louis, etc., R. Co. v. Martin* (Civ. App.), 87 S. W. 387, affirmed in 101 Tex. 656, no op. See, also, Texas, etc., *R. Co. v. Carlton*, 60 Tex. 397.

In the absence of contributory negligence on the part of the passenger. *St. Louis, etc., R. Co. v. Kennedy* (Civ. App.), 96 S. W. 653, affirmed in 101 Tex. 656, no op. See post, "Liability of Carrier as Affected by Contributory Negligence of Passenger," V, L.

"If a carrier is negligent in two particulars, and neither negligent act alone is sufficient to cause an injury, but both, acting concurrently, are the proximate cause of a wreck and subsequent injury, the carrier is liable." *Sproule v. St. Louis, etc., R. Co.* (Civ. App.), 91 S. W. 657.

A passenger may recover for inconvenience and injury due to a failure of the carrier to exercise that degree of care towards her that is due a passenger. Judgment (Civ. App.), 107 S. W. 71, reversed. *Gulf, C. & S. F. Ry. Co. v. Overton*, 110 S. W. 736, 101 Tex. 583.

It is the duty of a street railway company to exercise the highest degree of care in operating its cars to prevent injury to passengers, and failure of its servants in that respect is its negligence. (Tex. Civ. App. 1902), *Citizens' Ry. Co. v. Craig* (Civ. App.), 69 S. W. 239.

Failure of the motorman on a street car to exercise reasonable care in listening for signals to stop the car given by a passenger who desired to alight, in consequence of which he did not stop the car, and the passenger was injured in attempting to alight from it while in motion, was action-

able negligence. *Fuller v. Denison & S. Ry. Co.*, 74 S. W. 940, 32 Tex. Civ. App. 399.

**Carrier Liable Even for Slightest Negligence.**—Carriers are responsible for injuries arising from even the slightest negligence. *Ft. Worth & D. C. R. Co. v. Stingle*, 2 Willson, Civ. Cas. Ct. App. § 706.

Proof of slight neglect on the part of the servants of a railroad company is sufficient to fix its liability for injury to its passengers. *San Antonio & A. P. Ry. Co. v. Long* (Civ. App.), 26 S. W. 114.

A carrier of passengers is liable in damages for injuries which accrue to passengers by slightest neglect against which human prudence, diligence and skill can reasonably guard. *San Antonio, etc., R. Co. v. Long* (Civ. App.), 26 S. W. 114, 116, reversed in 87 Tex. 148; *Mexican Cent. R. Co. v. Lauricella* (Civ. App.), 26 S. W. 301, 303, affirmed in 87 Tex. 277; *Houston, etc., R. Co. v. George* (Civ. App.), 60 S. W. 313; *Houston City St. R. Co. v. Ross* (Civ. App.), 28 S. W. 254, 255; *Houston City St. R. Co. v. Desso* (Civ. App.), 28 S. W. 256; *Houston City St. R. Co. v. Wheeler* (Civ. App.), 28 S. W. 256.

In an action against a railroad company for injuries to a passenger an instruction that if the jury believe that plaintiff's intestate was killed through the negligence of the defendant company, its agents and employees, in the manner and form as alleged in plaintiff's petition then they will find for plaintiff the actual damages sustained, was not erroneous. *Galveston, H. & S. A. Ry. Co. v. Parsley*, 6 Tex. Civ. App. 150, 25 S. W. 64.

**Carrier May Not Limit Liability for Negligence.**—See post, "Limitation of Liability for Negligence," V, K.

**Physical Weakness of Passenger No Defense.**—A carrier is liable for the immediate results caused by its employee's carelessness and can not plead passenger's physical disability. *Sawyer v. Dulany*, 30 Tex. 479, 487, 488.

The liability of carriers does not depend upon the physical ability of the passengers, but upon their own conduct. And the fact that some of the passengers in a stage were in such a condition that the upsetting of the stage would be likely to produce serious results to them—as, the case of a woman who was pregnant—ought not to be pleaded in mitigation of damages, where those results were the consequence of the violation of duty on the part of the carriers, as the employment of a drunken driver. *Sawyer v. Dulany*, 30 Tex. 479.

**Instructions as to Liability for Negligence.**—In an action against a carrier for damages for injuries sustained by the falling of a seat, an instruction that a failure to exercise a high degree of care to provide safe seats, or to warn passengers of any defective seats, was negligence which would render the carrier liable for such damages as directly resulted therefrom, is not erroneous where the complaint charged, without exception, that the accident was caused by gross negligence, and the evidence disclosed that the seat had fallen previously on the same day. *International & G. N. R. Co. v. Anthony*, 57 S. W. 897, 24 Tex. Civ. App. 9.

In an action by a passenger for injuries, an instruction that the failure of any employee having care of the tracks to exercise a high degree of care was negligence, held proper where the accident was due to an open switch. *International, etc., R. Co. v. Bibolet*, 24 Tex. Civ. App. 4, 57 S. W. 974, affirmed in 84 Tex. 671, no op.

A charge that negligence, as applied to railroads engaged in the transportation of passengers, is a failure to exercise such a high degree of foresight as to possible dangers and such a high degree of prudence in guarding against them as would be used by very cautious, prudent, and competent persons under the same or similar circum-

stances, correctly defines negligence as applied to the duty owed by a carrier to its passengers, and is sufficient, when taken in connection with a further charge that the railroad does not, by accepting a passenger, become an insurer of his safety, but is only bound to use a high degree of care, etc. *St. Louis Southwestern Ry. Co. of Texas v. Parks*, 40 Tex. Civ. App. 480, 90 S. W. 343.

A charge that railroad companies must exercise that degree of foresight as to "possible dangers" to their passengers, etc., and a failure to do so is negligence, held not error, as it requires no more than the highest degree of care as to possible dangers to which the passenger may be exposed and not all possible dangers. *Missouri, etc., R. Co. v. Scarborough* (Civ. App.), 51 S. W. 356, affirmed in 93 Tex. 715, no op.

In an action for injuries to a passenger, an instruction that negligence when applied to carriers means a failure in the performance of duty imposed by law, for the protection of others, to exercise that high degree of care which very competent and prudent persons would usually exercise under the same or similar circumstances, was correct. *St. Louis, etc., R. Co. v. Harrison*, 32 Tex. Civ. App. 368, 73 S. W. 38, affirmed in 97 Tex. 645, no op.

Where it was alleged that a passenger's injuries were caused by defendant's failure to furnish coaches which were warmed and provided with water, it was error to refuse an instruction that it was defendant's duty to exercise such a high degree of foresight and prudence as would have been used by other cautious, prudent, and competent persons under similar circumstances, and to charge that defendant was only required to use reasonable care and diligence to warm its coaches and provide water. *Arrington v. Texas & P. Ry. Co.* (Civ. App.), 70 S. W. 551.

## 2. Freedom from Liability in Absence of Negligence Proximately Causing Injury.

### a. General Rule Stated and Applied.

**Rule Stated.**—As has been already seen, a carrier of passengers is not, as in the case of a carrier of goods, an insurer. See ante, "As Distinguished from Care Required of Carriers of Goods," IV, A, 1, b.

And such carrier of passengers is responsible for injuries to its passengers only in case of its negligence, or that of its agents or employees, proximately causing such injuries. *Boyles v. Texas, etc., R. Co.* (Civ. App.), 86 S. W. 936; *Dallas, etc., R. Co. v. Randolph*, 8 Tex. Civ. App. 213, 27 S. W. 925; *Texas, etc., R. Co. v. Reich*, 15 Tex. Civ. App. 13, 38 S. W. 257; *Texas, etc., R. Co. v. Beckworth*, 11 Tex. Civ. App. 153, 32 S. W. 347, affirmed in 93 Tex. 740, no op.

A charge permitting a verdict for the plaintiff if his injuries resulted from a cause in respect to which the defendant was not negligent is erroneous. *Missouri, etc., R. Co. v. Hay*, 28 Tex. Civ. App. 318, 67 S. W. 171.

In an action against a railroad company for an injury to a passenger it is not enough to entitle plaintiff to recover that the evidence shows the injured person did only what a prudent person would have done under the same circumstances, but it must likewise show that defendant committed some fault or was guilty of some negligence which contributed to the injury. *Gulf, Colorado & S. F. Ry. Co. v. Wallen*, 65 Tex. 588.

In an action against a railroad for damages for the death of a passenger, a charge that the jury should find for defendant if the railroad or its employees were not guilty of negligence as alleged, is unobjectionable. *Galveston, etc., Ry. v. Parsley*, 6 Tex. Civ. App. 150, 154, 25 S. W. 64, affirmed in 93 Tex. 707, no op.

## Negligence of Passenger Not Essential to Relieve Carrier from Liability.

—Where a passenger had jumped from a moving train at a station, it was error to instruct that, although defendant's servants had stopped the train at such station a sufficient length of time for him to alight in safety, by the exercise of ordinary care, in order for defendant to be relieved of liability they must believe that the passenger was guilty of negligence in jumping therefrom, since it does not necessarily follow that to relieve defendant from liability the passenger must have been negligent. *Texas & Ft. S. Ry. Co. v. Atchison* (Civ. App.), 54 S. W. 1075.

In suit by a lady passenger for injuries sustained in alighting from a train beyond her destination, a charge to the effect that the company would be liable if she was injured without negligence on her part, notwithstanding that the company had discharged its full duty toward her at the point of destination and alighting, is erroneous. *Texas, etc., R. Co. v. Woods*, 8 Tex. Civ. App. 462, 465, 28 S. W. 416.

Where it appeared that plaintiff jumped from defendant's street car while it was in motion, under the fear that it would collide with an engine at a crossing, and the evidence showed that the motorman saw the watchman on the crossing, but did not lessen the speed, because no danger signal was given, and that the car was stopped before reaching the crossing, but that plaintiff, without seeing the watchman, had jumped when the car was about 100 feet from the crossing, it was error to charge that defendant was not liable if the car was held in proper control, and was not running faster than six miles an hour, and if, in jumping, plaintiff did not act as a reasonable person; thus making defendant's freedom from liability depend on plaintiff's contributory negligence. *Dallas Consolidated Traction Ry. Co. v. Randolph*, 8 Tex. Civ. App. 213, 27 S. W. 925.

**Injury Must Be Proximate Result of Carrier's Negligence.**—If there was an intervening cause between negligence of railroad and injury sustained by passenger, so that such intervening cause became proximate cause of injury, and was not such as could reasonably have been contemplated from act of railroad, there can be no recovery against railroad for such injury. *Texas, etc., R. Co. v. Beckworth*, 11 Tex. Civ. App. 153, 155, 32 S. W. 347, affirmed in 93 Tex. 740, no op.

In order that a street railroad may be held responsible for injuries to a passenger on the ground that it was running its cars at a greater speed than allowed by a city ordinance, the speed must have caused or contributed to cause the accident. *Dallas Consol. Electric St. Ry. Co. v. Ison*, 83 S. W. 408, 37 Tex. Civ. App. 219.

A judgment for plaintiff in an action for personal injuries received in falling from the platform of a train will be reversed where the evidence is wholly insufficient to show that the accident resulted from the negligence of the defendant company. *Houston, etc., R. Co. v. Stewart*, 21 Tex. Civ. App. 33, 50 S. W. 580.

**Instructions as to Proximate Cause.**—In an action against a railroad for injury to a passenger a charge authorizing exemplary damages on account of general bad condition of road, without reference to whether plaintiff's injury resulted therefrom, is error. *Missouri Pac. R. Co. v. Shuford*, 72 Tex. 165, 170, 10 S. W. 408.

Where, in an action against a railway company for injuries to a passenger while waiting in a depot for a train in consequence of the cold condition of the waiting room, there was testimony that the passenger was on the same day exposed to cold at other places under such circumstances as might produce the injuries complained of, that long after the alleged exposure at the depot she was treated by

physicians for a disease not attributable to exposure to cold and which might produce the pains complained of, the failure to charge on the question of proximate cause was reversible error. *St. Louis, etc., R. Co. v. Lowe* (Civ. App.), 86 S. W. 1059.

In an action against a street railway for injuries to a passenger, where the evidence raised the issue as to whether the injuries from which the passenger suffered were caused by the accident in the car or had existed previous thereto, an instruction that there could be no recovery unless the negligence of defendant was the direct and proximate cause of the injury was proper. *Pelly v. Denison & S. Ry. Co.* (Civ. App.), 78 S. W. 542, affirmed in 98 Tex. 628, no op.

Charge that defendant railway company is responsible to plaintiff passenger for actual and direct results of his injury proximately resulting from its negligence was proper, instead of charge that defendant is liable for injuries sustained which were the direct and natural results of negligence complained of by plaintiff. *Texas, etc., R. Co. v. Davidson*, 3 Tex. Civ. App. 542, 543, 21 S. W. 68.

It is not error to refuse to charge that plaintiff could not recover if his injuries were purely accidental or caused by his own negligence, where the jury was instructed that the mere fact that plaintiff was injured by falling from the steps of the caboose would not render defendant liable, but its negligence must have caused the injury, and was fully instructed as to contributory negligence. *International & G. N. R. Co. v. Downing*, 41 S. W. 190, 16 Tex. Civ. App. 643.

In an action for injuries to a passenger, an instruction authorizing recovery if defendant was negligent in moving a car or in having an improperly constructed platform, if the plaintiff's injury was caused by such movement or the defective platform, is erroneous

because authorizing recovery if defendant was negligent in moving the car, and plaintiff was injured by the defective platform. *Missouri, K. & T. Ry. Co. of Texas v. Hay*, 67 S. W. 171, 28 Tex. Civ. App. 318.

It is error to charge that, if plaintiff was hurt in a certain way, "you will determine from the evidence whether the failure" to do certain things was negligence on the part of the defendant, and whether this was the proximate cause of the injury to plaintiff, and, if he sustained any injury, you will find for plaintiff," etc.,—since the jury are told, in effect, that, if plaintiff "sustained any injury," they are to find for him. *Texas & P. Ry. Co. v. Reich* (Civ. App.), 39 S. W. 257, 15 Tex. Civ. App. 13.

Instance of charges in suit against carrier for injuries from collision with rear section of train while plaintiff was riding in car with his racehorse, which were erroneous in that they authorized recovery if the conductor became aware of plaintiff's peril and failed to warn him regardless of whether the conductor was negligent or whether such lack of warning was the proximate cause of the injury. *Missouri, etc., R. Co. v. Cook*, 8 Tex. Civ. App. 376, 384, 27 S. W. 769, affirmed in 93 Tex. 690, no op.

In an action against a railroad for damages for injuries to passenger, the court did not err in withdrawing from the jury the question whether the absence of a bell cord or other means of communication between the conductor and engineer, and of air-brakes and a brakeman on the car, was negligence, where these defects had nothing to do with the accident in which the plaintiff was injured. *Levy v. Campbell* (Sup.), 19 S. W. 438.

In a suit based and tried on the theory that decedent's death resulted from her injury, a charge that if decedent was injured while on one of defendant's passenger trains as alleged (so that death resulted), and that a

collision of defendant's trains was the proximate cause of the injury, plaintiff should recover, does not conflict with a charge that if decedent was not injured by a collision of defendant's trains, or if she was injured by the collision, but it was not the proximate cause of her death, or if she died from some disease not caused by the injury she may have received by the collision, plaintiff can not recover. *Gulf, C. & F. Ry. Co. v. Farmer* (Civ. App.), 108 S. W. 729.

In an action against a carrier to recover for negligence alleged to be the result of permitting a passenger coach to become and remain cold, whereby plaintiff's wife contracted disease, defendant requested the court to charge "that the proximate cause of an event, as the term 'proximate cause' is used in the main charge, means that cause which, in a natural and continuous sequence, unbroken by any new cause, produces or brings about such event. If you believe from the evidence that the car upon which [plaintiff's wife] took passage was cold and not comfortably heated, and if you further believe from the evidence that defendant was negligent with respect to the condition of said car at the said time, and as a result thereof [plaintiff's wife] took and suffered with cold, and if you further believe from the evidence she now has consumption, yet unless you believe from the evidence that such consumption was caused solely by her having taken cold in said car, if she so took cold, \* \* \* and that such cold or exposure, if any, was the direct and sole cause of such consumption, then plaintiff can not recover for the injuries, if any, resulting from such consumption. \* \* \* You are further charged that the burden of proof is on plaintiff to show \* \* \* that the consumption \* \* \* was proximately and solely caused by her exposure, if she was exposed, \* \* \* and that such exposure, if any, was caused by the negligence of defendant." The court in-

structed as follows: "The burden of proof is on plaintiff to show \* \* \* that he is entitled to recover under the instructions hereafter given. By the term 'proximate cause,' as hereafter used, is meant that cause which, in a continuous sequence, unbroken by any new, independent cause, produces an event or injury, but for which the same would not have occurred. If you believe from the evidence that said car was cold, and that the servants of defendant were guilty of negligence, \* \* \* and that (plaintiff's wife) suffered with cold while in said car, and that she now has consumption, yet unless you believe from the evidence that said disease, if she has such, was proximately caused by defendant's negligence, if any, then and in that event you will find for defendant on the issue of her sickness and disease." Held, that the instructions given stated the law rather than the requested one, and no error was committed in the refusal. *Missouri, etc., R. Co. v. Byrd*, 40 Tex. Civ. App. 315, 89 S. W. 991, affirmed in 101 Tex. 648, no op.

In an action for injuries received in alighting from a car, the use of the word "accident" in instructions was not misleading as tending to cause the jury to believe that the injuries were not the result of defendant's negligence. *Rambie v. San Antonio & G. R. R.*, 100 S. W. 1022, 45 Tex. Civ. App. 422.

The court did not place the burden of showing that the failure to stop the car was not the proximate cause of the disaster by instructing that, if the jury found that the failure to stop the car was not the proximate cause of the injury, then the street car company would not be liable. *Galveston, H. & S. A. Ry. Co. v. Vollrath*, 89 S. W. 279, 40 Tex. Civ. App. 46.

**Act of Carrier Held Not Proximate Cause of Injury.**—Where a passenger was injured by an alleged sudden and premature start of the train while she

was attempting to alight at a station the carrier's alleged negligence in failing to provide vestibuled cars to prevent passengers from being thrown off or from jumping off the train while in motion was not the proximate cause of the injury. *Latimer v. St. Louis Southwestern R. Co. of Texas*, 90 S. W. 665, 40 Tex. Civ. App. 614.

A street railway motorman permitted plaintiff and certain other boys to ride on the front platform of a street car in consideration, as plaintiff claimed, of certain services performed for the motorman. After they had ridden several blocks, the motorman, without stopping the car, directed them to get off, and plaintiff in so doing was injured. Held, that the proximate cause of the injury was plaintiff's attempt to alight from the moving car, and not the act of the motorman in permitting him to ride on the front platform. Judgment (Civ. App.) 79 S. W. 320, reversed. *Denison & S. Ry. Co. v. Carter*, 82 S. W. 782, 98 Tex. 196, 107 Am. St. Rep. 626.

Where the vestibule on the end of a coach at which plaintiff claimed he was hurt in seeking egress from the car was not opened on the side next to the station, and had been opened on the other side only for the purpose of placing a hose to convey water into the car, and plaintiff was injured by the movement of the hose and the car while attempting to go out of such door, the railroad company was not guilty of negligence justifying a recovery. *Ratteree v. Galveston, H. & S. A. Ry. Co.*, 81 S. W. 566, 36 Tex. Civ. App. 197.

Injuries received by a passenger in rendering assistance to those wounded in a railway accident—as, from strain in lifting—are not proximate results of the negligence causing the accident. *Missouri, etc., Ry. Co. v. Simmons*, 12 Tex. Civ. App. 500, 33 S. W. 1096 (see 93 Tex. 691, no op.).

Plaintiff purchased a first-class ticket

and took passage on a mixed train. While the train was in motion, plaintiff stepped on a banana peel negligently permitted to remain on the floor of the water-closet, where it could not be seen by reason of the darkness. At the time of the accident the train made a sudden lurch, causing plaintiff to fall. Held, that the fact that plaintiff was compelled to ride on a mixed train instead of a first-class passenger train was not the proximate cause of his injuries, and hence it was error to permit evidence on such issue and to submit the same to the jury. *Chicago, R. I. & P. Ry. Co. v. Gragg*, 81 S. W. 93, 36 Tex. Civ. App. 102.

Where a passenger is carried beyond his destination by a railway company, and alights from the train at another place, and receives injuries which result from the manner, and not the place, of such alighting, the negligence of the company in carrying him beyond his destination is not the proximate cause of such injury. *Texas & P. Ry. Co. v. Woods*, 8 Tex. Civ. App. 462, 28 S. W. 416.

Though a passenger acts with prudence in taking his position on a car platform, yet, if he would not have fallen therefrom but for his drunkenness, it was the proximate cause of his falling, and prevented recovery for his death. *Houston & T. C. R. Co. v. Bryant*, 72 S. W. 885, 31 Tex. Civ. App. 483.

In an action by a passenger against a railroad company, a requested instruction that if such passenger deceived or misled the conductor as to his destination by conduct which would have misled or deceived a person of ordinary prudence, and that thereby the conductor was caused to carry the passenger beyond his destination, the railroad company would not be liable for injuries resulting therefrom, should have been granted, where the issue was raised, and the charge of the court did not present it. *St. Louis S. W. Ry.*

*Co. of Texas v. Ricketts* (Civ. App.), 62 S. W. 424.

A passenger who was carried beyond his station was put off at one end of a trestle, and his baggage at the other end. The passenger crossed the trestle to recover his baggage, and, while attempting to recross, with muddy and slippery feet, he fell, receiving injuries. Held that, since the negligence of the company in carrying him by his station was not the proximate cause of his injury, he could not recover. *International & G. N. Ry. Co. v. Folliard*, 66 Tex. 603, 1 S. W. 624.

Action by widow for damages for negligently causing the death of her husband. She had sent her two sons to the railway depot to bring their father home, expecting him to arrive as a passenger, intoxicated. The sons were ordered from the depot by the agent in charge. The husband arrived on the train after the boys had left, intoxicated, but knowing what he was doing. He left the train, deposited his baggage, and left the depot. Subsequently he returned, went to sleep upon the track, and was run over by another, a freight train, and killed. In such case it can not be held that the driving of plaintiff's sons from the depot, preventing them from meeting their father and conducting him home, was the immediate and proximate cause of his death, and that therefore the railway company was liable in damages for his death. The wrong in driving the boys from the depot was too remote from the injury to create liability. *Rozwadosfskie v. International, etc., R. Co.*, 1 Tex. Civ. App. 487, 20 S. W. 872.

Where a passenger, because the car in which he was riding was not sufficiently heated, attempted to pass from it to another car while the train was in motion, in order to find a warmer one, and was injured, the failure of the carrier to heat the car was not the proximate cause of the injury. *Sickles v.*

Missouri, K. & T. Ry. Co. of Texas, 13 Tex. Civ. App. 434, 35 S. W. 493.

A passenger, on finding that the ticket agent was not in his office, boarded a train without a ticket. An employee in charge of the train requested him to alight and procure a ticket. The agent, on being asked for one, directed him to board the train, which was then in motion. Held, that the absence of the agent from his office was not the proximate cause of an injury sustained by the passenger while attempting to board the moving train. *San Antonio & A. P. Ry. Co. v. Trigo* (Civ. App.), 101 S. W. 254.

**Evidence Insufficient to Show Negligence.**—A train stopped at a station long enough for plaintiff and his family to pass from the front of the car, where they should have gotten on, to the rear platform, and to get on there. No reason was shown why they walked the whole length of the car, and there was no evidence that they would not have had time to get safely seated had they got on in front. The testimony of all the witnesses but plaintiff's wife was that the train started slowly. No one saw plaintiff's wife fall, and she deposed before the trial that she did not know what caused her to fall from the train. At the trial she testified the train started off rapidly, and caused her to fall from the platform, but she was contradicted by her husband and brother and others. Held, that the evidence was insufficient to show negligence of the railway company. *Houston & T. C. R. Co. v. Stewart*, 50 S. W. 580, 21 Tex. Civ. App. 33.

In an action by a woman against a railway company for damages due to mortification caused by her becoming locked in the water-closet of a railway coach, on account of a defect in the door lock, it appeared that the lock was of the best manufacture, and that, as soon as plaintiff's predicament was discovered, plaintiff, while the brakeman was attempting to pry off the lock,

voluntarily escaped from the closet through the window, with her husband's assistance. Held, that defendant was not liable. *Gulf, C. & S. F. Ry. Co. v. Smith*, 10 Tex. Civ. App. 338, 30 S. W. 361.

Where the distance from the step of a railroad passenger car to the platform provided for passengers to alight was not more than 18 inches, the fact that the company did not provide a stool or box for passengers to use in alighting to such platform, as an additional step, was not such negligence as would authorize a recovery for injuries sustained by a fall of a passenger while alighting. *Texas Midland R. Co. v. Frey*, 61 S. W. 442, 25 Tex. Civ. App. 386.

Where, in an action for damages for injuries to plaintiff's hand by a car window was raised, and that he did not mean that when he entered the car the window was raised, and that he did not touch it, is disputed by other witnesses, and found untrue by the court, and it is found that plaintiff raised the window himself, and there is no evidence as to the cause of the fall, or that it was caused by any defect in the window or fastening, a judgment for plaintiff is not justified. *Texas Midland R. R. v. Johnson* (Civ. App.), 65 S. W. 388.

Where a passenger is injured while attempting to get off defendant's train about 200 yards from its station, and while the train is in motion, and the defendant's servants do nothing to cause such act, and have no notice of the passenger's intention, there is no negligence on the part of defendant which will warrant a recovery by the plaintiff. *Gulf, C. & S. F. Ry. Co. v. Cleveland* (Civ. App.), 61 S. W. 951.

There was no evidence that plaintiff was bruised or otherwise injured by his fall from the train; nor was there any proof of negligence on the part of defendant, unless it be inferred from the happening of the event. Held in-



sufficient to sustain a verdict for plaintiff. *San Antonio & A. P. Ry. Co. v. Choate* (Civ. App.), 43 S. W. 537.

**b. Injuries Unavoidable by Human Care and Foresight.**

**In General.**—Carriers of passengers are not liable for injuries to passengers which could not be reasonably anticipated and guarded against by human care and foresight. *Albright v. Penn*, 14 Tex. 290; *Galveston, etc., R. Co. v. Long*, 13 Tex. Civ. App. 664, 666, 36 S. W. 485; *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 544, 20 S. W. 766; *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95, 102, 10 S. W. 325.

A carrier is not responsible for injuries to passenger from dangers which are incident to railway travel, and which proper care and skill could not avoid. *Houston, E. & W. T. Ry. Co. v. Richards*, 49 S. W. 687, 20 Tex. Civ. App. 203.

It is only for the consequences of such risks as could have been provided against by proper diligence that the carrier is held liable. *Houston, etc., R. Co. v. Richards*, 20 Tex. Civ. App. 203, 49 S. W. 687.

A charge that a railroad is not liable if the death of a person was result of unavoidable accident is unobjectionable. *Galveston, etc., R. Co. v. Parsley*, 6 Tex. Civ. App. 150, 154, 25 S. W. 64, affirmed in 93 Tex. 707, no op.

**Applications of Rule—Injuries Due to Hidden Defects.**—Railroad companies in carrying passengers do not become insurers and are not liable for injuries resulting from accidents produced by latent defects in machinery or roadbed, which could not have been foreseen and provided against by exercising such prudence and care as reasonably cautious persons would exercise under the circumstances. *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 544, 20 S. W. 766.

"The subject of the liabilities of carriers of passengers is very fully discussed in *Ingalls v. Bills* and others

(9 Metcalf 1) where the injury arose from the breaking of one of the iron axletrees, in which there was a small flaw entirely surrounded by sound iron one-fourth of an inch thick, and which could not be discovered by the most careful examination externally. It was held that the proprietors of the coach were not liable under the circumstances for the injury, though they would have been liable had the defect been such as might have been discovered by the most careful and thorough examination. The distinction between the responsibilities of the carriers of passengers and those of goods was recognized in that case, and the latter were said to be responsible for the safe delivery of goods with but two exceptions, viz, the act of God and the king's enemies." *Albright v. Penn*, 14 Tex. 290.

**Accidents Caused by Forces of Nature.**—A railroad company is not liable in damages for personal injuries caused by a sudden break in a rail, brought about by cold weather, provided the rail was sufficiently strong before the accident. *Missouri Pacific R. Co. v. Johnson*, 72 Tex. 95, 102, 10 S. W. 325.

An instruction that defendant is not liable if the accident was directly caused by unprecedentedly bad weather, as sudden freezes and thaws, and this weather could not have been guarded against by human foresight, skill, and judgment, is sufficiently favorable to defendant. *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325.

Plaintiff, while riding in the caboose of a freight train, was injured by a derailment of the train. The train had previously encountered a hard rain, with high winds, and at the place where it was wrecked it encountered a cyclone which passed over the right of way; its path extending from 250 to 400 yards in width and 7 or 8 miles in length. The cyclone unroofed, wrenched from their foundations, and

destroyed houses, and its force stopped the train, wrenched and lifted the cars from their trucks, and hurled one of them a distance of 150 feet into a field beyond, and when it struck the ground whirled it around like a top. Only the engine and three heavy iron-tanked oil cars remained on the track. Held, that the wreck was the result of an act of God, for which the carrier was not responsible. *Galveston, H. & S. A. Ry. Co. v. Crier*, 100 S. W. 1177, 45 Tex. Civ. App. 434.

Where a collision in which the plaintiff in an action against a railroad for damages for personal injuries was injured would not have occurred had the railroad used proper diligence to flag a passenger train, a windstorm, which drove a freight train from a side track onto the main track and caused collision with the passenger train, is not such act of God as will excuse the railroad from liability. *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579, 592, 58 S. W. 614, affirmed in 94 Tex. 700, no op.

**Injuries Due to Acts of Strangers.**—A railroad company is not liable for the death of a person caused by the wanton act of some person not connected with railroad or in its employ. *Galveston, etc., R. Co. v. Parsley*, 6 Tex. Civ. App. 150, 154, 25 S. W. 64, affirmed in 93 Tex. 707, no op.

A passenger who is injured by the malicious act of one not in the employ of the railway company, whereby the car was derailed, can not recover for the damage inflicted. *Houston & T. C. Ry. Co. v. Lee*, 69 Tex. 556, 7 S. W. 324.

A passenger injured through the derailment of cars caused by the malicious acts of strangers to the company can not recover. *Houston, etc., R. Co. v. Lee*, 69 Tex. 556, 559, 7 S. W. 324.

Passenger injured in jumping from a train, on being frightened by a cry of danger from another passenger, can not recover from railroad. *Gulf, etc., R. Co. v. Wallen*, 65 Tex. 568, 572.

While plaintiff's son was leaning out

of a car window, he was struck by an open gate on a stock chute near defendant's track. One of defendant's employees testified that he had closed the gate, and thought that he had fastened it, and that just before the train came he saw some small boys near the track, and then noticed that the gate was open. Held, that it was reversible error to refuse a charge that defendant was not liable if the gate was opened by a stranger after it had been closed by defendant's employee. *Gulf, C. & S. F. Ry. Co. v. Phillips*, 74 S. W. 793, 32 Tex. Civ. App. 238.

One injured in jumping off a stationary passenger train, in the mistaken belief that there was danger of a collision with a freight train approaching from the rear, has no cause of action against the company. *Gulf, C. & S. F. Ry. Co. v. Wallen*, 65 Tex. 568.

That a passenger endeavored to raise the car window, but, failing, a stranger to her, and presumptively a passenger, of his own motion raised the window, but not quite high enough, and in consequence it suddenly fell, and injured plaintiff's hand, which she placed there without noticing to what height the window had been raised, does not render the company liable. *Dumas v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.), 43 S. W. 908.

A railroad company is not liable for an injury resulting from an accident happening to a passenger while attempting to board a train, when the accident was caused by another passenger, who was standing on the platform; it not appearing that the passenger was on the platform by reason of any negligence on the part of the company. *Hollman v. Houston & T. C. R. Co.*, 2 Posey, Unrep. Cas. 557.

**Injuries Due to Acts of Fellow Passengers.**—A railroad company is only answerable to a passenger for the exercise of such a high degree of foresight in preventing him from injury by negligent acts of fellow passengers, as would be used by very cautious,

prudent and competent persons under similar circumstances. *Gulf, etc., R. Co. v. Shields*, 9 Tex. Civ. App. 652, 656, 657, 28 S. W. 709, 29 S. W. 652, affirmed in 93 Tex. 685, no op.

A carrier is not liable to a passenger for his being shot in the foot by a pistol falling from the pocket of an intoxicated passenger sleeping quietly on a seat, where such an accident could not reasonably be anticipated. *Galveston, etc., R. Co. v. Long*, 13 Tex. Civ. App. 664, 666, 668, 36 S. W. 485.

Where a passenger carried alcohol on a train, without the company's knowledge, and negligently spilled it, and, before it could be removed from the car floor, another passenger carelessly threw a match into it, and a third passenger was burned in consequence, the last can not recover, although the conductor negligently permitted the sack in which the alcohol was carried to project over the arm of the seat, into the aisle. *Gulf, C. & S. F. Ry. Co. v. Shields*, 9 Tex. Civ. App. 652, 29 S. W. 652.

**Admissibility of Evidence That Employees of Carrier Did Not Actually Anticipate Injury.**—In an action against a street railroad for injuries to a passenger who jumped from a car while riding on the front platform, it was error to permit the conductor and motorman to testify that they had no idea that, if a horse fell down in front of the car, the passenger would become frightened and jump off, and that no one had ever told them or said anything to them to make them believe she would do so. *Moore v. Northern Texas Traction Co.*, 95 S. W. 652, 41 Tex. Civ. App. 583.

Where, shortly after an intoxicated passenger boarded a train, and before any of the trainmen, in the exercise of ordinary care, had been enabled to discover his condition or his intent, he willfully cut off the rear car from the train, and a passenger in such car was injured by a collision between the car and the balance of the train, caused by

the failure of the air brakes on the car to work with the same efficiency as they did on the train, defendant was not liable therefor. *Texas & P. Ry. Co. v. Storey*, 83 S. W. 852, 37 Tex. Civ. App. 156.

**Submission to Jury of Question as to Duty to Anticipate Injury Properly Refused.**—Where the evidence showed that plaintiff's son was fatally injured by striking against an open gate on a stock chute near defendant's track while leaning out of a car window, the court properly refused to submit to the jury the question whether, in building and maintaining the stock chute and gates in close proximity to the track, defendant ought to have anticipated that the gate might inflict the injury it did. *Gulf, C. & S. F. Ry. Co. v. Phillips*, 74 S. W. 793, 32 Tex. Civ. App. 238.

#### D. EXERCISE OF PROPER CARE A QUESTION FOR THE JURY.

**In General.**—Whether or not a carrier of passengers has exercised the proper degree of care to secure the safety of its passengers, is a question for the jury. *Eames v. Texas, etc., R. Co.*, 63 Tex. 660; *Missouri, etc., R. Co. v. Gist*, 31 Tex. Civ. App. 662, 73 S. W. 857, affirmed in 97 Tex. 641, no op.; *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 84, 15 S. W. 264; *St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, 88, 15 S. W. 266; *San Antonio, etc., R. Co. v. Robinson*, 79 Tex. 608, 15 S. W. 584; *Missouri Pac. R. Co. v. Long*, 81 Tex. 253, 16 S. W. 1016; *Gulf, etc., Ry. Co. v. Bell*, 93 Tex. 632, 57 S. W. 939; *Mills v. Missouri, etc., R. Co.*, 94 Tex. 242, 248, 59 S. W. 874, reversing 57 S. W. 291; *Dallas, etc., R. Co. v. Randolph*, 8 Tex. Civ. App. 213, 27 S. W. 925; *International, etc., R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102, 38 S. W. 401, affirmed (see 93 Tex. 711, no op.); *St. Louis, etc., R. Co. v. Martin*, 26 Tex. Civ. App. 231, 63 S. W. 1089; *Williams v. Galveston, etc., R. Co.*, 34 Tex. Civ. App. 145, 78 S. W. 45, affirmed in 98

Tex. 637, no op.; *El Paso, etc., R. Co. v. Harry*, 37 Tex. Civ. App. 90, 83 S. W. 735; *Cruseturner v. International, etc., R. Co.*, 38 Tex. Civ. App. 466, 486, 86 S. W. 778; *Johnson v. Texas Cent. R. Co.*, 42 Tex. Civ. App. 604, 93 S. W. 433; *Galveston, etc., R. Co. v. Morrison*, 46 Tex. Civ. App. 186, 102 S. W. 143, affirmed in 102 Tex. 582, no op.; *Gulf, etc., R. Co. v. Fox* (Sup.), 6 S. W. 569; *Texas, etc., R. Co. v. Reich* (Civ. App.), 32 S. W. 817; *St. Louis, etc., R. Co. v. Germany* (Civ. App.), 56 S. W. 586; *Northern, etc., R. Co. v. Hooper* (Civ. App.), 80 S. W. 113.

What omissions in a particular situation will amount to negligence are questions of fact for the jury, and, under the Texas system, where all matters of fact are required to be submitted to the jury, such a question is never for the court, unless the facts and circumstances are plainly such that admit of no issue on the subject. *San Antonio, etc., R. Co. v. Flory*, 45 Tex. Civ. App. 233, 100 S. W. 200, affirmed in 102 Tex. 592, no op. And see *Fort Worth, etc., R. Co. v. Spear* (Civ. App.), 107 S. W. 613; *Campbell v. Alston* (Civ. App.), 23 S. W. 33.

"Negligence, whether by the plaintiff or defendant, is generally a question of fact and becomes a question of law to be decided by the court only when the act done is in violation of some law, or when the facts are undisputed and admit of but one inference regarding the care of the party in doing the act in question. In other words, to authorize the court to take the question from the jury, the evidence must be of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it." *Choate v. San Antonio, etc., R. Co.*, 90 Tex. 82, 36 S. W. 247, 37 S. W. 319, reversing 35 S. W. 180, quoting *Lee v. International, etc., R. Co.*, 89 Tex. 583, 36 S. W. 63, reversing 34 S. W. 160.

In the absence of law declaring an act to be negligence, it is a fact to be

found by the jury on evidence, and it is error to instruct a jury as to what acts constitute negligence, when the law is silent as to such acts. *Houston, etc., R. Co. v. Miller*, 51 Tex. 270; *Texas, etc., R. Co. v. Murphy*, 46 Tex. 356.

"It will be seen by a perusal of the authorities that the cases are comparatively rare in which the question of negligence is declared to be one of law; the general rule being that negligence is a question of fact to be determined by the jury." *San Antonio, etc., R. Co. v. Long*, 4 Tex. Civ. App. 497, 22 S. W. 499. See, generally, the title NEGLIGENCE.

"In the nature of things the law must leave it to the juries in the exercise of a sound judgment, from their knowledge of men and the ordinary course of human affairs, to determine whether or not a carrier of passengers has exercised the degree of care required by law, and for that reason the charge should be such as to give the best direction to their investigation." *International, etc., R. Co. v. Welch*, 86 Tex. 203, 24 S. W. 390.

An instruction as to the particular acts the carrier must perform to discharge its duty of exercising the degree of care required of it, infringes on the province of the jury. *Christie v. Galveston City R. Co.* (Civ. App.), 39 S. W. 638.

An instruction "that the absence from their posts of duty on the train of the employees of the railroad would not entitle plaintiff to recover unless such absence caused or contributed in a material degree to the accident; and that, if there were nothing in the evidence from which they might conclude that the injury was caused by some act or omission not incident to the every-day usage of the carrier, or indicating fault on the part of the employees, to find for defendant," encroaches upon the province of the jury, whose special duty it is to determine

whether the acts and omissions in evidence constitute negligence. *International & G. N. R. Co. v. Eckford*, 71 Tex. 274, 8 S. W. 679.

In a personal injury suit against a carrier, qualifying a requested charge of negligence by adding in effect that the law did not declare what acts amounted to negligence, but the jury must determine from the evidence whether certain acts amounted to negligence, was not error. *Galveston, etc., Ry. Co. v. Cooper*, 2 Tex. Civ. App. 42, 51, 20 S. W. 990, affirmed in 85 Tex. 431.

**Illustrations.**—Whether defendant carrier was negligent because of failure of a servant to perform duties he was required to observe, held a question for the jury. *Missouri, etc., R. Co. v. Dill* (Civ. App.), 40 S. W. 347.

The question whether habitual failure of an engineer to stop his train at a railroad crossing proved him to be a reckless and incompetent employee is for the jury. (Civ. App. 1898) *Ft. Worth & N. O. Ry. Co. v. Enos*, 50 S. W. 595, modified *Missouri, K. & T. Ry. Co. v. Same* (1899) 50 S. W. 928, 92 Tex. 577.

Evidence, in an action for an injury received in a collision between trains by a person riding on one of them, examined, and held that the question of the gross negligence of the carrier was for the jury. *St. Louis Southwestern Ry. Co. of Texas v. Fowler* (Civ. App.), 93 S. W. 484.

Defendant carrier contracted to convey plaintiff, his household goods, and live stock under a contract entitling him to ride in the car, but also providing that he should get on and be on no freight train or other car while switching was being done at stations. The car, on arriving at a point near its destination, was left for the night, and plaintiff was informed by the train crew that they would return and take it to destination the next morning, when he was injured while in the car by the

carrier's employees running an engine against it with great force, without knowing that plaintiff was in the car. Held, that plaintiff was at most but a quasi passenger, and that it was error for the court, in its charge, to instruct that it was the duty of the carrier to exercise the utmost care to discover plaintiff's presence in the car at the time of the accident; whether a person in the exercise of such care would have done so being for the jury. *Ft. Worth & D. C. Ry. Co. v. Hardin*, 90 S. W. 679, 41 Tex. Civ. App. 19.

Where plaintiff was injured by being in a freight car while defendant was switching the same, it was error to instruct that defendant was not liable for injuries done plaintiff by an unusually violent coupling, if none of its servants knew or had notice of plaintiff's presence in the car, since this want of knowledge or notice may have been due to their negligence, and the question whether a prudent person would have made an unusually violent coupling without ascertaining if plaintiff was in the car, was for the jury. *Hardin v. Ft. Worth & D. C. Ry. Co.* (Civ. App.), 100 S. W. 995.

In an action for injuries to a passenger by being thrown from the platform of the train by a sudden jerk thereof as she was attempting to alight at a station, conflicting evidence of the carrier's negligence held to require submission of such issue to the jury. *Latimer v. St. Louis Southwestern Ry. Co. of Texas*, 40 Tex. Civ. App. 614, 90 S. W. 665.

In action for injuries to a passenger, evidence held to present a question for the jury whether the fall of plaintiff was caused by the moving of the stool placed for passengers to alight on. *St. Louis Southwestern Ry. Co. of Texas v. Johnson*, 97 S. W. 1039, 100 Tex. 237.

A male passenger, while the train was in motion, left the day coach for

the smoking car to use a closet therein. While on the platform he took hold of the knob of the door of the smoker when a porter took hold of the inside knob to leave the car. The passenger stepped aside, and the porter opened the door and passed out. The porter, though seeing the passenger, who, in order to steady himself, placed his hand on the side of the door, pulled the door shut with a jerk and injured the hand. Held, that the question of the negligence of the porter was for the jury. *St. Louis & S. F. R. Co. v. Neely*, 101 S. W. 481, 45 Tex. Civ. App. 611.

In an action against a carrier to recover for injuries from a collision of the car on which plaintiff was riding with another one of defendant's cars, plaintiff contended that the accident had resulted in neurasthenia, while defendant contended that her condition was due to hysteria, with which she was suffering prior to the accident. Held, that it was a question of fact whether plaintiff was suffering from neurasthenia produced from defendant's negligence. *El Paso Electric Ry. Co. v. Bolgiano* (Civ. App.), 109 S. W. 388.

Where, in an action for personal injuries sustained by falling from an overcrowded car, it appeared that defendant had advertised an excursion, and on the day thereof its regular passenger and mail train, which was followed by two excursion trains, took on passengers who had purchased excursion tickets, the question whether defendant rested under a duty not to allow the mail train to be delayed in order to place a less crowded train in front, or whether defendant was negligent in not making such delay, was for the jury. *Williams v. International & G. N. R. Co.*, 67 S. W. 1085, 28 Tex. Civ. App. 503.

Plaintiff was a passenger on defendant's train, which was stopped at 8 o'clock at night by a washout. The conductor, knowing the track could not be repaired till the next day, refused to

back the train to the last station passed, and ordered all passengers to get off and go to a farmhouse about two miles back. The night was dark and rainy, and the path to the farmhouse dangerous. Held, that it was a question for the jury whether defendant should have backed its train. *Houston, E. & W. T. Ry. Co. v. Rogers* (Tex. Civ. App.), 40 S. W. 201, 16 Tex. Civ. App. 19.

In an action for personal injuries caused by falling through a trestle while alighting from a train in the dark, it is error to take the question of negligence from the jury by charging that, if plaintiff alighted without directions to do so by the company's servants, and with knowledge of the locality of the station, such act constituted negligence on his part. *International & G. N. R. Co. v. Eckford*, 71 Tex. 274, 6 S. W. 679.

Whether defendant was guilty of negligence in not having a ditch near its station lighted or guarded, and in failing to warn plaintiff, was for the jury. *San Antonio & A. P. Ry. Co. v. Turney*, 78 S. W. 256, 33 Tex. Civ. App. 626.

Plaintiff, in an action against a carrier for personal injuries received while alighting from a train at night, at the direction of the conductor, to purchase a ticket, testified that he fell over some skids and trucks that were lying on the platform of the depot. The only evidence to contradict plaintiff was the testimony of a single witness that the skids and trucks were kept against the wall of the depot. Held, that it was a question for the jury whether the leaving of the skids and trucks where they were when plaintiff stumbled over them was negligence. *Chicago, R. I. & P. Ry. Co. v. Barrett*, 80 S. W. 660, 35 Tex. Civ. App. 366.

The station of a carrier stood between its main track and a siding. The platform adjacent to the siding was high, and not adapted to use by passengers. Trains usually passed at such

station, one of them going on the siding. Sometimes passengers were taken on from the siding, in which event the train would proceed without returning to the platform on the main track, and again it would return to the platform on the main track. The platform at the siding was unsuitable and insufficient for the convenience of passengers, while that beside the main track was suitable. A passenger had frequently taken the train at the siding, and, on the occasion of receiving his injury, attempted to board the train from the platform on the siding, while it was moving. Held, that whether the carrier was guilty of negligence proximately causing such passenger's injury was for the jury. Judgment (Civ. App.), 57 S. W. 291, reversed. *Mills v. Missouri, K. & T. Ry. Co. of Texas*, 59 S. W. 874, 94 Tex. 242, 55 I. R. A. 497.

In an action against a railway company for injuries resulting from plaintiff's being thrown from the platform of a car by a jerk, a charge that no deduction of negligence could be made from the mere fact of a violent jerk of the train was properly refused where it appeared that the jerk was of an unusual nature, as the question of defendant's negligence was for the jury. *San Antonio & A. P. Ry. Co. v. Choate*, 56 S. W. 214, 22 Tex. Civ. App. 618.

Where a passenger conductor was in charge of a train partially filled with school children in charge of a government Indian agent, being transported at night, whether the high degree of care required of him authorized him to lock the doors of a car containing such children, so that the carrier was not thereby rendered liable for false imprisonment of one of them, was properly submitted to the jury. *Peck v. Atchison, etc., R. Co. (Civ. App.)*, 91 S. W. 323.

Whether railroad employees were negligent in not going to the assist-

ance of a passenger whose clothes caught fire from alcohol spilled by a fellow passenger is a question for the jury. *Gulf, C. & S. F. Ry. Co. v. Shields*, 9 Tex. Civ. App. 652, 28 S. W. 709.

Instructions that it is the duty of a railroad company to keep its platform in a safe condition, and that negligence is the omission to perform a duty, are erroneous, and tell the jury that permitting a broken place in the platform (the thing complained of) was negligence, which was a question for the jury. *Missouri, etc., R. Co. v. Wylie (Civ. App.)*, 26 S. W. 85.

Where, in an action for injuries to plaintiff's wife, sustained while boarding defendant's train, it was alleged that, defendant having failed to provide a suitable platform, and having failed to have its depot grounds properly lighted, and having permitted the steps leading to the platform of its coaches to be covered with ice, it was negligent for defendant to fail to have some person present to assist plaintiff's wife to board, whether defendant owed her a duty to assist her to board was for the jury. *Ft. Worth & D. C. Ry. Co. v. Work (Civ. App.)*, 100 S. W. 962.

In an action against a carrier for personal injuries to a passenger, it was proper to instruct that it was the duty of defendant to allow time for passengers to alight from its trains, and if it failed to use that high degree of care which every prudent, cautious, and competent person would use under the same or similar circumstances, it was negligent, since it left to the jury to determine the degree of care, under the circumstances, that was required of defendant. *Galveston, H. & N. Ry. Co. v. Morrison*, 102 S. W. 143, 46 Tex. Civ. App. 186.

In an action for injury to a passenger in a street car, alleged to be due to negligence in colliding with a water cart, the court refused a requested in-

struction that, if the motorman in charge of the car was in exercise of a very high degree of care and prudence to prevent the accident, defendant would not be liable. Held, that the latter was entitled to have the issue of proper care submitted to the jury in terms, and the court erred in refusing to do so. *Houston Electric Co. v. Nelson*, 77 S. W. 978, 34 Tex. Civ. App. 72.

In an action against a railway company by a shipper for injuries received by falling from a bridge connecting different parts of the company's grounds, the submission by the court of the question whether the bridge was in an unsafe and dangerous condition implies the submission of the question whether defendant had failed to exercise reasonable diligence to secure its safe condition. *Texas & P. Ry. Co. v. Hudman*, 8 Tex. Civ. App. 309, 28 S. W. 388.

In an action by a passenger for personal injuries, evidence considered, and held sufficient to take the case to the jury on the question of defendant's negligence in causing an unusually sudden stop. *Houston & T. C. Ry. Co. v. Johnson* (Civ. App.), 103 S. W. 239.

For further illustrations, see the various sections of this title wherein are treated the duties and liabilities of the carrier in particular instances, as, for instance, in furnishing proper station facilities, proper accommodation on trains, duties as to passengers boarding and alighting from trains, etc.

**When Submission of Question Improper.**—Where a petition for the death of a passenger did not complain of the reasonableness of a custom of the carrier to move the train, by which deceased was killed, from a siding, and proceed without a second stop at the station, and there was evidence that, before the train moved to the siding, all passengers were warned to go

aboard, and that the train would not again stop after moving out of the siding, but that, notwithstanding such warning, deceased, who might have heard such warning, attempted to board the train as it was passing the station after coming from the siding, it was improper for the court to leave it to the jury to say whether the act of the conductor, in refusing to stop the train at the station a second time, was reasonable. *Houston & T. C. R. Co. v. Schuttee* (Civ. App.), 91 S. W. 806.

**Violation of Duty Imposed by Statute Negligence as Matter of Law.**—When, by statute, a specific duty is imposed on a railway company, in regard to the running and management of its train, a breach of such duty, by which one receives personal injury, may be declared, in a charge of the court, as matter of law, to be wrongful or negligent. *Texas & P. Ry. Co. v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272.

## V. Duties and Liabilities of Carrier.

### A. AS TO STATIONAL FACILITIES.

#### 1. General Rule Stated, Construed and Applied.

**Duty to Provide and Maintain Reasonably Safe and Suitable Facilities.**—Independent of statute, the duties of a carrier of passengers require that it should furnish reasonable station facilities for the accommodation of travelers upon its lines. *Missouri, etc., R. Co. v. Kendrick* (Civ. App.), 32 S. W. 42; *Texas, etc., R. Co. v. Mays*, 4 App. Civ. Cases, § 159, 15 S. W. 43; *International, etc., R. Co. v. Pevey*, 30 Tex. Civ. App. 460, 70 S. W. 778; *Missouri, etc., R. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905.

And should keep same in safe condition. *Texas, etc., R. Co. v. Mays*, 4 App. Civ. Cases, § 159, 15 S. W. 43. And see *Davis v. Houston, etc., R. Co.*, 29 Tex. Civ. App. 42, 68 S. W. 733.



It is well settled that it is the duty of the company to provide reasonably safe and suitable station facilities to allow its passengers to get on and off its cars with safety. *Texas, etc., R. Co. v. McLane* (Civ. App.), 32 S. W. 776, affirmed in 93 Tex. 741, no op.

A common carrier's contractual relations with passengers do not cease where he safely alights at depot. Their duty is to provide suitable depot accommodations for passengers, and to keep the platforms in a safe condition. *Stewart v. International, etc., R. Co.*, 53 Tex. 289, 296.

As to the statute making the point of intersection or connection of two roads a depot, see the title CARRIERS, ante, p. 304.

**Test as to Sufficient Compliance with Rule.**—A railroad company is bound to exercise such care as persons of ordinary prudence would have exercised under the same circumstances to keep its station safe for the use of passengers or persons lawfully using the same. *Trinity & S. Ry. Co. v. O'Brien*, 46 S. W. 389, 18 Tex. Civ. App. 690.

The test of liability is not whether the premises have been placed in a safe condition, but whether the company has used due diligence to so maintain them. *Texas, etc., R. Co. v. Huffman*, 83 Tex. 286, 290, 18 S. W. 741; *Gulf, etc., R. Co. v. Wells*, 81 Tex. 685, 17 S. W. 511; *Texas, etc., R. Co. v. Hudman*, 8 Tex. Civ. App. 309, 28 S. W. 388, affirmed in 93 Tex. 674, no op.

Where a plaintiff is bitten by a vicious dog, fastened in defendant's railroad station, it is a question for the jury, under all the circumstances, whether defendant was guilty of negligence in placing him where he was tied; and they are to determine the effect to be given evidence of notice or absence of notice of his viciousness. *Trinity & S. Ry. Co. v. O'Brien*, 46 S. W. 389, 18 Tex. Civ. App. 690.

Where plaintiff sued a railway com-

pany for injuries resulting from the bite of a dog tied by a railway porter near the door of the waiting room at a station, the fact that the porter did not know that the dog was vicious would not as matter of law relieve the defendant from liability. *Trinity, etc., R. Co. v. O'Brien*, 18 Tex. Civ. App. 690, 694, 46 S. W. 389.

**Abandonment of Original Stopping Place as Evidence That It Was Unsuitable.**—The fact that, after the occurrence of an accident at a station, the carrier prepared a new stopping place, a short distance from the old, which it abandoned, is no admission by the carrier that the place originally provided was unsuitable. *Galveston, H. & S. A. Ry. Co. v. Walker* (Civ. App.), 48 S. W. 767.

Evidence that a new stopping place which a carrier provided in place of an old one was imperfectly constructed is inadmissible to show negligence in the construction of the first one. *Galveston, H. & S. A. Ry. Co. v. Walker* (Civ. App.), 48 S. W. 767.

**Application to All Portions of Premises Where Proper for Passenger to Go.**—The rule of high care, which a carrier of passengers must use in maintaining its depot in a safe condition for passengers, applies to any part of its premises where by the acts of the carrier it is made necessary or proper for the passenger to go to board a train. *San Antonio & A. P. Ry. Co. v. Turney*, 78 S. W. 256, 33 Tex. Civ. App. 626. And see *Stewart v. International, etc., R. Co.*, 53 Tex. 289.

Evidence showing that a railroad company has constructed, without guard rails, over a 20-foot excavation, a railway bridge, which it might reasonably expect that a person shipping stock over the road might use in going from one part of the station grounds to another in the prosecution of his business, shows, with reference to such person, a want of diligence on the part of the company to secure the

safety of the bridge. *Texas & P. Ry. Co. v. Hudman*, 8 Tex. Civ. App. 309, 28 S. W. 388.

A corner of depot grounds, 130 feet from the passenger depot, occupied by a fuel company as a wood yard, near which a prospective passenger alighting from a hack has no occasion to pass, is not a place where such passengers may be expected to resort, so as to charge the company with the duty of keeping it lighted and in a safe condition. *Davis v. Houston, E. & W. T. Ry. Co.*, 68 S. W. 733, 29 Tex. Civ. App. 42.

A prospective passenger, injured by falling into a hole in a corner of depot grounds not for use by passengers, claimed that he was directed by the company's employee to go from the passenger depot to the freight depot to get a ticket. He believed, but would not swear positively, that defendant's night clerk was the one giving such direction, in attempting to obey which he came to his hurt. The night clerk and train dispatcher, who alone were about the premises at the time, positively denied giving any such direction, and both knew that tickets were not sold at the freight depot. The person accompanying plaintiff testified that afterwards, on purchasing a ticket from the night clerk, plaintiff said, "You came near getting me killed," to which no reply was made, but did not identify the clerk as the person giving the direction. Held, that the evidence was insufficient to show such an express invitation by an authorized agent of the company as to require a reversal of judgment in its favor. *Davis v. Houston, E. & W. T. Ry. Co.*, 68 S. W. 733, 29 Tex. Civ. App. 42.

Where plaintiff's evidence tended to show that he was injured by falling into a ditch while being led or directed by defendant's servant to a train which he desired to board, which had stopped some distance from the depot, it was not error to refuse to instruct that, if

the place where plaintiff was injured was a portion of defendant's depot grounds where the public did not or would not ordinarily resort, defendant would not be required to keep said ditch or ravine covered, and its failure so to do would not constitute negligence. *San Antonio & A. P. Ry. Co. v. Turney*, 78 S. W. 256, 33 Tex. Civ. App. 626.

Where plaintiff testified that defendant's conductor waited at the station until plaintiff got his transportation, and then said: "Hurry up. Let's go"—and that he started to accompany the conductor, who pointed out his train, but fell in a ditch and was injured, the testimony warranted a charge as to plaintiff's acting under the direction of defendant's conductor. *San Antonio & A. P. Ry. Co. v. Turney*, 78 S. W. 256, 33 Tex. Civ. App. 626.

**To Whom Duty Owed.**—A railroad company is required to keep its premises safe for the use of the public where it expressly, or by its conduct, invites or induces such use. *Smith, v. Texas, etc., R. Co.*, 2 Posey 329, 390. And see *Texas, etc., R. Co. v. Reich* (Civ. App.), 32 S. W. 817.

Duty of railroad company to keep its grounds in a reasonably safe condition is a duty which it owes only to its employees and to persons who may be upon its premises by its express or implied invitation. *Davis v. Houston, etc., R. Co.*, 29 Tex. Civ. App. 42, 68 S. W. 733.

With regard to persons as to whom there is an express or implied invitation to come upon its premises, the carrier is under the obligation to use ordinary care to keep its premises in a reasonably safe condition, so that such invited persons will not be injured. *Galveston, etc., R. Co. v. Matzdorf* (Civ. App.), 107 S. W. 882, citing *Hamilton v. Texas, etc., R. Co.*, 64 Tex. 251; *T. & P. R. Co. v. Best*, 66 Tex. 116, 18 S. W. 224; *Houston, etc., R. Co. v. Phillio*, 96 Tex. 18, 69 S. W.

994, reversing 67 S. W. 915; *International, etc., R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102, 38 S. W. 401, affirmed (see 93 Tex. 711, no op.); *Gulf, etc., R. Co. v. Williams*, 21 Tex. Civ. App. 469, 51 S. W. 653.

There is an implied invitation, on the part of railway companies, to persons to meet the coming friend, or to accompany the departing one to its depot, and such persons are entitled to the exercise of ordinary care on the part of the company, in having its premises in a reasonably safe condition, in order that they may not be injured by any defects. *Galveston, etc., R. Co. v. Matzdorf* (Civ. App.), 107 S. W. 882.

A railroad company which is negligent in maintaining a defective door mat at its depot is liable for injuries sustained by a person who is injured by being caught and thrown by such mat, though the injured person was not a passenger, but came to the depot to bid a departing passenger goodbye. *Galveston, H. & S. A. Ry. Co. v. Matzdorf* (Civ. App.), 107 S. W. 882.

A person who goes to a railway station to meet a friend expected on the train, and to get on the train in case his friend is aboard, is not a trespasser, but is entitled to receive the protection of ordinary care from the railway company. *Texas & P. Ry. Co. v. Best*, 18 S. W. 224, 66 Tex. 116.

## 2. Duty as to Depots and Waiting Rooms.

### a. In General.

The company having neglected during cold weather to heat its depots, a passenger may recover for suffering sustained from contracting a severe cold and a fever while waiting several hours for a delayed train. *Texas & P. Ry. Co. v. Mayes*, 4 Willson, Civ. Cas. Ct. App. § 159, 15 S. W. 43.

Where the negligence of a carrier in failing to properly warm a waiting room produced a condition of health in a passenger obliged to wait in such

room rendering the passenger susceptible to tuberculosis, and as a natural and probable consequence she became affected with the disease and died thereof, the carrier was liable. *Chicago, R. I. & G. Ry. Co. v. Groner*, 95 S. W. 1118, 43 Tex. Civ. App. 264.

Where a passenger, because of a recent surgical operation, was weak, debilitated, and naturally very susceptible to extreme heat, a negligent delay without notice to her of the train for three hours in a very warm and close place, without the proper and usual accommodations furnished by railways, was the natural and probable cause of her injuries. *Gulf, C. & S. F. Ry. Co. v. Redeker*, 100 S. W. 362, 45 Tex. Civ. App. 312.

In an action by a passenger, it appeared that when she was admitted to the waiting room her train was due by schedule in a few minutes, and that she had not been advised that the train was late, or, if late, that she could assume that it would not arrive at any time. The train did not arrive for an hour, and she contracted an illness owing to the lack of a fire in the station. Held, that the fact that every other passenger in the party of which plaintiff was a member suffered in some degree from the cold and exposure, but that no other person became ill therefrom, was not relevant. *International & G. N. R. Co. v. Johnson*, 95 S. W. 595, 43 Tex. Civ. App. 147.

It is the duty of a railroad company to furnish comfortable waiting rooms at its depots, and the custom of the agent in charge of a depot to invite passengers, when the weather was disagreeable, to come into the office in the depot, does not relieve it from liability for failing to maintain a proper waiting room. *Missouri, K. & T. Ry. Co. v. McCutcheon*, 77 S. W. 232, 33 Tex. Civ. App. 557.

In an action for injuries sustained by exposure to the cold while in defendant's depot waiting for delayed trains,

evidence of the custom of the depot agent to invite persons waiting for trains to come into the office when the weather was cold was not admissible as tending to show the state of weather at the times complained of by plaintiff; the office not being intended by defendant for a waiting room. *Missouri, K. & T. Ry. Co. v. McCutcheon*, 77 S. W. 232, 33 Tex. Civ. App. 557.

Statute imposing penalty for railroad's failure to keep stations heated for a stated time before and after the arrival of trains, does not affect the company's duty to use reasonable care to keep the station reasonably warm for the comfort of passengers waiting for a delayed train. *Texas, etc., R. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 129, 30 S. W. 720, affirmed in 93 Tex. 674, no op.

**b. Statutory Requirement as to Keeping Depots Open, Lighted and Warm.**

**Provision Stated.**—It is expressly required by the Texas statutes that carriers shall keep their depots lighted, warm, and open to all passengers who are entitled to go therein, for a time not less than one hour before the arrival and after the departure of all passenger trains. Rev. Stat. 1895, § 4521. *International, etc., R. Co. v. Pevey*, 30 Tex. Civ. App. 460, 70 S. W. 778; *Texas, etc., R. Co. v. Moore* (Civ. App.), 41 S. W. 499; *Gulf, etc., R. Co. v. Turner* (Civ. App.), 93 S. W. 195; *St. Louis, etc., R. Co. v. Lowe* (Civ. App.), 97 S. W. 1087, affirmed in 102 Tex. 592, no op.; *St. Louis, etc., R. Co. v. Wallace*, 32 Tex. Civ. App. 312, 74 S. W. 581; *Texas, etc., R. Co. v. Griggs* (Civ. App.), 106 S. W. 411; *Texas, etc., Railroad v. Little* (Civ. App.), 77 S. W. 958.

Under the statute as it originally stood (art. 4238, Sayles' Stat.), it was provided that "each and every railroad company shall keep its depots or passenger houses, in this state, lighted and warm, and open to the ingress and

egress of all passengers, a reasonable time before the arrival and after the departure of all trains carrying passengers on such railroad, or both of such railroads, if at a crossing." *Missouri, etc., R. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905; *Texas, etc., R. Co. v. Mays*, 4 App. Civ. Cases, § 159, 15 S. W. 43.

**Such Provision Constitutional.**—Acts 1889 Ch. 23, p. 19, requiring railroad companies to keep their passenger depots lighted and warmed and open to passengers a reasonable time before the arrival and after the departure of passenger trains, is not violative of constitution Art. 3, § 35. *Texas & Pac. Ry. Co. v. Mays*, 4 Willson, § 159, 15 S. W. 43.

**Purpose of Statute.**—"Irrespective of the statute it was the defendant's duty to provide a suitable station to accommodate its passengers departing and arriving, and the purpose of the statute was to fix a time that the stations should be warm, lighted, and kept open." *International, etc., R. Co. v. Pevey*, 30 Tex. Civ. App. 460, 70 S. W. 778.

Act March 6, 1891, imposes a penalty on a railroad company failing to keep its passenger depots open, lighted, and warmed "for a time not less than one hour before the arrival and after the departure of all trains carrying passengers." Held, that the time so fixed was not the limit of the company's legal duty, as regards a passenger injured by the failure to warm the waiting room of the depot while she was waiting for a delayed train. *Texas & P. Ry. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 30 S. W. 720.

**Liability for Violation.**—A penalty is imposed for failure to comply with art. 4521. *International, etc., R. Co. v. Pevey*, 30 Tex. Civ. App. 460, 70 S. W. 778.

And the statute also provides that the company "shall be liable to the party injured for all damages by reason of such failure. *International, etc.,*

*R. Co. v. Pevey*, 30 Tex. Civ. App. 460, 70 S. W. 778; *St. Louis, etc., R. Co. v. Wallace*, 32 Tex. Civ. App. 312, 74 S. W. 581.

A railroad company can not escape liability for failure to light its depot, as required by Sayles' Supp. Rev. St. art. 4238 (Laws 1889, p. 19), by contracting with another company to light it. *Texas & P. Ry. Co. v. Reich* (Civ. App.), 32 S. W. 817.

**Statute Construed and Applied in Actions for Damages for Violation.**—Rev. St. 1895, art. 4521, requiring railroads, under a penalty, to keep their depots or passenger houses lighted, and open to ingress and egress of passengers, does not apply to depot platforms or other places, where passengers are expected to get on or off trains. *Gulf, C. & S. F. Ry. Co. v. Barnett*, 47 S. W. 1039, 19 Tex. Civ. App. 626.

Rev. St. 1895, art. 4521, makes it the duty of a railroad to have its depot "lighted, warmed and open to the ingress and egress of all passengers who are entitled to go therein, for a time not less than one hour before the arrival and after the departure of all trains carrying passengers." Plaintiff and his family, passengers on defendant's train, reached their destination early in the morning, and found the depot closed. Held, that damages suffered by them by reason of exposure to inclement weather during such time as was reasonably necessary to enable them to secure accommodations were the proximate result of defendant's breach of duty, for which it was liable. *St. Louis Southwestern Ry. Co. of Texas v. Wallace*, 74 S. W. 581, 32 Tex. Civ. App. 312.

Under Rev. St. 1895, § 4521, requiring depots to be warm for at least an hour before the arrival of passenger trains, and making the company liable for damages suffered by reason of a violation, a company which has neglected to warm the depot or give a prospective passenger definite infor-

mation as to when a late train will arrive can not escape liability on the ground that she should have abandoned her trip and returned to her home. *St. Louis Southwestern Ry. Co. of Texas v. Lowe* (Civ. App.), 97 S. W. 1087, affirmed in 102 Tex. 592, no op.

In a husband's action for the suffering of his wife occasioned by the unwarmed condition of the defendant railroad company's depot, the fact that the wife was cold when she entered the depot would not affect the right to recover for suffering from continued or increased cold thereafter occasioned by its unwarmed condition. *Texas, etc., Railroad v. Little* (Civ. App.), 77 S. W. 958.

Where a railroad, in compliance with the express requirements of Rev. St. 1895, art. 4521, opened its station one hour before the departure of a train, it was not liable to a prospective passenger for injuries and suffering resulting to the passenger from exposure before the station was opened. *Texas Midland R. R. v. Griggs* (Civ. App.), 106 S. W. 411.

Rev. St. art. 4521, requires carriers to keep their depots lighted, warm, and open to all passengers who are entitled to go therein for a time not less than one hour before the arrival and after the departure of all passenger trains. Held, that such statute did not require a station agent to permit a passenger to leave his wife and children in a waiting room from 1 o'clock a. m. until he could go 4½ miles into the country and obtain a conveyance, and the carrier was, therefore, not liable for injuries sustained from exposure of the passenger and family while walking the distance. *International & G. N. R. Co. v. Pevey*, 70 S. W. 778, 30 Tex. Civ. App. 460.

In an action against a carrier, evidence held sufficient to show that illness experienced by a passenger was due to defendant's negligence, whereby the passenger was exposed to inclement weather, owing to a station be-

ing closed and to her being compelled to wait in an insufficiently heated waiting room. *International & G. N. R. Co. v. Johnson*, 95 S. W. 595, 43 Tex. Civ. App. 147.

In an action against a railroad company for injuries to a passenger resulting from its failure to heat its depot, a verdict for plaintiff will not be reversed on the ground that the court charged that it was the duty of defendant to keep its depot reasonably warm instead of charging that it was its duty to use reasonable diligence in that respect where the evidence showed that no diligence whatever has been exercised to heat the depot. *Texas & Pacific Ry. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 30 S. W. 720.

In a suit by a person against a railway company for damages sustained by reason of defendant's failure to keep the depot open, warmed, and lighted, it is error to refuse an instruction that plaintiff can not recover if she would not have used the depot had it been open, warmed, and lighted, when there is testimony upon which to base such instruction. *Texas & P. Ry. Co. v. Moore* (Tex. Civ. App.), 41 S. W. 499.

Where, in an action by a passenger for injuries received by waiting in an unheated depot for a delayed train, the undisputed evidence showed that there was no fire in the depot, and the evidence as to whether the depot was comfortable without a fire was conflicting, an instruction that it was the duty of the company to heat the depot for the comfort of passengers one hour before the scheduled arrival of trains and for the time that trains were delayed was inapplicable and misleading. *Gulf, C. & S. F. Ry. Co. v. Turner* (Civ. App.), 93 S. W. 195.

The refusal to charge that the law only requires that a railroad shall have a fire in its depot when necessary, and that whether the company was negligent in failing to have a fire depended

on the facts, and that the mere failure to have a fire was not negligence unless a person exercising the degree of care which would be exercised by a very prudent person would have had a fire in the depot was erroneous, where the court only charged that it was the duty of the company to heat the depot for the comfort of passengers. *Gulf, C. & S. F. Ry. Co. v. Turner* (Civ. App.), 93 S. W. 195.

In a husband's action for suffering occasioned his wife by the unwarmed condition of defendant railroad company's depot, the court instructed that if plaintiff and his wife were not guilty of negligence in connection with her riding to the depot as she did, clad as she was, and if they did as persons of ordinary prudence would have done, and she became cold in going to the depot, and was cold when she entered it, and if the depot was not warm, and plaintiff's wife suffered from cold while there, which suffering was the result of the concurrent action of her going there, without negligence, and defendant's failure to have the depot warm, defendant would be liable for damages for the suffering of plaintiff's wife from cold while in the depot. Held, that the instruction was objectionable as leading the jury to understand that they could award damages for cold suffered by plaintiff's wife while in the depot, due to the combined effect of her ride thither and of defendant's negligence in failing to have its waiting room warm. *Texas Midland R. R. v. Little* (Civ. App.), 77 S. W. 958.

### 3. Duty as to Platforms, Approaches, etc.

#### a. In General.

**Duty to Provide and Maintain Reasonably Safe Platforms, etc.**—It is the duty of a railroad company to provide reasonably safe and suitable platforms to allow passengers to get on and off cars at stations with safety. *Texas, etc., R. Co. v. McLane* (Civ. App.), 32

S. W. 776, affirmed in 93 Tex. 741, no op.

And it is the duty of such companies to keep in a safe condition all portions of their platforms and approaches thereto, to which the public resort. *Stewart v. International, etc., R. Co.*, 53 Tex. 289; *Texas, etc., R. Co. v. Mangum*, 68 Tex. 342, 4 S. W. 617; *Texas, etc., R. Co. v. Hudman*, 8 Tex. Civ. App. 309, 28 S. W. 388, affirmed in 93 Tex. 674, no op.; *Chicago, etc., R. Co. v. Barrett*, 35 Tex. Civ. App. 366, 80 S. W. 660, affirmed in 98 Tex. 611, no op.; *Houston, etc., R. Co. v. McCarty*, 40 Tex. Civ. App. 364, 89 S. W. 805; *Harrison v. Missouri, etc., R. Co.*, 49 Tex. Civ. App. 467, 109 S. W. 442; *Dillingham v. Teeling* (Civ. App.), 24 S. W. 1094; *Texas, etc., R. Co. v. Reich* (Civ. App.), 32 S. W. 817; *Texas, etc., R. Co. v. McKenzie*, 2 Posey 307, 308.

As well as all portions of their station grounds reasonably near to platform, where passengers or those who have purchased tickets, with a view to taking passage on the cars, would naturally go. *Stewart v. International, etc., R. Co.*, 53 Tex. 289; *Texas, etc., R. Co. v. Hudman*, 8 Tex. Civ. App. 309, 28 S. W. 388, affirmed in 93 Tex. 674, no op.

"The cases are numerous where passengers have recovered for injuries received after alighting from the cars, the railroads having failed to exercise due care in providing means for safe egress. *McDonald v. Chicago & N. W. R. Co.*, 26 Iowa 124; *Patten v. Chicago & N. W. R. Co.*, 32 Wis. 533; *Osborne v. Union Ferry Co.*, 53 Barb. 629; *Gaynor v. Old Colony, etc., R. Co.*, 100 Mass. 211; *Imhoff v. Chicago, etc.*, 20 Wis. 364; *Columbus & Ind. R. Co. v. Farrell*, 31 Ind. 408; *Martin v. G. N. R. Co.*, 81 Eng. Com. Law 179; *Nicholson v. Lancashire & Yorkshire R. Co.*, 3 Hurlstone & Coltman 534; *Caterham R. Co. v. London R.*, 87 Eng. Com. Law 410; *Shearman & Ref. on Negligence*, § 275; *Hutchinson on Carriers*, § 516, et seq.; *Redfield on*

*Carriers*, § 514." *Stewart v. International, etc., R. Co.*, 53 Tex. 289.

In an action for injuries sustained while leaving defendant's depot, the court properly refused an instruction that, if defendant had provided one safe egress from its platform, it could leave the remainder of its premises as it might deem proper, without being chargeable with negligence. *Gulf, C. & S. F. Ry. Co. v. Hodges* (Civ. App.), 24 S. W. 563.

Plaintiff, not being familiar with the surroundings, was put off the train on a low platform, and attempted to leave at the end in the direction he desired to go, and, on account of the absence of light, was unable to see that there were no steps there. The way prepared by the company was zigzag in direction, and up several steps, and across a higher platform. Held, that the court properly charged that it was the duty of the company to provide good and safe places of egress from its platform at such places as persons would naturally or ordinarily go. *Texas & P. Ry. Co. v. Brown*, 78 Tex. 397, 14 S. W. 1034.

A railroad company was liable for injuries to one of its passengers, sustained after alighting from a train at a station by slipping down an incline on a platform leading to the waiting room, because of the failure of the railroad to use ordinary care to keep it in safe condition for the use of passengers, or to warn them that it was not a proper way for them to take in going to and from the train, though another and safe way to the waiting room had been provided by the company, where the platform on which the injury occurred was usually used by passengers going to and from the train, and where such use had been continued for such a length of time that the railroad company necessarily knew of the use. *Missouri, etc., R. Co. v. Criswell*, 101 Tex. 399, 108 S. W. 806.

Where a person owns and keeps a

lunch stand at a railroad station, by authority of the company, which can be approached only over the company's platform, the company is responsible for its condition to persons passing over it to make purchases at the lunch stand. *Dillingham v. Teeling* (Civ. App.), 24 S. W. 1094.

**Duty as to Platform Built and Controlled by Stranger.**—A railroad is bound to use ordinary care to keep and maintain in a reasonably safe condition a platform used by it, or by its passengers, with its knowledge and consent, to get on or off of trains, although the platform was built by, and is under, the control of a stranger. *Houston E. & W. T. Ry. Co. v. McCarty*, 89 S. W. 805, 40 Tex. Civ. App. 364.

**Duty as to Walk Maintained and Used Jointly with Other Companies.**—In an action against a railroad company for injuries caused by a defective walk leading from a union depot on defendant's land, the fact that defendant did not authorize its construction or maintenance will not relieve it from liability, where it appears that it maintained the walk jointly with other companies, and knew that it was used by passengers after leaving its trains, and was defective. *Gulf, C. & S. F. Ry. Co. v. Glenk*, 9 Tex. Civ. App. 599, 30 S. W. 278.

It is not a good defense to an action against a railroad company for injuries sustained because of a defective walk leading from a union depot on defendant's lands that a certain street railway company had trespassed upon its premises, and built its track thereon, where such trespass was not accompanied by such exclusive possession as to prevent all approach by defendant, and render it unlawful for it to properly maintain the walk. *Gulf, C. & S. F. Ry. Co. v. Glenk*, 9 Tex. Civ. App. 599, 30 S. W. 278.

**To Whom Duty Owed.**—A railway company owes to one who is shipping

stock over the road the duty of exercising proper diligence to provide him with proper approaches to all portions of its station grounds, where the reasonable prosecution of his business required him to go. *Texas & P. Ry. Co. v. Hudman*, 8 Tex. Civ. App. 309, 28 S. W. 388.

A person going on a railroad platform to assist an aged friend to board a train may recover for injuries occasioned by defects in the platform. *Hamilton v. Texas & P. Ry. Co.*, 64 Tex. 251, 53 Am. Rep. 756.

A person who goes on the platform of a railway company at its station to meet a passenger is not a trespasser. Hence the company must exercise due diligence to secure his safety. *Gulf, C. & S. F. Ry. Co. v. Williams*, 51 S. W. 653, 21 Tex. Civ. App. 469.

The fact that the person injured was a passenger of one of the other railroad companies who maintained the defective walk approaching the depot used in common by several companies and not of defendant, will not relieve it from liability for the injury. *Gulf, C. & S. F. Ry. Co. v. Glenk*, 9 Tex. Civ. App. 599, 30 S. W. 278.

A person who goes to a depot merely as an acquaintance of and to say good-by to a departing passenger, and not as an attendant or to assist her, is not there on an implied invitation of the carrier, but as a mere licensee, to whom it owes no duty to keep the waiting room and its approaches in a safe condition. Judgment (Tex. Civ. App.), 107 S. W. 882, reversed. *Galveston, H. & S. A. Ry. Co. v. Matzdorf*, 112 S. W. 1036, 102 Tex. Civ. App. 42.

**Duties as to Freight Platforms.**—A carrier is under no duty to a passenger to keep in a safe condition the part of its depot platform used, to his knowledge, exclusively for handling freight; so that it is not liable for injury received by him in stepping through a hole in it; he having gone there on a



dark night to relieve himself; there being no closet, except across the track, the way to which was lighted. *Houston, E. & W. T. Ry. Co. v. Grubbs*, 67 S. W. 519, 28 Tex. Civ. App. 367.

A railway company, inviting a passenger to alight after dark at a freight depot, instead of a regular passenger depot, is bound to keep the platform and approaches in a safe condition for the passenger's reception and egress, and to provide lights, if necessary to his safety. *Stewart v. International & G. N. R. Co.*, 53 Tex. 289, 37 Am. Rep. 753.

**Obligation as to Premises Leased by Railroad to Another for Hotel Purposes.**—A railway company which leases ground near its road bed to be used by the lessee for hotel purposes, is under no implied obligation to keep in repair or well lighted that portion of the passway beyond its platform, leading from its road bed to the hotel, and which is situated on the rented premises. Nor does the fact that the ground on which the hotel is erected is owned by the company render it liable for injuries which result from the defective or dangerous construction of the approaches or entrances to the hotel. *Texas, etc., R. Co. v. Mangum*, 68 Tex. 342, 4 S. W. 617, in which case it was held that the general rule must apply that the tenant, and not the landlord, must be liable for the injuries resulting from defects in the rented premises.

**Degree of Care Required as to Providing Safe Platforms and Approaches.**—The high degree of care generally required of railroad companies to prevent injuries to their passengers would seem to apply as well to keeping their platform and usual approaches to depots and cars in reasonably safe condition as to other incidents and instrumentalities of transportation. *Chicago, etc., R. Co. v. Barrett*, 35 Tex. Civ. App. 366, 80 S. W. 660, affirmed in 98 Tex. 611, no op., citing *Gulf, etc., R. Co. v. Butcher*,

83 Tex. 309, 18 S. W. 583; *Ft. Worth, etc., R. Co. v. Davis*, 4 Tex. Civ. App. 351, 23 S. W. 610; *Stewart v. International, etc., R. Co.*, 53 Tex. 289; *San Antonio, etc., R. Co. v. Turney*, 33 Tex. Civ. App. 626, 78 S. W. 256, affirmed in 98 Tex. 631, no op.; *Missouri, etc., R. Co. v. Mitchell*, 34 Tex. Civ. App. 394, 79 S. W. 94.

A carrier of passengers, though not bound to have its depot platform absolutely safe, is bound to use more than ordinary care and precaution in making it reasonably safe. *Gulf, C. & S. F. Ry. Co. v. Butcher*, 83 Tex. 309, 18 S. W. 583.

An instruction that a railroad is bound to keep its station platforms and approaches in safe condition requires a degree of diligence not demanded by the law. *Gulf, C. & S. F. Ry. Co. v. Gross* (Civ. App.), 21 S. W. 186.

A carrier owes to persons visiting its depot for the purpose of welcoming or bidding adieu to parting friends the duty of providing reasonably safe approaches to its trains and furnishing reasonably sufficient lights for that purpose, but it only owes them ordinary care, while with passengers it must exercise the highest degree of care. *Missouri, K. & T. Ry. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905.

**No Liability Where Neglect Not Proximate Cause of Injury.**—In an action for injuries caused by being struck by a train while about to board another train, it was error to submit the question whether defendant's failure to provide a proper platform was the proximate cause of the injury, where the ground was level on both sides of the train, and it was not shown that the failure to have such a platform was the cause of plaintiff's going on the side of the train not usually used by passengers in getting on and off trains. *St. Louis S. W. Ry. Co. of Texas v. Caseday* (Tex. Civ. App.), 40 S. W. 198.

**Effect of Knowledge by Passenger of Defective Condition of Platform.**

Although a station platform is in a defective condition, a passenger has the right to use the same by going upon it to signal an approaching train and take passage upon that train, but he is obliged to use the platform with care proportioned to the risk arising from its defective condition. *Houston E. & W. T. Ry. Co. v. McCarty*, 89 S. W. 805, 40 Tex. Civ. App. 364.

An intending passenger on a railroad train has as much right to go upon a station platform for the purpose of flagging the train as for taking passage on it when it arrives. *Houston E. & W. T. Ry. Co. v. McCarty*, 89 S. W. 805, 40 Tex. Civ. App. 364.

**Liability as Affected by Contributory Negligence of Passenger.**—In an action against a carrier for injuries to a passenger caused by a defective station platform, where the answer alleged and the evidence showed that the defects of the platform were apparent and obvious, a requested charge that if the platform was in an obviously dilapidated or unsafe condition, so that plaintiff should have known of the same, he would be presumed to have known thereof, and could not recover if he was in any way negligent in moving about or stepping upon the platform, should have been given, and it was not sufficient to charge that if plaintiff knew the defective condition of the platform, and a person of ordinary prudence having such knowledge would not have gone upon it, he could not recover, and to give a general charge on contributory negligence. *Houston, E. & W. T. Ry. Co. v. McCarty*, 89 S. W. 805, 40 Tex. Civ. App. 364.

Generally as to the effect of contributory negligence upon the right of a passenger to recover for injuries resulting from the negligence of a carrier, see post, "Liability of Carrier as Affected by Contributory Negligence of Passenger," V, L.

**Negligence in Construction a Question for Jury.**

—It is a question for the jury whether the construction of a platform at an unusual height, and four feet from the car platform, constitutes negligence. *Gulf, C. & S. F. R. Co. v. Fox* (Sup.), 6 S. W. 569.

Whether a railroad company was negligent in maintaining at a station walks of loose gravel and stone, on which plaintiff slipped in attempting to board a train, was a question for the jury. *Johnson v. Texas Cent. R. Co.*, 93 S. W. 433, 42 Tex. Civ. App. 604.

Where, in an action for injuries sustained by plaintiff's wife in attempting to board defendant's train, she testified that it was "quite a high step" from the platform to the steps of the coach, and defendant's employees testified that the distance was 12 or 14 inches, the question of defendant's negligence in not providing a better platform was for the jury. *Ft. Worth & D. C. Ry. Co. v. Work* (Civ. App.), 100 S. W. 962.

**Evidence in Actions for Damages.**

—In an action for injuries sustained by plaintiff in attempting to save another from being struck by a train, evidence considered, and held sufficient to take to the jury the question as to whether the carrier was negligent in leaving a depression in the depot platform, in attempting to go around which the danger was incurred and the injury sustained. *Harrison v. Missouri, K. & T. Ry. Co. of Texas*, 109 S. W. 442, 49 Tex. Civ. App. 467.

Evidence in an action against a railroad company by a prospective passenger for an injury occasioned by falling at night into a hole in the depot grounds considered, and held not to show negligence in defendant in failing to keep its grounds lighted and in a safe condition. *Davis v. Houston, E. & W. T. Ry. Co.*, 68 S. W. 733, 29 Tex. Civ. App. 42.

Evidence of the existence of a hole

in a depot platform 10 hours after an accident caused thereby, was properly admitted to prove the condition of the platform at the time of the accident, where limited by the charge of the court to that purpose. *Texas Midland R. R. v. Brown* (Civ. App.), 58 S. W. 44, affirmed in 93 Tex. 740, no op.

In an action against a railroad company for injuries from a defective platform, the fact that it was repaired after the accident is not admissible. *Missouri, etc., R. Co. v. Wylie* (Civ. App.), 26 S. W. 85.

In an action for injuries to a passenger while alighting from defendant's train, evidence of the condition of the pavement where defendant alighted, four or five weeks after the accident, tending to show the existence of lumps of coal and clinkers, should be excluded. *Missouri, K. & T. Ry. Co. of Texas v. Dunbar*, 108 S. W. 500, 49 Tex. Civ. App. 12.

**Facts Held to Show Negligence.—**

A railroad was negligent in maintaining a platform, on which passengers were expected to alight, with a space of 12 or 13 inches between it and the lower steps of the car. (Civ. App. 1902) *Gulf, C. & S. F. Ry. Co. v. Shelton*, 69 S. W. 653, 70 S. W. 359, affirmed (1903), 72 S. W. 165, 96 Tex. 301.

Where plaintiff's wife, while attempting to get aboard a train, was compelled to step from the ground to steps on the train, a distance of about thirty to thirty-five inches, in which act she was injured, it is held that the company was liable for such injuries, in absence of contributory negligence. *Missouri Pac. R. Co. v. Watson*, 72 Tex. 631, 634, 10 S. W. 731.

A railroad was negligent where an employee, who knew that the platform was insufficiently lighted, and of the existence of a space between it and the lower steps of the car, directed and commanded a passenger to leave the train while under motion. (Civ. App. 1902), *Gulf, C. & S. F. Ry. Co. v. Shelton*, 30 Tex. Civ. App. 72, 69 S.

W. 653, 70 S. W. 359, affirmed (1903), 72 S. W. 165, 96 Tex. 301.

In *Houston, etc., R. Co. v. Reason*, 61 Tex. 613, the testimony of a witness tended to show that such was the construction of the platform on which the appellee says he was when struck, that the cars, in passing, extended over it some eighteen inches; his own testimony showed that there was no lights at the depot. If these things were true (and whether so or not was for the jury), it was held that the evidence showed a want of due care by the appellant towards persons who might visit its depot in the night to take passage on its trains.

**Facts Held Not to Involve Issue as to Safety of Platform.**—Where a passenger, while attempting to board a train, was injured by stepping off a platform, the end of which he could not see because of darkness, the sufficiency of the platform was not involved, and the submission of that issue to the jury was error. *Gulf, C. & S. F. Ry. Co. v. Barnett*, 47 S. W. 1039, 19 Tex. Civ. App. 626.

**b. Duty to Light.**

**In General.**—It is the settled law that carriers of passengers are required to keep the approaches to and the platforms themselves so lighted at night for a reasonable time before the arrival and after the departure of its trains as to enable the traveling public to approach and leave its depots and trains with a reasonable degree of safety. *Texas, etc., R. Co. v. Reich* (Civ. App.), 32 S. W. 817. And see *St. Louis, etc., R. Co. v. Ratley* (Civ. App.), 87 S. W. 407, affirmed in 101 Tex. 656, no op.; *Houston, etc., R. Co. v. Reason*, 61 Tex. 613; *Texas, etc., R. Co. v. Lee*, 21 Tex. Civ. App. 174, 175, 176, 51 S. W. 351, 57 S. W. 573, affirmed in 93 Tex. 722, no op.; *Houston, etc., R. Co. v. Grubbs*, 28 Tex. Civ. App. 367, 67 S. W. 519; *Rozwadowskie v. International, etc., R. Co.*, 1 Tex. Civ. App. 487, 20 S. W. 872.

It has been held that a railroad company is liable to persons lawfully on its premises for failure to keep them sufficiently lighted; and this without reference to any statutory provision. *Texas, etc., R. Co. v. McKenzie*, 2 Posey 307, 308; *Rozwadosfskie v. International, etc., R. Co.*, 1 Tex. Civ. App. 487, 494, 20 S. W. 872; *Texas, etc., R. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 30 S. W. 720, affirmed in 93 Tex. 674, no op.

In an action against a railroad company for injuries received by a passenger in falling off a platform at a depot on which he had alighted from a train at night, the court properly instructed that if the plaintiff was careful, and was injured in the attempt to get off the platform, and if it was negligently constructed and badly lighted, and if a person would naturally get off the platform at that place, the company would be liable. *Texas & P. Ry. Co. v. Brown*, 78 Tex. 397, 14 S. W. 1034.

A shipper going upon a railway depot platform at night to protect live stock shipped by him from injury by hoodlums, is not a trespasser, and the company is liable for injuries to him caused by its neglect to properly light the platform. *Smith v. Texas, etc., R. Co.*, 2 Posey 329, 330.

In an action against a railroad company for injuries received by a passenger in falling off a platform at a depot on which he had alighted from a train in the nighttime, the court properly refused to instruct that, if the depot had places prepared for the public where they could go in safety, then plaintiff could not recover if he received his injuries in going from the depot in a direction where the public did not usually go, and in a direction which had not been prepared for the public, as the negligence complained of was not that the company had not constructed a safe passageway, but that passengers were left to grope

their way without sufficient light, and encounter dangers that could not be seen. *Texas & P. Ry. Co. v. Brown*, 78 Tex. 397, 14 S. W. 1034.

A station at a small village was not abandoned by a railway company, so as to relieve it from duty with reference to lighting and safety of platform, where, though it ceased to maintain an agent and sell tickets there, tickets were sold to such point and its passenger trains regularly stopped there. *Gulf, etc., R. Co. v. Williams*, 21 Tex. Civ. App. 469, 51 S. W. 653.

**Right of Court in Charge to Assume It to Be Carrier's Duty to Light Platform.**—As Rev. St. 1895, art. 4521, makes it the duty of a carrier to have its platform sufficiently lighted, the court had the right to assume in its charge that defendant should have had its platform so lighted. *Missouri, K. & T. Ry. Co. v. Miller*, 15 Tex. Civ. App. 428, 39 S. W. 583.

**Obligation as to Other than Passengers.**—To the extent of ordinary care, the carriers owe this duty to those persons visiting their depots for the purpose of welcoming the coming of or bidding adieu to departing friends. *Texas, etc., R. Co. v. Reich* (Civ. App.), 32 S. W. 817; *Missouri, etc., R. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905; *T. & P. R. Co. v. Best*, 66 Tex. 116, 18 S. W. 224; *Texas, etc., R. Co. v. Brown*, 78 Tex. 397, 398, 14 S. W. 1034.

What would be a reasonably sufficient lighting for this purpose might not fill the full measure of caution due to passengers. In one instance, ordinary care is the measure of liability; while in the other, the highest degree of care is required. *Missouri, etc., R. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905.

**To What Platforms, etc., Law Applicable.**—It has been held that the law as to lighting platforms and approaches only applies to the duty of lighting such platforms as are reason-

ably necessary to the ingress and egress of the traveling public to the depots and trains, and not necessarily to all platforms and approaches that may be used in connection with such depots for other purposes. *Texas, etc., R. Co. v. Reich* (Civ. App.), 32 S. W. 817.

**Carrier Liable Only for Proximate Consequences of Neglect of Duty.**—

An assault by a negro on a female passenger, in an unlighted waiting room after dark, is not such a proximate consequence of the railroad company's failure to light the room as to charge it with having foreseen the danger and render it liable therefor. *Prokop v. Gulf, C. & S. F. Ry. Co.*, 79 S. W. 101, 34 Tex. Civ. App. 520.

**Negligence in Performance of Duty Question for Jury.**—

Where a passenger was injured by stepping off the end of a platform, which he could not see because of darkness, the question whether the railroad company was negligent in failing to light it was for the jury. *Gulf, C. & S. F. Ry. Co. v. Barnett*, 47 S. W. 1039, 19 Tex. Civ. App. 626.

Whether it was, under the circumstances, negligence in a railroad company not to provide lights at a freight depot is a question of fact for the jury. *Stewart v. International, etc., R. Co.*, 53 Tex. 289.

*Sayles' Supp. Rev. St.*, art. 4238 (Laws 1889, p. 19), requiring railroad companies to keep their depots lighted, requires the lighting only of such platforms or approaches as are necessary for ingress and egress of passengers; and where a passenger is injured at night by falling over an obstruction on an unlighted south platform of a union depot, and it appears that the trains of several of the defendant companies stop on that side of the depot, the question of the negligence of a company whose trains stop at a platform on the north side is for the jury. *Texas & P. Ry. Co. v. Reich* (Civ. App.), 32 S. W. 817.

In an action against a railroad company for injuries received by plaintiff's wife in alighting from a train, where several witnesses testified that she was injured through being compelled to jump from the car steps to the platform in the dark while the train was moving, it was not error for the court to submit to the jury, as a possible ground for recovery, the question whether defendant was negligent in failing to provide sufficient lights, though no witness testified that the accident would not have occurred if the platform had been properly lighted. *Eddy v. Still*, 3 Tex. Civ. App. 346, 22 S. W. 525.

In an action against a carrier for injuries sustained by a passenger when alighting from a train in the night time, it was contended under one of defendant's assignments of error that the court erred in submitting the issue of defendant's failure to furnish sufficient lights, on the ground that the evidence did not show that such failure was the proximate cause of the injury. Held, that such objection was not sufficient as a complaint against the insufficiency of the evidence to establish the fact that the failure to furnish lights was not negligence. *St. Louis, etc., R. Co. v. Ratley* (Civ. App.), 87 S. W. 407, affirmed in 101 Tex. 656, no op.

**Allegations in Actions for Damages for Neglect of Duty.**—

In an action against a railway company for injuries sustained by alighting from a train, it was not error to reject evidence that there was no lights at the station, failure to provide lights not being pleaded. *Milligan v. Texas & N. O. R. Co.*, 66 S. W. 896, 27 Tex. Civ. App. 600.

A petition charging a railroad with neglect of duty in not providing "proper lights and accommodations for passengers at its freight depot" at the time, and that plaintiff's fall and injuries were occasioned by that neglect, is sufficient on general demurrer.

*Stewart v. International, etc., R. Co.*, 53 Tex. 289.

An allegation that the "depot" was not lighted so as to enable plaintiff to get off with safety is sufficiently broad to admit proof that the pass way between the cars was not lighted; the term "depot" including the platform and approaches thereto. *Galveston, H. & S. A. Ry. Co. v. Thornsberry* (Sup.), 17 S. W. 521.

**Evidence in Action for Damages.**—Where a complaint by a passenger for injuries sustained by falling from a depot platform insufficiently lighted alleged as a ground for recovery that defendant failed to station a guard on the platform to warn passengers of the danger of falling therefrom, testimony of the conductor that he did not station any one on the platform to notify passengers of the danger is relevant. *Texas & P. Ry. Co. v. Taylor* (Civ. App.), 58 S. W. 166, reversed on rehearing 58 S. W. 844.

Evidence that the depot at which plaintiff attempted to get off was dimly lighted; that it was too dark for plaintiff to see the ground or distinguish objects around him; and that the conductor, when asked by a passenger, who got off just ahead of plaintiff, whether the train did not stop long enough for passengers to get off, flippantly replied that it seemed not,—is sufficient to warrant the submission to the jury of the question whether plaintiff was in danger, and whether it was known to defendant's agent. *Galveston, H. & S. A. Ry. Co. v. Thornsberry* (Sup.), 17 S. W. 521.

Where a depot platform was elevated five feet above the track, a verdict is warranted finding the company negligent in failing to light the platform at night, so that passengers could safely pass from the platform to the cars. *Texas & P. Ry. Co. v. McKenzie*, 2 Posey Unrep. Cas. 307.

In an action for injuries to a passenger by falling from defendant's insufficiently lighted platform in the

night time, evidence held sufficient to sustain a verdict for plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. Cannady*, 82 S. W. 1069, 36 Tex. Civ. App. 646.

Where a passenger was directed to alight from a moving train at night, and was injured in so doing, the railroad was negligent in not having the platform sufficiently lighted. (Civ. App. 1902), *Gulf, C. & S. F. Ry. Co. v. Shelton*, 69 S. W. 653, 70 S. W. 359, affirmed (1903), 72 S. W. 165, 96 Tex. 301.

**Instructions.**—In an action against a railroad company for personal injuries sustained by a passenger while attempting to alight from a train, it is proper to charge that a railroad company, carrying passengers by means of steam, is held to a high degree of care to prevent accidents to passengers; and a further instruction that it is the company's duty, at each station where passengers get off its trains at night, to have the pass-way out of the cars so lighted as to enable passengers getting off, and using reasonable care and diligence, to do so with safety, is not objectionable as being a mere repetition of the former instruction, since it is but the application of the legal rule first laid down to the case made by the proof. *Galveston, H. & S. A. Ry. Co. v. Thornsberry* (Sup.), 17 S. W. 521.

Where, in an action on account of an injury received on alighting from a car, the only evidence as to the faulty construction of the platform is as to the space left between the car door and the platform, it is not prejudicial error to instruct the jury that it is the duty of the company "to keep in safe condition all portions of its platforms and approaches thereto." *Missouri Pac. Ry. Co. v. Long*, 81 Tex. 253, 16 S. W. 1016.

## B. AS TO PROTECTION OF PERSONS WHILE ON CARRIER'S PREMISES.

### 1. Passengers.

**In General.**—A railroad company

owes to a passenger in its station house waiting to take a train, the duty to protect against assaults or offensive conduct by third persons. *Houston, etc., R. Co. v. Phillio*, 96 Tex. 18, 69 S. W. 994, reversing 67 S. W. 915.

Where a person enters the waiting room at a railroad station for the purpose of procuring a ticket and taking a passage on a train, which is due to arrive in a short time, he becomes entitled to the protection and care due a passenger by a carrier. While this relationship of carrier and passenger continues to exist, it is the duty of the employees of the carrier to protect him from violence or insult of other passengers or by strangers, and a failure on the part of said employees to exercise such care will render the carrier liable for injury thereby caused the passenger. *McCardell v. Gulf, etc., R. Co.* (Civ. App.), 102 S. W. 941, citing *Dillingham v. Russell*, 73 Tex. 47, 11 S. W. 139; *Missouri, etc., R. Co. v. Russell*, 8 Tex. Civ. App. 578, 28 S. W. 1042, affirmed in 93 Tex. 668, no op. See, also, *Houston, etc., R. Co. v. Perkins*, 21 Tex. Civ. App. 508, 52 S. W. 124, affirmed in 93 Tex. 710, no op.

In railroad stations a passenger is as much entitled to proper treatment and protection as when he is aboard a conveyance, and employees put there to be brought in contact with passengers and to render to them services due to them from the carriers are as fully within the principle stated as are such employees upon trains and vessels. *Texas, etc., Railroad v. Dean*, 98 Tex. 517, 85 S. W. 1135, reversing 82 S. W. 524.

A passenger on a railway train remains such after alighting therefrom, and while on the depot premises of the company, for a period of time reasonably necessary to enable him to leave the premises, and is, therefore, entitled to the protection of the company's agents and servants from assaults of third persons during such time. *Texas, etc., R. Co. v. Dick*, 26

Tex. Civ. App. 256, 63 S. W. 895, affirmed in 94 Tex. 697, no op., 95 Tex. 688, no op.

**Illustrations.**—A woman who enters a railroad station with the intention of becoming a passenger is entitled to protection against insult, though she has not yet purchased a ticket. *Texas & P. Ry. Co. v. Jones* (Tex. Civ. App.), 39 S. W. 124.

A woman who enters a railroad station with the intention of becoming a passenger, may recover damages for mental suffering caused by abusive language addressed to her by the wife of the station agent, in his hearing, and without his interference. *Texas, etc., R. Co. v. Jones* (Civ. App.), 39 S. W. 124, affirmed in 93 Tex. 674, no op.

Where plaintiff, a negro, entered the waiting room of defendant's passenger station to procure a ticket and take passage on defendant's train, which was shortly to arrive, when he was assaulted, thrown out of the station, and shot by a stranger in the presence of defendant's employees, who did nothing to assist him, defendant was guilty of a breach of its duty to plaintiff as a passenger, and was responsible for his injuries. *McCardell v. Gulf, C. & S. F. Ry. Co.* (Civ. App.), 102 S. W. 941.

A railroad company, which employs a policeman at a depot to look after passengers, is liable to a passenger for loss of an eye, caused by the policeman striking with a billy, the passenger having, after being roused from a drunken sleep, and started to his train, merely attempted to come back into the depot. *Texas & P. Ry. Co. v. Bowlin* (Civ. App.), 32 S. W. 918.

Where a carrier permitted a person in a drunken condition to enter its waiting room, and he used indecent language, and while armed with a knife made an assault on plaintiff, a female passenger, the company was liable for damages sustained thereby. *Judgment* (Civ. App.) 67 S. W. 915, reversed. *Houston & T. C. R. Co. v.*

Phillio, 69 S. W. 994, 59 L. R. A. 392, 96 Tex. 18, 97 Am. St. Rep. 868.

Where a carrier permits a drunken person to enter its waiting room, and use vulgar language, and with an open knife to assault passengers, it can not shield itself from injuries to a female passenger, resulting from the fright, on the ground that the agent in charge of the room merely regarded the matter as a joke. (Civ. App.), *Houston & E. C. R. Co. v. Phillio*, 67 S. W. 915, judgment reversed 69 S. W. 994, 96 Tex. 18, 59 L. R. A. 392, 97 Am. St. Rep. 868.

An instruction, in an action for assault by the baggage master of a carrier on one who had gone to the depot to take passage and was in the baggage room for the purpose of identifying her baggage and having it checked, that if her brother had made an unprovoked assault on the baggage master, and the baggage master was acting in self-defense, or it reasonably appeared to him at the time that it was necessary to defend himself, and he used no more force than was necessary, or reasonably appeared to him to be necessary, to defend himself, the carrier was not liable, is erroneous; the carrier's duty to the passenger being that its baggage master should use the utmost degree of care not to injure the passenger, and the instruction submitting another lesser degree of care in effect substituting the rule of self-defense in criminal cases—reasonable care to use no more force than necessary, and that, too, to be judged from the standpoint of the carrier's servant. *Hartley v. Pecos Valley & N. E. Ry. Co.* (Civ. App.), 103 S. W. 1123.

**Duty of Carrier in Case of Attempt to Arrest Passenger.**—A carrier is not required to make active resistance to an officer who is attempting to arrest a passenger, or to inquire into the authority under which the officer

assumes to act. Judgment (Civ. App. 1904) 82 S. W. 524, reversed. *Texas Midland R. R. v. Dean*, 85 S. W. 1135, 98 Tex. 517, 70 L. R. A. 943.

**Liability for Act of Agent in Procuring Arrest of Passenger in Depot.**—See the title FALSE IMPRISONMENT.

**Liability for Injuries Which Could Not Have Been Foreseen.**—The mere fact that plaintiff's wife, a passenger, while seated alone in a dark waiting room, was assaulted, does not show that defendant's agents should have foreseen the assault. *Prokop v. Gulf, etc., R. Co.*, 34 Tex. Civ. App. 520, 79 S. W. 101, affirmed in 98 Tex. 628, no op.

"It is practically conceded by appellant, and is certainly the law, that the duty of the carrier to protect passengers from the assaults and insults of third persons arises only when the threatened wrong occurs in the presence or within the knowledge of its agents or when from the facts and circumstances attending or preceding the injury the carrier might have foreseen and prevented it. This is too well settled in this state to admit of further controversy. *Thweatt v. Houston, etc., R. Co.*, 31 Tex. Civ. App. 227, 71 S. W. 976; *Houston & T. C. Ry. Co. v. Phillio*, 5 Texas Ct. Rep., 666; *Gulf, etc., R. Co. v. Shields*, 9 Tex. Civ. App. 652, 28 S. W. 709, 29 S. W. 652, affirmed in 93 Tex. 685, no op.; *Galveston, etc., R. Co. v. Long*, 13 Tex. Civ. App. 664, 36 S. W. 485; *Jones v. Missouri K & T. Ry. Co.*, 7 Texas Ct. Rep. 535. The general possibility of injury from such sources has never, so far as we are advised, been held to call this duty into action." *Prokop v. Gulf, etc., R. Co.*, 34 Tex. Civ. App. 520, 79 S. W. 101, affirmed in 98 Tex. 628, no op.

**Evidence in Actions for Assault.**—Evidence held sufficient to show that plaintiff, while lawfully at a passenger depot, was wrongfully assaulted by a



railroad policeman acting as agent of the company and not in his capacity as an officer. *Texas, etc., R. Co. v. Taylor*, 31 Tex. Civ. App. 617, 73 S. W. 1081, affirmed in 97 Tex. 648, no op.

In an action by passenger for assault by L., defendant's depot policeman, on a car platform, evidence that plaintiff was not in the way of passengers, but that L. did affect their ingress and egress, is not objectionable as tending to cause the jury to render a verdict for more than actual damages. *Gulf, etc., R. Co. v. Perry* (Civ. App.), 30 S. W. 709, 710, affirmed in 93 Tex. 662, no op.

## 2. As to Others than Passengers.

While a railway company owes to a passenger in its station house waiting to take the train a duty to protect against assaults or offensive conduct by third persons, it does not owe such duty to one properly there to assist such passenger in taking the train. *Houston, etc., R. Co. v. Phillio*, 96 Tex. 18, 69 S. W. 994, reversing 67 S. W. 915.

Where a husband went to defendant's station with his wife to assist her in boarding defendant's train, but without any intention of himself becoming a passenger, he was only entitled to the rights of a licensee, and was not entitled to recover against the company for an assault or indignity sustained by him at the hands of a disorderly person permitted to remain in the station. Judgment (Civ. App.) 67 S. W. 915, reversed. *Houston & T. C. R. Co. v. Phillio*, 69 S. W. 994, 39 L. R. A. 392, 96 Tex. 18, 97 Am. St. Rep. 868.

## C. DUTY TO INFORM PASSENGERS AS TO MOVEMENTS OF TRAINS.

**In General.**—A carrier, in the absence of a request for information, is not bound to inform a passenger of the time of departure of its earliest train from a junction point to her des-

tinuation. *Latimer v. St. Louis Southwestern Ry. Co. of Texas*, 90 S. W. 665, 40 Tex. Civ. App. 614.

A charge that it is the duty of a railroad company to use such care to inform a passenger as to what train she should take as reasonably prudent persons engaged in the same business and under similar circumstances would use, is erroneous, in that it relieves the passenger of the duty to exercise ordinary intelligence and prudence in ascertaining the train she should take. *Missouri, K. & T. Ry. Co. v. Walden* (Civ. App.), 46 S. W. 87.

**Duty to Indicate Direction of Trains by Platform Signs or by Announcement.**—The statutes of Texas do not impose the duty upon railroads to display upon their platform signs showing which way its trains are going, nor require of them to have an employee call out the direction the train is going. *Gary v. Gulf, etc., R. Co.*, 17 Tex. Civ. App. 129, 42 S. W. 576.

In an action against a railroad company to recover for injury to plaintiff's wife, caused by the conductor's want of proper care in putting her off a train which she had taken by mistake, evidence tending to show that such mistake was due to defendant's failure to provide signs or call trains was irrelevant. *Gary v. Gulf, C. & S. F. Ry. Co.*, 42 S. W. 576, 17 Tex. Civ. App. 129.

## D. DUTIES AND LIABILITIES AS TO RECEIVING, TRANSPORTATION AND DISCHARGE OF PASSENGERS.

### 1. In General.

It is the duty of the common carrier to safely and securely carry persons who bear to it the relation of passenger, and to use the utmost care and diligence to safely carry the passenger to the end of his route. *St. Louis, etc., R. Co. v. Johnson*, 29 Tex. Civ. App. 184, 68 S. W. 58, affirmed in 95 Tex. 685, no op.

The carrier undertakes to transport

the passenger safely from the initial point of transportation to the place of destination. *Missouri, etc., R. Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496; *Missouri, etc., R. Co. v. Glass*, 46 Tex. Civ. App. 126, 102 S. W. 447.

**Implied Obligation to Transport without Unreasonable Delay.**—Defendant contracted to transport plaintiff from P. to B., via S., on June 9, 1903. Plaintiff left P. at 8 a. m., and defendant's train was due to arrive at B., via S., at 4 o'clock p. m. Plaintiff arrived at S. about 1 o'clock p. m., and was there compelled to remain 24 hours for the train to B. by reason of an alleged wreck on that branch of defendant's road. Held, that such delay was unreasonable, and constituted a breach of defendant's implied contract to transport plaintiff without unreasonable delay. *International & G. N. R. Co. v. Harder*, 81 S. W. 356, 36 Tex. Civ. App. 151.

**Responsibility for Proximate Results of Breach of Contract.**—When the carrier violates its duty and breaches the contract of carriage, it becomes responsible for the proximate results of such act, but not for consequences which could and should have been avoided by the passenger. The passenger must make the best of the situation, and refrain from unnecessarily bringing about an aggravated state of consequences. *Russell v. Missouri, etc., R. Co.*, 12 Tex. Civ. App. 627, 35 S. W. 724, affirmed in 93 Tex. 737, no op. See, generally, the title DAMAGES.

For particular duties and liabilities of a carrier as imposed by its contract of transportation, express or implied, with the passenger, see the various subdivisions in this section.

## 2. Duty to Receive and Carry.

**Statutory Provisions.**—Article 4495, Rev. Stat., requires railroad companies to take and transport passengers on due payment of fare, legally authorized for the transportation. *Mills*

*v. Missouri, etc., R. Co.*, 94 Tex. 242, 59 S. W. 874, reversing 57 S. W. 291.

As to the statutory requirement of sufficient accommodation for the transportation of all such passengers as shall, within a reasonable time, offer for transportation at the place of starting, see post, "Duty to Furnish Sufficient Accommodations," V, D, 6, c, (1).

Article 4227 provides that "In case of refusal by such corporation or their agents so to take and transport any passenger or property, or to deliver the same, or either of them, at the regular or appointed time, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of suit." *Houston, etc., R. Co. v. Smith*, 63 Tex. 322.

**Duty to Carry on Freight Trains.**—If a carrier holds itself out as carrying passengers on freight trains, it is bound to so carry a passenger who tenders the fare. *Eddy v. Rider*, 79 Tex. 53, 57, 15 S. W. 113.

Generally, as to the status of persons riding on freight trains, see ante, "General Rules for Determining Existence of Relation," I, A.

**Liability for Exemplary Damages for Refusal Transport.**—Exemplary damages can not be recovered from a railroad company for the malicious acts of its agents in failing or refusing to carry a passenger, where it is not shown that such malicious acts were ratified by the company. *Townsend v. Texas & N. O. Ry. Co.*, 88 S. W. 302, 40 Tex. Civ. App. 71.

**Allegation in Action for Refusal to Carry of Willingness to Pay Fare.**—In an action against a railway company for its refusal to transport plaintiff as a passenger, it is necessary to allege that plaintiff was ready and willing to pay his fare. *St. Louis S. W. Ry. Co. v. Thomas (Civ. App.)*, 27 S. W. 419.

### 3. Duty to Maintain Regular Schedule.

The Texas statutes expressly provide that railroad companies shall start and run their cars for the transportation of passengers at regular times to be fixed by public notice. Rev. Stat., art. 4226. *Eddy v. Rider*, 79 Tex. 53, 15 S. W. 113; *Houston, etc., R. Co. v. Smith*, 63 Tex. 322.

### 4. Duty to Stop to Take on or Discharge Passengers.

**In General**—Where a train does not stop at a regular station, a passenger prevented from alighting there is entitled to recover such damages as she may have sustained by such breach of contract. *Houston & T. C. Ry. Co. v. McKenzie* (Tex. Civ. App.) 41 S. W. 831.

Where in an action against a railway company for killing a passenger who alighted at a station beyond a section house at which the company had agreed to stop its train to enable him to alight but refused to do so, it was error to instruct that it was immaterial whether the train was stopped at the section house. *Ormond v. Hayes*, 60 Tex. 180.

At 10 o'clock at night a married woman, just recovering from a spell of sickness, missed a train going to her home, through the station agent's negligence in failing to get a ticket for her and to signal the train to stop. She had to walk two miles to find a place to stay, by reason whereof she became sick and remained so for a long time. Held, that the railroad company was liable. *Houston & T. C. R. Co. v. Rand*, 1 White & W. Civ. Cas. Ct. App. § 255.

A carrier failing to stop its train to permit plaintiff to board it is liable for the injuries received by him while proceeding to his destination, where he exercises ordinary care in choosing a means of transportation and in the prosecution of his journey; and, where he procured a conveyance after the failure of a train to stop to permit

him to board it, he did not, as a matter of law, assume the risk from injuries resulting from exposure to the weather while making the trip by means of the conveyance selected. (Civ. App.) *International & G. N. R. Co. v. Addison*, 93 S. W. 1081, reversed (Sup.) 97 S. W. 1037, 8 L. R. A. (N. S.), 880, 100 Tex. 241.

Where a holder of a passenger ticket entitling him to passage over a railway from one point to another took passage on a train on the advice of a railway employee provided for that purpose, the employees in charge of the train were required to stop it at the destination of the passenger, and ejecting him at another place subjected the company to damages. *International & G. N. R. Co. v. Smith*, 90 S. W. 709, 40 Tex. Civ. App. 432.

A railroad company is not bound, in the absence of contract or statute, to stop all its trains at every station, and a passenger, with means at his command of ascertaining before he enters a train whether it will deliver him at his destination, must avail himself of the opportunity, and enter the proper conveyance. *Texas & P. Ry. Co. v. Bell*, 87 S. W. 730, 39 Tex. Civ. App. 412.

**Statutory Provision as to Stops.**—The legislature, under the general police power of the state, can regulate the time of stoppage of passenger railroad trains at stations. *Davidson v. State*, 4 Tex. Crim. App. 544, 548.

The court will not declare Paschal's Dig., art. 6532, requiring conductors of passenger trains to stop not less than five minutes at each station, unconstitutional unless it shall plainly appear that the vested charter or other important rights of a railroad company were unduly prejudiced thereby. *Galveston, Harrisburg & S. A. R. Co. v. Le Gierse*, 51 Tex. 189.

In an action for damages sustained by a passenger by the company's failure to stop the train at his destina-

tion, in which the evidence is conflicting as to whether the company was bound to stop, notwithstanding the train was a special one, and did not ordinarily stop at that point, it is error to give a charge as to the company's duty to stop at stations which is inapplicable, in assuming that plaintiff was entitled to have the train stop in any event. *Missouri, K. & T. Ry. Co. v. Byas*, 9 Tex. Civ. App. 572, 29 S. W. 1122.

**Duty to Stop at Flag Stations.**—A railroad company is bound to stop its trains in response to proper signals at a flag station at which it is in the habit of stopping. *San Antonio & A. P. Ry. Co. v. Safford* (Civ. App.), 48 S. W. 1105.

By the sale of a ticket from one station to another, a flag station, a railroad company undertakes to carry the purchaser to his destination, and let him off there, and is bound to fulfill its obligation. *San Antonio & A. P. Ry. Co. v. Dykes* (Civ. App.), 45 S. W. 758. See, also, *Missouri, etc., R. Co. v. Glass*, 46 Tex. Civ. App. 126, 102 S. W. 447.

In an action against a carrier for carrying a passenger by a flag station to which his ticket read, it was no defense that the train was so crowded that the conductor had not had time to reach plaintiff before his station was passed. *Missouri, K. & T. Ry. Co. of Texas v. Glass*, 102 S. W. 447, 46 Tex. Civ. App. 126.

Plaintiff, a ticket holder at a flag station on a dark night, waved a valise and a white handkerchief at an approaching train. The signals were not seen, and the train passed on. The proper signal at night is a light. Held, that plaintiff could not recover of the railroad company. *St. Louis, I. M. & S. Ry. Co. v. Berryhill*, 3 Willson, Civ. Cas. Ct. App. § 319.

In an action for damages against a railroad company for carrying plaintiff beyond his station, it appeared that

he knew when he bought his ticket that the station was a flag station, where trains stopped only on notice to the conductor; that he neither notified him nor any employee of the company, and he was carried two miles beyond the station before he notified any of the employees as to where he wanted to get off; that the conductor then proposed to carry plaintiff to the next station, which was four miles further, or put him off there; and that he agreed to get off, and walk back. Plaintiff testified that he was not sick, and felt no ill effects from walking. The weather was pleasant, and the road dry, and he got off the train about sundown. Held, that the evidence did not support a verdict for plaintiff. *Gulf, C. & S. F. Ry. Co. v. Ryan*, 4 Willson, Civ. Cas. Ct. App. § 305, 18 S. W. 866.

**Evidence as to Custom to Stop at Certain Station.**—In an issue as to whether stopping a train at a certain station was in violation of the company's rule, the defendant having introduced its time table to show that it did not stop there, the plaintiff was properly permitted in rebuttal to show that trains frequently stopped there. *Texas & P. Ry. Co. v. Elliott*, 54 S. W. 410, 22 Tex. Civ. App. '31.

**Admissibility of Time Tables in Actions for Failure to Stop.**—A railway time table arranged for employees only, and reserving the right to vary therefrom, is inadmissible in a suit for damages for failure to stop a train at a point mentioned therein. *Beauchamp v. International, etc., R. Co.*, 56 Tex. 239, 243, 245.

**As to recovery of damages for mental suffering for refusal to stop for passenger**, see the title DAMAGES.

**Failure to Stop Street Car to Admit Passenger as Ground for Exemplary Damages.**—Where, in an action against a street railroad for damages for failure to stop a car and admit plaintiff

as a passenger, plaintiff and one who accompanied him testified that they commenced signaling the car by waving their hands when it was a quarter of a mile distant, and continued it until it passed, and that when it passed the motorman motioned to them and the conductor signaled them and laughed. The motorman testified that they stood near the track talking, but gave no signal until he was even with them. Held, that an instruction on exemplary damages was warranted. *Northern Texas Traction Co. v. Peterman* (Civ. App.), 80 S. W. 535.

### 5. Duty to Afford Opportunity and Facilities for Boarding Trains.

#### a. General Rule as to Allowance of Time.

##### (1) Duty to Allow Reasonable Time.

**Rule Stated.**—It is the duty of a railroad company to give a reasonable time to enable passengers, in the exercise of reasonable diligence and care, to board its trains. *Hull v. East Line, etc., R. Co.*, 66 Tex. 619, 620, 2 S. W. 831; *Gulf, etc., R. Co. v. Powers*, 4 Tex. Civ. App. 228, 23 S. W. 325; *Missouri, etc., R. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905; *International, etc., R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102, 38 S. W. 401, affirmed (see 93 Tex. 711, no op.); *Houston, etc., R. Co. v. Copley*, 38 Tex. Civ. App. 568, 87 S. W. 219, affirmed in 101 Tex. 641, no op.; *Texas, etc., R. Co. v. McGilvary* (Civ. App.), 29 S. W. 67 (see 93 Tex. 741, no op.); *Central Tex., etc., R. Co. v. Holloway* (Civ. App.), 54 S. W. 419, affirmed in 93 Tex. 726, no op.; *International, etc., R. Co. v. Anchonda* (Civ. App.), 68 S. W. 743, affirmed in 97 Tex. 637, no op.; *Texas, etc., R. Co. v. Gray* (Civ. App.), 71 S. W. 316, affirmed in 97 Tex. 648, no op.; *St. Louis, etc., R. Co. v. Cannon* (Civ. App.), 81 S. W. 778, affirmed in 98 Tex. 630, no op.

Failure to give a passenger an opportunity to board a train at an established station gives a cause of action

to any person injured thereby. *Hull v. East Line, etc., R. Co.*, 66 Tex. 619, 620, 2 S. W. 831.

Instructions that the railroad company was not liable unless its employees knew that plaintiff was off the train, and wanted to get on again, were properly refused, as it was the duty of the company to give a reasonable time for passengers to board the train, and use the utmost care as to them. *Texas & P. Ry. Co. v. Gray* (Civ. App.), 71 S. W. 316, affirmed in 97 Tex. 648, no op.

Where, in an action against a carrier for injuries to a passenger at a station, in attempting to board the train, there was evidence to justify the jury in finding that defendant was negligent in not giving the passenger reasonable time to board the train after signal that it was ready to move, and in giving the train an unusual jerk while the passenger was attempting to board it, and the jury finds for plaintiff, it is conclusive that he was not guilty of contributory negligence. *Texas & P. Ry. Co. v. Gray* (Civ. App.), 71 S. W. 316, affirmed in 97 Tex. 648, no op.

In an action for injuries suffered by plaintiff in being thrown from a train in attempting to board it, an instruction to find for defendant unless it stopped its train a reasonably sufficient time to enable plaintiff to get on the cars by the use of ordinary diligence and care, and the failure to do so was through the negligence of plaintiff, is not misleading, as requiring the jury, in order to find for defendant, to go further than to find that the train was stopped long enough to have enabled plaintiff to get on the cars by the exercise of ordinary care, and to find, in addition, that her failure to board the train was due to her negligence. *International & G. N. R. Co. v. Anchonda*, 73 S. W. 557, 33 Tex. Civ. App. 24.

As to the commencement of the re-

lation of carrier and passenger when the latter attempts to board the carrier's conveyance at a proper place and in the proper manner, see ante, "Persons Boarding Conveyance with Intention of Taking Passage," I, C, 1, c.

**Liability for Injury to Passenger Boarding Trains by Sudden Starting of Same.**—If one entitled to the rights of a passenger on a railway train is, without being guilty of contributory negligence, injured in the effort to get on the train, which has started from a stopping place before the time designated to the passenger by the conductor in charge, the company is liable in damages for the injury. *Texas Pac. Ry. Co. v. Davidson*, 68 Tex. 370, 4 S. W. 636.

In an action for injuries to plaintiff caused by the train starting up while she was attempting to get on, an instruction to the jury that if the averments of the plaintiff were true, including an averment that she had been promised 10 minutes by the conductor in which to check her baggage, and the train started before that time expired, then they should find for the plaintiff, is not erroneous as laying too much stress on the time promised her by the conductor. *Texas Pac. Ry. Co. v. Davidson*, 68 Tex. 370, 4 S. W. 636.

In an action for injuries to a passenger while boarding a train, an instruction that the defendant owed to a person attempting to board its train as a passenger a duty to give a reasonably sufficient time for him to do so, and that defendant was liable for any failure to perform that duty with the high degree of care that a person of very great prudence would use, was not objectionable as placing the absolute duty upon the defendant as a matter of law to stop its trains a reasonably sufficient time to enable passengers to enter its cars. *Galveston, H. & S. A. Ry. Co. v. Fink*, 99 S. W. 204, 44 Tex. Civ. App. 544.

Undue prominence is not given to the character of duty required of a conductor by the paragraphs of the charge, in an action for injury to a passenger by the starting of the train while he was boarding it, stating that it was the duty of the conductor to use the care of very prudent persons to stop the train long enough for the passenger to get on, provided he was reasonably diligent and careful in getting on, and that it was the duty of the conductor to exercise the degree of care commonly used by very careful and prudent persons in similar circumstances to afford the passenger an opportunity to get on, provided he was reasonably diligent in using ordinary care in getting on. *Houston & T. C. R. Co. v. Copley*, 87 S. W. 219, 38 Tex. Civ. App. 568.

Recovery may be had by passenger injured by the sudden jerking of train as he was attempting to get on, though the engineer did not know of his presence, the conductor having told him to get aboard. *Missouri Pac. R. Co. v. Foreman* (Civ. App.), 46 S. W. 834, affirmed in 93 Tex. 647, no op.

Evidence that when plaintiff reached the train, which was running not more than four miles an hour, he was seen and known to be a passenger, and was told by the conductor, who had just gotten on, to get aboard, and that, while attempting to do so in a prudent manner, the engineer started the train with a sudden jerk, whereby he was thrown, authorizes an instruction that defendant railroad company was required to exercise great care in running its passenger trains, or in starting or stopping trains where passengers get aboard or alight. *Missouri Pac. R. Co. v. Foreman* (Civ. App.), 46 S. W. 834, affirmed in 93 Tex. 647, no op.

Where, in an action by a passenger for injuries sustained in boarding a train after visiting a lunch counter, the complaint alleged that defendant's employees negligently failed to give the customary time to board the train

after giving the signal to start, and also that, when plaintiff attempted to board the train after it had been put in motion, such employees negligently caused it to give a sudden jerk, which threw him to the ground, an instruction that if he was injured through defendant's negligence in either of such particulars, and was without negligence, he could recover, was not objectionable as authorizing a recovery on more than one theory. *Texas & P. Ry. Co. v. Gray* (Civ. App.), 71 S. W. 316.

**Allowance of Time to Enter Cars and Be Seated.**—A railroad train must stop at stations where passengers get on the cars a sufficient length of time to enable them to get on, and get seats in the cars. (1883) *International & G. N. Ry. Co. v. Copeland*, 60 Tex. 325; (1893) *Gulf, C. & S. F. Ry. Co. v. Powers*, 4 Tex. Civ. App. 228, 23 S. W. 325.

**(2) Application of Rule to Passengers Alighting Temporarily En Route.**

Where a passenger alights at an intermediate station on his trip for any purpose consistent with the character of a passenger, with the express or implied consent of the carrier and the knowledge by it that he expects to return and continue his passage on the same train, he does not lose his character as a passenger, and is entitled to the protection due a passenger in his efforts to board the train. *Missouri, K. & T. Ry. Co. of Texas v. Price*, 106 S. W. 700, 48 Tex. Civ. App. 210.

When a train stops at a station, a passenger may alight for the purpose of speaking to some one on the platform; hence a railroad is liable for negligently injuring passenger in returning to train. *Galveston, etc., R. Co. v. Cooper*, 2 Tex. Civ. App. 42, 50, 20 S. W. 990, affirmed in 85 Tex. 431.

A passenger on a railroad train is not guilty of negligence in leaving the train during a stop of 10 or 15 minutes,

and waiting for the signal to get on the train before attempting to do so. *Texas & P. Ry. Co. v. Mayfield*, 56 S. W. 942, 23 Tex. Civ. App. 415.

During a stop of 10 or 15 minutes of defendant's train at a station, plaintiff alighted with other passengers, and stood on the platform talking until the conductor's call to get aboard, when he caught hold of the railing of the nearest coach to get on; but, the steps being crowded, and being unable to get on, he held onto the railing, and ran along the platform, until he could have opportunity to jump on. In so doing plaintiff stumbled over an oil bucket that had been left on the platform by defendant, and was injured. Held, that defendant was guilty of negligence in starting the train before the passengers had time to get on after the conductor's call to get aboard, and in leaving the oil bucket so near the train as to interfere with passengers in their efforts to board the train, warranting plaintiff's recovery. *Texas & P. Ry. Co. v. Mayfield*, 56 S. W. 942, 23 Tex. Civ. App. 415.

One of the grounds of negligence alleged in the petition being that, after the conductor's signal for the train to start, sufficient time was not given for the passengers to get aboard before the train was started, and there being evidence to support such allegation, it was not error to charge that if the jury found that, before plaintiff had time to reboard the train, defendant negligently started the train, and thereby injured plaintiff, it would be guilty of negligence. *Texas & P. Ry. Co. v. Mayfield*, 56 S. W. 942, 23 Tex. Civ. App. 415.

Where a through passenger leaves the train at an intermediate station, and the employees of the train carelessly give it a sudden jerk just as she is attempting to re-enter it on the side opposite the platform, whereby she is injured, such carelessness is

negligence, as to her, rendering the carrier liable. *St. Louis & S. W. Ry. Co. v. Humphreys*, 62 S. W. 791, 25 Tex. Civ. App. 401.

Where a train stops between stations on account of a wreck, and the passengers leave the train without objection from the conductor, it is negligence to start the train without first giving the passengers timely warning to return. *Gulf, C. & S. F. Ry. Co. v. Roundtree* (Civ. App.), 25 S. W. 989.

A passenger, at midnight got off the train at a water tank, and, in attempting to get on, was run over. Held, that the court should have charged that if it was not a regular passenger station, and defendant's servants in charge of the train knew that no passenger was to get on or off there that night, and did not know that plaintiff got off, it was for the jury to determine whether defendant was guilty of negligence which was the proximate cause of plaintiff's injury, and also should have defined "proximate cause." *Galveston, H. & S. A. Ry. Co. v. Cooper*, 70 Tex. 67, 8 S. W. 68.

Generally, as to the rule that a passenger does not lose his status as such by alighting temporarily at an intermediate station, see ante, "Persons Leaving Conveyance Temporarily at Intermediate Station or Stop," I, C, 2, b.

### (3) Duty to Hold Train for Passengers Alighting by Conductor's Order or Consent.

**Persons Alighting to Purchase Ticket on Conductor's Order.**—It is the duty of a railway company to hold a train at a station a reasonably sufficient length of time to allow a passenger who has been instructed so to do by its conductor in charge of the train, to procure a ticket and board the train before it is started. *Johnson v. Texas Cent. R. Co.*, 42 Tex. Civ. App. 604, 93 S. W. 433.

Plaintiff, having boarded defendant's train without a ticket, was directed

by the conductor to pay his fare to the next station, and there get off and purchase a ticket for the rest of his journey; the conductor stating that he would have time enough to do this and get back on the train. Plaintiff accordingly got off at the next station to purchase a ticket, but just as it was handed to him the train started, and he was unable to get aboard. Held, that defendant was negligent in not holding the train for a reasonably sufficient time to enable plaintiff to alight, purchase his ticket, and return, without incurring the risk of boarding the train while in motion. *St. Louis S. W. Ry. Co. v. Germany* (Civ. App.), 56 S. W. 586.

Where, after plaintiff had boarded a train without a ticket, he was directed to disembark and obtain one, and was injured while endeavoring to again get aboard after the train had started, the carrier's failure to hold the train a reasonable time to enable plaintiff to obtain a ticket, and its negligence in directing him to leave the train to get a ticket, were properly submitted to the jury. *San Antonio & A. P. Ry. Co. v. Trigo*, 108 S. W. 1193, 49 Tex. Civ. App. 523.

Where a conductor instructed a passenger to procure a ticket at a certain station, it was a question for the jury whether the railroad company was negligent in not holding the train a reasonably sufficient length of time to allow the passenger to procure the ticket and board the train before it started. *Johnson v. Texas Cent. R. Co.*, 42 Tex. Civ. App. 604, 93 S. W. 433.

**Persons Alighting with Conductor's Consent.**—A passenger having made known to the conductor his desire to alight to get a lunch during the time the train stopped, and the conductor having informed him that he would have time to do so, and consented to his alighting for that purpose and the passenger having alighted, it was the duty of the conductor to hold the



train in accordance with his answer; the passenger not having boarded the train sooner. *Missouri, K. & T. Ry. Co. of Texas v. Price*, 106 S. W. 700, 48 Tex. Civ. App. 210.

A railroad company is liable to a passenger who is injured while getting on a moving train; he having been induced to leave it by the assurance of the conductor that it would stop at the station five minutes, and the conductor having, before the expiration of that time, given the signal to start, with knowledge that the passenger had left the train, and while he was so far away that he could not board the train before it started. *Foreman v. Missouri Pac. Ry. Co.*, 4 Tex. Civ. App. 54, 23 S. W. 422.

**(4) Proper Time as Dependent on Physical Condition of Passenger.**

The persons in charge of a train are negligent, where, with knowledge that a passenger boarding it is a cripple, compelled to use a crutch and stick, they start before she has reasonable time to enter the car and take her seat, thereby causing injury to her. *Central Texas & N. W. Ry. Co. v. Holloway* (Civ. App.), 54 S. W. 419, affirmed in 93 Tex. 726, no op.

One in charge of an aged and infirm passenger on a crowded train is not guilty of negligence contributing to the wrongful ejection of such passenger because he enters another car for the purpose of securing a seat, as he has a right to presume that the carrier's employees will exercise that degree of care, for the safety of passengers, that the law requires of them. *St. Louis & S. F. R. Co. v. McAnellia* (Civ. App.), 110 S. W. 936.

**(5) Liability for Injuries to Passengers after Allowance of Reasonable Time.**

**In General.**—Where the employees having charge of a railway train have stopped it at the station long enough to give passengers reasonable time to enter and become seated, and have

given the usual signals upon starting, the company is not liable in damages to one who, having failed to sit down, is thrown and injured by the starting of the train. *International & G. N. Ry. Co. v. Copeland*, 60 Tex. 325.

In an action against a railroad company to recover damages for being left at a railroad station at which the train on which plaintiff was a passenger was announced to stop 20 minutes for supper, the evidence was conflicting as to whether it did in fact stop for 20 minutes, but it was not contradicted that full and fair notice was given by the conductor for all to get aboard. Held, that a verdict for plaintiff could not be sustained. *Texas Trunk Ry. Co. v. Mullins* (Civ. App.) 18 S. W. 790.

**Liability as Affected by Carrier's Knowledge of Dangerous Position of Passenger.**—A railroad company guilty of starting its train while a passenger was in a position of peril in attempting to board it, of which it had knowledge, is liable for injuries received by the passenger, though the train had stopped for a sufficient length of time for the passenger to have boarded it. *St. Louis Southwestern Ry. Co. of Texas v. Cannon* (Civ. App.), 81 S. W. 778, affirmed in 98 Tex. 630, no op.

If a passenger negligently remains in a waiting room after being notified to board the train, and, while attempting to get on the train, the officer in charge puts it in motion, knowing that such person is in the act of getting on, and he is injured, the railway will be liable. *Gulf, C. & S. F. R. Co. v. Fox* (Sup.), 6 S. W. 569.

In an action against a railroad company for injuries to a passenger while attempting to board a train at a station, because of the sudden starting thereof, the conductor testified that he did not know that the passenger was getting on the train, though he stood on the well-lighted platform, at a short distance from the place where the pas-

senger was hurt. The porter testified that he did not see the passenger, though he was on the platform, between the conductor and the place of the accident, and looked up and down the platform before giving the signal to the conductor that it was all right to start. Held, that an instruction authorizing a verdict for plaintiff if the train was started while she was in the act of boarding it, and the employees in charge of the train knew of her position, was not erroneous; the company being chargeable with knowledge of those things which its employees by the exercise of ordinary care ought to have known, and, being thus chargeable, it had legal knowledge of the position of the passenger. *St. Louis Southwestern Ry. Co. of Texas v. Cannon* (Civ. App.), 81 S. W. 778, affirmed in 98 Tex. 630, no op.

In an action against a railroad company for injuries sustained by a passenger while attempting to board a train, a requested instruction that if, after the passenger arrived at the train, she took a position with one foot on the ground and the other on the step of the car, and so remained until her daughter, who went into the car, returned, and failed, in so doing, to exercise ordinary care, the verdict should be for the company, was properly refused because the testimony showed that the daughter had not returned at the time of the accident. *St. Louis Southwestern Ry. Co. of Texas v. Cannon* (Civ. App.), 81 S. W. 778, affirmed in 98 Tex. 630, no op.

The instruction was also erroneous because it ignored the evidence tending to show that the company started its train while the passenger was in a position of peril, which was known to the company's employees. *St. Louis Southwestern Ry. Co. of Texas v. Cannon* (Civ. App.), 81 S. W. 778, affirmed in 98 Tex. 630, no op.

#### **b. Duty to Furnish Proper Facilities.**

As to the duty of a carrier to con-

struct and maintain suitable platforms, etc., and to light same, see ante, "Duty as to Platforms, Approaches, etc.," V, A, 3.

#### **Failure to Provide Proper Facilities Must Be Proximate Cause of Injury.**

—Where a passenger, in attempting to board a train, slipped and fell by reason alone of the icy condition of the car steps, the fact that the railroad company may also have been negligent in not providing a portable step is not a ground of recovery. *Ft. Worth & D. C. Ry. Co. v. Work* (Civ. App.), 100 S. W. 962.

#### **c. Liability for Negligence in Assisting Passenger in Boarding Train.**

In an action for injury to plaintiff's wife, evidence that when the train was about to start, the conductor ordered her to get off and go to a rear car where there was no platform, and that a brakeman seized and jerked her aboard, injuring her spine, was sufficient to support a verdict for the plaintiff. *International, etc., R. Co. v. Mulliken*, 10 Tex. Civ. App. 663, 664, 32 S. W. 152, affirmed in 93 Tex. 643, no op.

#### **d. Liability for Injury to Passengers Crossing Tracks to Enter Trains.**

Two trains passed daily at a station, where the one first arriving passed to a side track, to reach which from the depot it was necessary for passengers to cross the main track, on which the second train was due five minutes later. On the conductor of the first train calling "All aboard," plaintiff, without looking, started to cross the main track to such train, but was struck by the second train, which had signaled its approach, but which he could not see, on account of the crowd, until he reached the track. Held, that plaintiff's failure to look and listen was not negligence per se, but the question was properly submitted to the jury. *Gulf, C. & S. F. Ry. Co. v. Morgan*, 64 S. W. 688, 26 Tex. Civ. App. 378.

While a train was standing at a station, and excursionists were crowding into it from each side, a freight car was moved up on a side track, and into the crowd, knocking one down and running over his arm, and knocking another away. A brakeman was on the car as a lookout, but he saw no one in its way, and saw no one struck, and did not warn the people of the car's approach or their danger. Held to be actionable negligence. (Civ. App. 1898) *St. Louis S. W. Ry. Co. of Texas v. Casseday*, 48 S. W. 6, reversed (1899) 50 S. W. 125, 96 Tex. 525.

Where, in an action against a railroad, there was some evidence that when a freight train moved into a crowd at the depot it did not ring the bell nor blow the whistle, a verdict will not be set aside on the ground that the company was not guilty of any negligence. (Civ. App. 1898) *St. Louis S. W. Ry. Co. of Texas v. Casseday*, 48 S. W. 6, reversed (1899) 50 S. W. 125, 96 Tex. 525.

#### **6. As to Construction, Maintenance, Equipment and Operation of Road, Means of Transportation, etc.**

##### **a. In General.**

The high degree of care and skill required of a railroad company engaged in the transportation of passengers pertains to the original construction, by competent engineers and workmen, of the road bed, track, engines, cars, and other appliances necessary to carry on properly the business of its road and operate its trains, the frequent and careful examination of the same to see that they have been thus constructed, to have been kept in safe condition and repair to prevent accidents, so far as human skill and foresight could reasonably anticipate and avoid the same; and also to the employment of a sufficient number of good, steady, and competent agents and employees to so conduct and con-

trol the train as to insure its careful and skillful management. *International, etc., R. Co. v. Halloren*, 53 Tex. 46. See, also, *Missouri, etc., R. Co. v. Flood*, 35 Tex. Civ. App. 197, 79 S. W. 1106, affirmed in 98 Tex. 625, no op.; *Levy v. Campbell* (Sup.), 19 S. W. 438; *Chicago, etc., R. Co. v. Barrett*, 35 Tex. Civ. App. 366, 80 S. W. 660, affirmed in 98 Tex. 611, no op.

If the company is negligent in any of these particulars, and this negligence is the legal cause of inquiry to the passenger, it is liable in damages. *International, etc., R. Co. v. Halloren*, 53 Tex. 46; *Levy v. Campbell* (Sup.), 19 S. W. 438.

Street railways are not insurers of the safety of their passengers, they are common carriers of passengers, with duties and responsibilities similar to those of a railroad company, and are required to exercise the highest degree of care and skill in their transportation, by providing suitable tracks, rolling stock, and appliances, and in the management of their business and movement of their cars. *San Antonio, etc., R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752, affirmed in 93 Tex. 719, no op. See, also, *Texas, etc., R. v. Miller*, 79 Tex. 78, 82, 15 S. W. 264; *Citizens R. Co. v. Sinclair*, 36 Tex. Civ. App. 266, 81 S. W. 329.

**Liability for Concurrent Negligence as to Road Bed and Operation.**—In an action against a railway company for injuries to a mail clerk in consequence of the derailment of a train, the petition alleged that the company was negligent in failing to exercise proper care to furnish a safe road bed and in running the train at an unsafe speed. Two persons who passed over the track before the accident testified that the track was in a bad condition. The conductor testified that the track was apparently in a good condition, that the train was running 25 miles an hour when the derailment occurred,

that it was unusual for a train to jump the track at that rate of speed, and that the train was running 25 miles an hour 110 feet from where he had been told there was a bad place. Held to require a charge that, if the concurrent negligence of the company in failing to provide a safe road bed and in failing to properly operate the train caused the injury, it was liable, though each negligent act acting separately was not the proximate cause. *Sproule v. St. Louis & S. F. Ry. Co.* (Civ. App.), 91 S. W. 657.

#### **Degree of Care and Skill Required.**

—In accordance with the rule already laid down as to the degree of care required of carriers of passengers a railroad or street car company are not insurers as to the safety of their passengers, but the measure of their duty in the construction, equipment and maintenance of their tracks, rolling stock and other appliances, is that degree of care and skill which very cautious persons generally in their line of business, are accustomed to use, under similar circumstances, to prevent danger. *International, etc., R. Co. v. Halloren*, 53 Tex. 46; *San Antonio, etc., R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752, affirmed in 93 Tex. 719, no op.; *Citizens R. Co. v. Sinclair*, 36 Tex. Civ. App. 266, 81 S. W. 329; *Missouri, etc., R. Co. v. Flood*, 35 Tex. Civ. App. 197, 79 S. W. 1106, affirmed in 98 Tex. 625, no op.; *Levy v. Campbell* (Sup.), 19 S. W. 438.

For the general rule as to the degree of care required of carriers of passengers, see ante, "Degree of Care Required," IV, A, 1. As to application of this test in particular matters relating to the construction, equipment and operation of railroads, street railroads, etc., see the appropriate places in this section relating thereto.

#### **b. Duties as to Track, Road Bed, etc.**

##### **(1) Duties as to Construction, Maintenance, and Repair.**

**In General.**—While a carrier of pas-

sengers upon an ordinary road is not responsible for its condition, as it is not under his control and supervision, a different rule prevails as regards a railroad corporation, which, under extraordinary grants of franchise, builds, controls, and generally has the exclusive use of its road bed and track. *International, etc., R. Co. v. Halloren*, 53 Tex. 46.

It is the duty of a railroad company to see that its road bed and track are constructed by competent engineers and workmen, of good and suitable material, and to maintain the same in good order. *International, etc., R. Co. v. Halloren*, 53 Tex. 46; *Texas, etc., R. Co. v. De Milley*, 60 Tex. 194; *Galveston, etc., R. Co. v. Snead*, 4 Tex. Civ. App. 31, 23 S. W. 277; *Texas, etc., R. Co. v. Barron*, 4 Tex. Civ. App. 546, 549, 23 S. W. 537; *International, etc., R. Co. v. Anthony*, 24 Tex. Civ. App. 9, 12, 57 S. W. 897, affirmed in 94 Tex. 691, no op.; *San Antonio, etc., Co. v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015, affirmed in 97 Tex. 646, no op.; *Houston, etc., R. Co. v. Norris* (Civ. App.), 41 S. W. 708; *St. Louis, etc., R. Co. v. Boyer*, 44 Tex. Civ. App. 311, 97 S. W. 1070; *Galveston, etc., R. Co. v. Patillo*, 45 Tex. Civ. App. 572, 101 S. W. 492, affirmed in 102 Tex. 583, no op.; *Galveston, etc., R. Co. v. Waldo* (Civ. App.), 26 S. W. 1004; *Galveston, etc., R. Co. v. Goodwin* (Civ. App.), 26 S. W. 1007; *Sproule v. St. Louis, etc., R. Co.* (Civ. App.), 91 S. W. 657; *Norton v. Galveston, etc., R. Co.* (Civ. App.), 108 S. W. 1044.

"A railway car can not be successfully or safely run except upon a track, and a railway company can not lawfully, either as to car or track, be wanting in extraordinary diligence towards passengers without becoming responsible in law for the consequences." *San Antonio, etc., Co. v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015, affirmed in 97 Tex. 646, no op.

The liability of a railroad company for exemplary damages for injuries to a passenger does not depend on its ability to keep its road in such condition that it can be safely operated. *Texas Trunk Ry. Co. v. Johnson*, 75 Tex. 158, 12 S. W. 482.

**Right of Passenger to Assume That Road Was Properly Constructed.**—In *San Antonio, etc., Co. v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015, affirmed in 97 Tex. 646, no op., it was held that the appellee had the right to assume that appellant had performed its duty in so constructing its road that its passengers, even on the footboards of its cars would not be exposed to injury by the unsafe construction of its road.

**Test as to Care of Road, etc., Required of Company.**—The high degree of skill and care required of a railroad company towards its passengers extends to the original construction of its road bed, etc. *International, etc., R. Co. v. Halloren*, 53 Tex. 46, 53; *Levy v. Campbell* (Sup.), 19 S. W. 438; *San Antonio, etc., Co. v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015, affirmed in 97 Tex. 646, no op.

An instruction that it is the duty of a railroad company to use the greatest care and skill in constructing its road, "in order to transfer over it safely its passengers, and in like manner to use such care in keeping" it "in repair as to secure its passengers a safe travel, as the nature of the business reasonably requires to protect the traveling public," does not make the company an insurer of the safety of passengers. *Galveston, H. & S. A. Ry. Co. v. Snead*, 4 Tex. Civ. App. 31, 23 S. W. 277.

In an action by a passenger against a railroad company for personal injuries, caused by an alleged defective roadbed, an instruction that it is the duty of the company to furnish a reasonably safe roadbed, and to use ordinary care to keep it so, but, if the

roadbed was not unsafe, or, if it were, it was not due to defendant's negligence, and its condition was unknown to defendant, or was known to plaintiff, or such condition was not the proximate cause of plaintiff's injuries, the jury must find for defendant, is not erroneous. *Galveston, H. & S. A. Ry. Co. v. Waldo* (Civ. App.), 26 S. W. 1004.

In an action against a railroad company for personal injuries sustained by a passenger, an instruction asked by the company that, if the track and rails where the accident occurred were in such condition as, in the judgment of experienced railroad men, was reasonably safe for passenger travel, as far as they could see, there can be no recovery, is properly refused, as seeking to apply an improper test as to the care of its road required of the company. *Missouri Pac. Ry. Co. v. Jarard*, 65 Tex. 560.

In an action against a carrier for injury to a passenger caused by a rough place in the roadbed, an instruction that "it was the duty of defendant to keep its roadbed in such repair, and its cars in such condition, as to transport those traveling upon its trains safely over its road, and, if it negligently failed to do so, and an injury resulted from such failure without such want of care on the part of the party injured as a prudent person would have used under like circumstances," then defendant would be liable, is erroneous, as it makes defendant an insurer of its passengers. *Gulf, C. & S. F. Ry. Co. v. Killebrew* (Sup.), 20 S. W. 182, reversed in (Civ. App. 1892) 20 S. W. 1005.

In an action against a carrier for injury to a passenger caused by a rough place in the roadbed, the court charged that "it was the duty of defendant to keep its roadbed in such repair and its cars in such condition as to transport those traveling upon its trains safely over its road, and if it negligently

failed to do so, and an injury resulted from such failure without such want of care on the part of the party injured as a prudent person would have used under like circumstances," then defendant would be liable. Held, that if this instruction was erroneous, as making defendant an insurer of its passengers, the error was cured by another instruction requiring plaintiff to show by a preponderance of the evidence that defendant had negligently suffered its roadbed to be out of such repair as to cause said injury." *Gulf, C. & S. F. Ry. Co. v. Killebrew* (Civ. App.), 20 S. W. 1005, reversing (Sup.), 20 S. W. 182.

In an action against a railroad for injuries to a passenger in a wreck, where the only issue presented was the unsafe condition of the track, owing to a failure to properly spike and tamp the ties and fill in between them where old ties had been replaced by new ones, and defendant sought to show that skillful trackmen had cared for the track in a careful manner the day before the wreck, the court charged that defendant was bound to exercise "that very high degree of care which a very highly skillful, experienced, and very careful person would exercise under similar circumstances in the conduct of the business." A special charge was also given that the care required was such as a very highly experienced and skillful, and very highly prudent, railroad trackman would have exercised under the circumstances. Held, that the special charge did not limit the degree of care required by the main charge, since "trackmen" were the only men working on the tracks "under similar circumstances," and the term included the roadmaster and section foreman as well as the common section hand. *Norton v. Galveston, H. & S. A. Ry. Co.* (Civ. App.), 108 S. W. 1044.

The keeping of railroad tracks in such a condition that the trains can

be operated over them in the usual and customary way in which the same are operated is not the test of the degree of care required of the railroad, but it is bound to the highest degree of care keeping its tracks in condition for the operation of its trains. *St. Louis & S. F. R. Co. v. Boyer*, 97 S. W. 1070, 44 Tex. Civ. App. 311.

**Carrier Not Required to Insure Safety against Unforeseen Contingencies.**—It is only for the consequence of such risks as could have been provided against by proper diligence that the carrier is held liable. *Houston, etc., R. Co. v. Richards*, 20 Tex. Civ. App. 203, 49 S. W. 687; *Texas, etc., R. Co. v. Hardin*, 62 Tex. 367. See ante, "Care Required of Carrier," IV.

In a personal injury suit against a carrier by a passenger, a charge that defendant was required to so construct its track as to avoid dangers which could be foreseen by skillful engineers was error. *Houston, etc., R. Co. v. Richards*, 20 Tex. Civ. App. 203, 205, 49 S. W. 687.

"These unavoidable dangers may be foreseen by competent engineers, and hence this instruction, taken literally, would make the carrier responsible for their consequences, although with all proper care and skill they could not have been averted." *Houston, etc., R. Co. v. Richards*, 20 Tex. Civ. App. 203, 205, 49 S. W. 687.

A railway company is required to so construct its road bed and track as to avoid such dangers as could be reasonably foreseen by competent and skillful engineers might be occasioned by ordinary rain-falls and freshets incident to the section of the country through which it is constructed, but it would not be guilty of such culpable negligence as to make it liable in damages if it failed to provide against such extraordinary floods, or other inevitable casualties caused by some

hidden force of nature unknown to common experience, and which could not have been reasonably anticipated by the ordinary skill and experience required in the prudent construction of the railroad. *International & G. N. R. Co. v. Halloren*, 53 Tex. 46.

By a sudden and extraordinarily heavy rainfall, about dark, confined to a limited locality, a portion of a railway bed was so undermined that it gave way under the weight of a train, three or four hours afterwards, and a passenger was injured. The railway bed was in safe condition before the rainfall; a train had safely passed over it two hours before the accident; and it had been inspected between the time of the passage of that train and the time of the accident, and was apparently in safe condition. The defect was not visible at the time of the accident. The train in question was carefully run at half speed at the time in question. Held, that no action would lie against the company. *International & G. N. R. Co. v. Halloren*, 53 Tex. 46, 37 Am. Rep. 744.

Where the evidence tended to show that the accident was caused by a broken rail, defendant alleged that the condition of its track was due to unprecedented rain, cold, and snow, and it was shown that there had been much and continuous rain and snow prior to the accident. Held, that a charge that defendant would not be liable if the defect that caused the accident was brought about by weather unusual and unprecedented, against which the company could not have guarded by the use of proper care and skill, was proper. *Missouri Pac. Ry. Co. v. Mitchell*, 72 Tex. 171, 10 S. W. 411.

A charge assuming negligence if the "cause of the car or trucks leaving the track was a defective roadbed, ties, or joints, or bolts," is objectionable, as liability for the consequences of such defective condition exists only when

such condition might, by the exercise of proper care, have been discovered and remedied before the accident. *Houston, E. & W. T. Ry. Co. v. Norris* (Tex. Civ. App.), 41 S. W. 708.

A mere continued spell of wet weather with a fall of snow is not such an unexpected and unforeseen contingency as will relieve a railroad company from liability to a passenger for injuries resulting from failure to keep the track in repair. *Missouri Pacific Ry. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325.

In an action by a passenger for personal injuries sustained in a railroad wreck, the fact that the accident was caused by a break in the track resulting from a flow of water during a rain is not sufficient ground for a new trial after verdict for plaintiff, when the evidence was conflicting as to whether the rainfall was unusually great. *Texas & P. Ry. Co. v. Barron*, 78 Tex. 421, 14 S. W. 698.

**Allegations as to Defective Condition of Track, etc.**—In an action against a railroad company for personal injuries, the complaint alleged derailment of defendant's car, on which plaintiff was a passenger, and its collision with a bridge, precipitating the car into the river, and alleged that the proximate cause of such injury was the defective condition of defendant's track and bridge; that the track was constructed on a steep grade, through a deep cut, which was defective in having no ditches to carry off water from the track during storms. Held to state a cause of action for negligence. *Galveston, H. & S. A. Ry. Co. v. Waldo* (Civ. App.), 26 S. W. 1004.

While plaintiff was a passenger on defendant's train it ran onto a siding because of a switch being open, collided with cars standing on the siding, and in the collision plaintiff was injured. In an action for damages, plaintiff's petition alleged that without plaintiff's fault or negligence the de-

defendant negligently ran said passenger train against and into a car on the track of the railroad, which caused the collision by which plaintiff was injured. Held, that a charge that the failure of any employee charged with the running of the company's trains, or the care of its tracks, to exercise a high degree of care, was negligence on the part of the company, was not objectionable on the ground that the care of the track was not raised by either the pleadings or the evidence, since the "care of the track" could only be construed, under the petition and facts, to mean care of the track with reference to the switch being in proper position. *International & G. N. R. Co. v. Bibolet*, 57 S. W. 974, 24 Tex. Civ. App. 4.

**Question as to Condition of Road One for Jury.**—Where a railroad's defense in a suit resulting from a wreck is that an unprecedented rainfall caused the washout, it is for the jury to determine its liability from all the evidence, and to determine whether the roadbed was properly constructed. *Texas, etc., R. Co. v. Barron*, 78 Tex. 421, 425, 14 S. W. 698.

In *Texas, etc., R. Co. v. De Milley*, 60 Tex. 194, the court instructed the jury as to the duty of a railway company to construct its road with good and suitable material, and to maintain it in good order, and informed the jury that a failure to do so was negligence. This was not an invasion of the province of the jury; for the whole question as to the condition of the road was left to the finding of the jury.

Where a portion of a railway bed was undermined by sudden and extraordinarily heavy rainfalls and gave way whereby a passenger was injured, although the railway bed was in safe condition before the rain and a train had safely passed over it two hours before the accident, and it had been inspected before the time of the pas-

sage of the train and was apparently in safe condition an instruction that the liability of the railroad depended on the manner and speed of running the train, considering the condition of the track and the state of the weather, if that in any way superinduced the accident, was erroneous as failing to submit the question of the knowledge of the condition of the track on the part of those in charge of the train. *International & G. N. R. Co. v. Halloren*, 53 Tex. 46.

In an action for injuries received by plaintiff while a passenger on defendant's train because of the car window falling on his hand in passing over a rough place in the road, an instruction for the jury to find for plaintiff if they "believe from the evidence \* \* \* that while traveling on said train plaintiff was injured by reason of said train passing over a rough place in defendant's roadbed," causing the sash to fall on his hand and injure it, is not erroneous as being on the weight of the evidence, and withdrawing from the jury the question whether the rough place in the roadbed was caused by defendant's negligence, where the court also charges that plaintiff must show that "defendant had negligently suffered its roadbed to be out of such repair as to cause said injury." *Gulf, C. & S. F. Ry. Co. v. Killebrew (Sup.)*, 20 S. W. 182.

**Evidence as to Condition of Road.**—In an action for injury received by a passenger on a railroad from a broken rail, evidence of other defects in the road in the vicinity of the accident held admissible to show that the company did not take due care of their road. *Texas & P. Ry. Co. v. De Milley*, 60 Tex. 194.

In an action against a railroad company for damages to a passenger caused in a wreck, evidence of bad condition of defendant's line of railway should be confined to the place of the wreck. *Texas Trunk R. Co. v.*



Johnson (Civ. App.), 25 S. W. 740, affirmed in 86 Tex. 421.

In a suit by a passenger for personal injuries caused by a railroad wreck, the condition of the roadbed at the time and place of the wreck may be shown. *Missouri Pac. R. Co. v. Mitchell*, 75 Tex. 77, 81, 12 S. W. 810.

To show a carrier's knowledge of the defective condition of a switch which caused a wreck, evidence of the previous condition of the switch causing the wreck is admissible. *Houston, E. & W. T. Ry. Co. v. Richards*, 49 S. W. 687, 20 Tex. Civ. App. 203.

To show a carrier's knowledge of the defective condition of a switch which caused a wreck, evidence that other switches on the track in similar condition had caused wrecks is admissible. *Houston, E. & W. T. Ry. Co. v. Richards*, 49 S. W. 687, 20 Tex. Civ. App. 203.

In an action for injuries to a passenger, by striking an open gate on a stock chute near the track while leaning out of a car window, held, evidence of the previous condition of the gate was admissible. *Gulf, etc., R. Co. v. Phillips*, 32 Tex. Civ. App. 238, 74 S. W. 793.

In an action by a passenger against a railroad company for personal injuries alleged to have been caused by defective cattle guards, evidence of their condition is admissible. *Galveston, H. & S. A. Ry. Co. v. Goodwin* (Tex. Civ. App.), 26 S. W. 1007.

In an action against railroad company for personal injuries resulting to a passenger from the bad condition of the roadbed causing the wreck, evidence is admissible of the general bad condition of the defendant's line. *Texas Trunk R. Co. v. Johnson*, 86 Tex. 421, 424, 25 S. W. 417.

In an action for injuries to a passenger by derailment of the train, caused by a washout, evidence of a passenger on the wrecked train that he heard one of the crew of a passing

train say to one of the trainmen of the train which was wrecked, "You had better not pull out from El Reno, as I believe you will go into the river," was admissible to show notice to the crew of the wrecked train of the probably dangerous condition of the track, the wreck having occurred in that vicinity. *Chicago, R. I. & P. Ry. Co. v. Cain*, 84 S. W. 682, 37 Tex. Civ. App. 531.

Evidence, in an action for injury to a passenger from being thrown from the train while passing from one car to another, held sufficient to authorize a finding that the accident was caused by a defective track. *Galveston, H. & S. A. Ry. Co. v. Patillo*, 101 S. W. 492, 45 Tex. Civ. App. 572.

In an action by a railroad passenger for injuries occasioned by the train leaving the track, evidence of the general condition of the road at or near the place of the accident is admissible on an issue whether the track was kept in proper repair. *Missouri Pac. R. Co. v. Collier*, 62 Tex. 318.

In an action for personal injuries occasioned by the overturning of a car, plaintiff's evidence being very strong to show that the condition of the track was bad, the rails being badly worn and ends of sleepers rotten, and that its condition had not materially changed for several months, and defendant's witnesses virtually admitting that the condition of the track was bad, but endeavoring to account for it by the prevalence of bad weather, the admission, for the purpose of showing knowledge on the part of the company, of evidence of the reputation as to condition of the track in the community along the line, and of a letter written to a local treasurer, for the production of which no notice was given, is harmless error. *Missouri Pac. Ry. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325.

In a personal injury suit by a passenger because of defective roadbed,

the condition of the road elsewhere, and the fact of previous wrecks elsewhere, are not admissible. *Missouri Pac. R. Co. v. Mitchell*, 75 Tex. 77, 81, 12 S. W. 810.

It has often been held in Texas that measures taken by a railway company, after an accident, by which it has changed the condition existing at the time of the accident, can not be received as implying an admission of negligence. *Gulf, etc., R. Co. v. McGowan*, 73 Tex. 355, 11 S. W. 336; *Missouri Pac. R. Co. v. Hennessey*, 75 Tex. 155, 158, 12 S. W. 608; *Galveston, etc., R. Co. v. Briggs*, 4 Tex. Civ. App. 515, 23 S. W. 503; *San Antonio, etc., R. Co. v. Lynch*, 8 Tex. Civ. App. 513, 28 S. W. 252, and authorities there cited; *Galveston, etc., R. Co. v. Walker* (Civ. App.), 48 S. W. 767.

Evidence of repair of track after the accident, when offered in chief by the plaintiff and not in rebuttal of any proof made by the opposite party, is inadmissible. *Fordyce v. Chancey*, 2 Tex. Civ. App. 24, 21 S. W. 181, citing *Gulf, etc., R. Co. v. McGowan*, 73 Tex. 355, 11 S. W. 336; *Missouri Pac. R. Co. v. Hennessey*, 75 Tex. 155, 12 S. W. 608; *St. Louis, etc., R. Co. v. Jones* (Sup.), 14 S. W. 309.

In a suit for personal injury to a passenger, the fact that soon after the wreck certain uninjured ties were replaced and others reset is admissible to rebut the railroad's evidence that the track was in good condition at time of wreck and used thereafter without repair. *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 543, 20 S. W. 766.

Evidence that a railway company had repaired its track at the place of the alleged injury to passenger, and subsequent thereto is not admissible as showing negligence at the time of the injury. *Texas Trunk R. Co. v. Ayres*, 83 Tex. 268, 271, 18 S. W. 684.

In an action for injuries to a passenger by derailment of a train being run over a completely submerged

track, evidence held sufficient to establish defendant's negligence. *Chicago, R. I. & P. Ry. Co. v. Cain*, 84 S. W. 682, 37 Tex. Civ. App. 531.

Evidence as to whether exercise of highest degree of care by defendant railway would have made its roadbed and track safe for passengers is inadmissible, where no evidence connected the condition of the track with the injury sued for. *Sickles v. Missouri, etc., R. Co.*, 13 Tex. Civ. App. 434, 436, 35 S. W. 493, affirmed in 93 Tex. 720, no op.

In an action for injuries to a passenger, the answer to a question to a witness whether or not the exercise of the highest degree of care by the defendant railway company would have placed its roadbed and track in any safer condition for the running of its passenger trains was properly excluded because calling for an opinion. *Sickles v. Missouri, K. & T. Ry. Co. of Texas*, 13 Tex. Civ. App. 434, 35 S. W. 493.

## (2) Duty to Keep Track Free from Obstruction.

The duty of a railroad company to exercise the utmost care for the safety of its passengers extends to keeping its road bed free from obstructions endangering such passengers. *International, etc., R. Co. v. Thompson*, 34 Tex. Civ. App. 67, 77 S. W. 439, affirmed in 98 Tex. 622, no op.

Where a train is derailed by an animal wounded by a preceding train, and left on or near the track, the company is chargeable with negligence. *Mexican Cent. Ry. Co. v. Lauricella*, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103.

Where an animal strays on the track in the nighttime, and is not discovered by the trainmen until struck by the train, though it could have been seen 400 yards away, there is such negligence on the part of the company as to render it liable to a passenger injured in the resulting acci-

dent. *Mexican Cent. Ry. Co. v. Lauricella*, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103.

Where a train collides with cattle on the track, injuring a passenger, it can not, as a basis for exclusion of evidence that the right of way fence near the place was so defective as not to prevent cattle coming through, be held, as matter of law, that a carrier by rail owes its passengers no duty to fence its right of way, or to use reasonable care and diligence to keep the fence in such repair as will prevent cattle coming through onto the track. *International & G. N. R. Co. v. Thompson*, 77 S. W. 439, 34 Tex. Civ. App. 67.

Where the derailment was caused by a collision with a calf on the track, which could have been seen 600 feet in advance of the train, and the railroad company failed to fence its track, having that right, it is sufficient to show negligence. *Gulf, C. & S. F. Ry. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 23 Am. St. Rep. 345, 11 L. R. A. 486.

The failure of a railroad company to cut down bushes along the track, which enabled cattle to come suddenly upon the track without time for the engineer to avoid them, renders the company liable to a passenger injured by a cow so getting onto the track and derailling the train. *Eames v. Texas & N. O. Ry. Co.*, 63 Tex. 660.

#### **c. Duties as to Vehicles and Means of Carriage.**

##### **(1) Duty to Furnish Sufficient Accommodations.**

**Statutory Requirement.**—The Texas statutes expressly make it the duty of a railroad company engaged in transporting passengers to furnish sufficient accommodations for the transportation of all such passengers as shall, within a reasonable time previous to the starting of its cars, offer for transportation at the place of starting. Rev. Stat. art. 4226. *Houston, etc., R. Co.*

*v. Smith*, 63 Tex. 322; *Eddy v. Rider*, 79 Tex. 53, 15 S. W. 113.

**Liability for Injuries from Overcrowding.**—The negligence of a railroad company in overcrowding its cars, compelling a passenger to ride on the platform, from which he was pushed by the jostling of other passengers, was a proximate cause, the casualty being one which the company might reasonably have foreseen, though it could not have foreseen the particular circumstances. *International & G. N. R. Co. v. Williams*, 50 S. W. 732, 20 Tex. Civ. App. 587.

Under Rev. St. 1895, arts. 4509, 4516, requiring railroad companies to furnish separate coaches for negroes and whites, and making it their duty to remove passengers from the coaches in which they were not entitled to ride, it was error to refuse to instruct that if plaintiff, a negro, entered the negro coach, but, on account of white men occupying the seats and room, was crowded onto the platform, from which he was pushed or thrown by the swaying of the car, without negligence on his part, he was entitled to recover, there being evidence to support the instruction. *Williams v. International & G. N. R. Co.*, 67 S. W. 1085, 28 Tex. Civ. App. 503.

##### **(2) Duty to Furnish Equal Accommodations.**

Under Rev. St. 1895, art. 4509, providing that railroad companies shall furnish separate coaches for white and negro passengers, equal as to comforts, a negro can recover for pain suffered by failure of the company to furnish in the car set apart to negroes a water-closet, as in the other cars. *Henderson v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.), 38 S. W. 1136.

It is no defense to an action for such injury that the negro did not go into the car provided for white passengers, which, under the statute, he had no right to do. *Henderson v. Gal-*

veston, H. & S. A. Ry. Co. (Tex. Civ. App.), 38 S. W. 1136.

In an action for damages by a negro against a railroad company for being required to ride in a car not provided with a water-closet, evidence that plaintiff suffered no discomfort or injury on account of the car not being provided with a water-closet is admissible. *Henderson v. Galveston, H. & S. A. Ry. Co.* (Civ. App.), 42 S. W. 1030, affirmed in 93 Tex. 709, no op.

The failure of a railway company to provide a passenger with a coach "equal in all points of comfort and convenience to those furnished passengers of another race," will not render it liable in damages in an action by such passengers, suing as a private person, in the absence of proof of actual injury or special damage to plaintiff resulting from such failure. *Norwood v. Galveston, etc., R. Co.*, 12 Tex. Civ. App. 560, 34 S. W. 180.

**(3) Liability for Refusal of Accommodations to Which Ticket Entitles.**

Where a lady purchasing a first-class ticket was refused admission to the ladies' car in which those having such tickets were entitled to ride, it was held that she was entitled to recover. *Texas & P. Ry. Co. v. Johnson*, 2 Willson, Civ. Cas. Ct. App. §§ 185, 186.

**(4) Duty to Use Properly Constructed Cars.**

**In General.**—A railroad must furnish safe cars for the transportation of all persons, whether passengers or employees, who have the right to travel on them, and if a car be so improperly constructed as to make its use gross negligence, and such negligence is the proximate cause of an injury, an action for damages will lie. *Gulf, Western Texas & Pac. Ry. Co. v. Ryan*, 69 Tex. 665, 7 S. W. 83.

**Use of Broad Gauge Car on Narrow Gauge Track.**—The use in a train running over a track of three feet gauge, of two large box cars built for a road

of four feet eight inches gauge, with knowledge of the defect, is inconsistent with the high degree of care required of passenger carriers, and a court in a suit by the administrator of a passenger for damages for his wrongful death, may so instruct. *East Line & Red River Ry. Co. v. Smith*, 65 Tex. 167.

**(5) Duty as to Appliances for Safety of Passengers.**

**In General.**—The high degree of care imposed upon a railroad company by law as a carrier of passengers requires it to adopt all reasonable means for the comfort and safety of its passengers. *Houston, etc., R. Co. v. Rogers*, 16 Tex. Civ. App. 19, 40 S. W. 201.

It is the duty of the carrier to avail itself of well-tested inventions and improvements which materially contribute to safety. *Johnson v. Gulf, etc., R. Co.*, 2 Tex. Civ. App. 139, 21 S. W. 274.

**Applications of Rule.**—The duty of a carrier to exercise the highest degree of care compatible with the reasonable prosecution of its business to prevent injury to a passenger extends to the providing of a safe spark arrester. (1903) *St. Louis Southwestern Ry. Co. of Texas v. Parks*, 76 S. W. 740, 97 Tex. 131, reversing for error in charge 73 S. W. 439; (Civ. App. 1904) *Missouri, K. & T. Ry. Co. of Texas v. Flood*, 79 S. W. 1106, 35 Tex. Civ. App. 197.

In an action against a railroad for injuries to a passenger caused by cinders escaping from the engine and getting into the passenger's eyes, a charge to find for plaintiff, if defendant negligently failed to equip its engine with proper and suitable appliances to prevent the escape of cinders or negligently failed to have such appliances in reasonably good repair, or if its servants negligently operated the engine and such negligence was the proximate cause of plaintiff's injury, was proper. *St. Louis Southwestern Ry. Co. of Texas v. Parks*, 90 S. W. 343, 40 Tex. Civ. App. 480.

A passenger was injured by the window of a car falling on his fingers, and in an action for the injuries it was shown that the car had left a place of general inspection; that it was a new one, and that the window was supplied with proper catches, but that the window was not raised above the catches; and that it is sometimes difficult to raise windows above catches on new cars. Held, that the evidence was sufficient to sustain a verdict for plaintiff. *International & G. N. R. Co. v. Phillips*, 69 S. W. 107, 29 Tex. Civ. App. 336.

A finding that a street railway was negligent in using for the carriage of a small child an open car, the seats of which projected along the floor, so as to leave an opening or pitfall through which the child fell to the street, was justified. *Northern Texas Traction Co. v. Rove*, 86 S. W. 621, 38 Tex. Civ. App. 601.

Plaintiff, while traveling on defendant's passenger train, started to go from one coach to another for water, and on his return lost his balance by the movement of certain planks across the space between the cars, and was thrown to the ground. Defendant was changing the drawheads of its cars, and the coaches in this instance were chained together leaving an extraordinary space between the cars of about 18 inches, covered by the planks, which were nailed at one end and loose at the other. Held, that the use of such a coupling and walkway constituted negligence on the part of the carrier. *St. Louis S. W. Ry. Co. v. Keitt* (Civ. App.), 76 S. W. 311, affirmed in 97 Tex. 645, no op.

In an action by a passenger for personal injuries alleged to have been caused by defendant's negligence in using a car door of unusual construction, rendering it more than ordinarily dangerous, plaintiff can recover on proof of this allegation on showing that such negligence caused his injury with

no contributory negligence on his own part. *Sturdivant v. Ft. Worth, etc., R. Co.* (Civ. App.), 27 S. W. 170, 171.

In an action for injuries to a passenger whose fingers were crushed by the closing of a car door, the evidence held sufficient to warrant a finding that the latch used to hold the door open was defective. *Missouri, K. & T. Ry. Co. of Texas v. Perry* (Civ. App.), 93 S. W. 42.

Where, in an action for injuries to a passenger, the alleged negligence was that defendant failed to fasten back the door of a coach, so as to cause the door safely to stand open; that the catch in use for the purpose of holding the door open was old and out of repair; and that the train on which plaintiff was riding was carelessly and suddenly stopped with great force, and the door was thrown from its fastenings against plaintiff, he being in no position to examine the fastenings of the door, was entitled to recover for the injury sustained, if the proof showed some degree of negligence on defendant's part with reference to any one of the grounds alleged. *Texas & P. Ry. Co. v. Leakey*, 87 S. W. 1168, 39 Tex. Civ. App. 584.

In *Citizens R. Co. v. Wade*, 40 Tex. Civ. App. 561, 91 S. W. 645, affirmed in 101 S. W. 631, no op., it was held that the evidence was sufficient to support a finding of negligence on the part of appellant in providing the car with defective and insufficient brakes and other appliances with which to control its movements.

Rev. St. art. 4517, requiring railroad companies to provide the rear coach of every train transporting passengers and merchandise with a good and efficient brake, and to station a competent brakeman on such coach, does not render a railroad company liable for an injury to a passenger on a passenger train resulting from a failure to provide an efficient hand brake and brakeman on the rear coach, as the statute

only applies to mixed trains. *Texas & P. Ry. Co. v. Storey*, 68 S. W. 534, 29 Tex. Civ. App. 483.

**Test as to Degree of Care.**—It is not to be understood that the general rule as to the degree of care demanded of carriers of passengers requires of a railroad company every possible precaution which ingenuity might suggest or the skill of science might afford, by which accidents may be avoided, but that it shall adopt such precautions of known value as have been practically tested. *International, etc., R. Co. v. Halloren*, 53 Tex. 46; *International, etc., R. Co. v. Welch*, 86 Tex. 203, 24 S. W. 390. And see *Texas, etc., R. Co. v. Jumper*, 24 Tex. Civ. App. 671, 60 S. W. 797.

Plaintiff, a passenger on defendant's train, was injured by the escape of a red-hot cinder from the engine. Held, that a charge which required defendant to show that its engine was equipped with the best appliances obtainable, without qualification as to whether such appliances were in use or had been approved, was erroneous, since it imposed too high a degree of care. *Texas Midland R. Co. v. Jumper*, 60 S. W. 797, 24 Tex. Civ. App. 671.

Instructions in an action for an injury to a passenger by a cinder were erroneous which placed on defendant the burden of proving that it had selected, or exercised the highest degree of care to select, the best spark arrester in use. *Missouri, K. & T. Ry. Co. of Texas v. Mitchell*, 79 S. W. 94, 34 Tex. Civ. App. 394.

In an action for injuries to a passenger, a requested charge that, if the engine was equipped with one of the best appliances for preventing the escape of cinders, and defendant had used ordinary care to keep the same in repair, and it was carefully handled, then the burden was on plaintiff to show negligence, while correct as to the burden of proof, was erroneous in stating the test of care to be the

selection of "one of the best approved appliances," the proper test being the exercise of that high degree of care required of a carrier in selecting the appliance. Judgment, *St. Louis S. W. Ry. Co. v. Parks* (Civ. App.), 73 S. W. 439, reversed. *St. Louis Southwestern Ry. Co. of Texas v. Parks*, 76 S. W. 740, 97 Tex. 131.

**Sufficiency as Dependent on Nature of Road and Amount of Its Business.**

—Treating of the subject of the use of certain engines and machinery on short branch roads with comparatively a small amount of business Mr. Wharton says: "If I employ a carrier of small means and machinery, knowing what his capacity is, I must take him as I find him. \* \* \* A railroad doing a small business in a sparsely populated territory, and running only a few trains, is not required to apply all the delicate checks and guards that are in use. \* \* \* Diligence in all these cases is not the perfection of the ideal road; it is the practical adequacy of the actual road for the particular duty it undertakes." *International, etc., R. Co. v. Copeland*, 60 Tex. 325, quoting Whart. on Neg., sec. 140.

**Carrier Liable Only for Results Which Might Have Been Anticipated.**

—Where the air brakes on the rear passenger coach of a train are in such a condition that the passengers are not endangered as long as the coach is attached to the train, the fact that the brakes are not in such a high degree of efficiency as to stop such coach before the forward section of the train is stopped, on the brakes being automatically set by the act of a drunken passenger in uncoupling the rear coach while the train is in motion, is not sufficient, as a matter of law, to render the company liable to a passenger injured in a collision of the coach with the forward section, as the company is not bound, as a matter of law, to anticipate such unauthorized acts by

passengers, but the question whether the circumstances require it to anticipate such act is for the jury. *Texas & P. Ry. Co. v. Storey*, 68 S. W. 534, 29 Tex. Civ. App. 483.

**No Liability for Defects Not Discoverable by Exercise of High Degree of Care.**—Where it appears that the accident causing the injuries resulted from a flaw in the axle of defendant's locomotive tender, and that such flaw could not have been discovered by the exercise of the very high degree of care imposed by law, a verdict for plaintiff should be set aside. *Texas & P. Ry. Co. v. Buckalew* (Civ. App.), 34 S. W. 165.

**Question as to Negligence in Using Certain Appliances One for Jury.**—Where a passenger in a Pullman car goes to the wash room while the car is in motion, and while steadying himself by placing his hand on what appeared to him a plain wall, in order to dry his hands after washing, his hand is caught in a door as it is opened, which was due to the peculiar mechanism of the door, it is a question for the jury whether the company was negligent in using a door of that kind. *Sturdivant v. Ft. Worth & D. C. Ry. Co.* (Civ. App.), 27 S. W. 170.

Where a passenger was injured by the falling of a car window, caused by defective or insufficient fastenings, whether defendant's failure to provide the windows with reasonably safe fastenings and keeping them in that condition was negligence was for the jury, and hence it was error for the court to charge as a matter of law that "any failure or omission of defendant" to so provide and keep reasonably safe fastenings was negligence. *International & G. N. R. Co. v. Hubbs*, 82 S. W. 1062, 37 Tex. Civ. App. 77.

Whether a street railroad was negligent in using, for the transportation of small children, an open car, the seats of which projected beyond the floor, so as to leave an opening or

pitfall through which a child might fall to the street, is a question of fact. *Northern Texas Traction Co. v. Rove*, 86 S. W. 621, 38 Tex. Civ. App. 601.

**Burden of Proof as to Showing Use of Best Appliances Available.**—Where it is shown that a passenger on a railroad train has been injured by a red-hot cinder from an engine, the burden of proof is on the company to show that the engine was properly equipped. *Texas Midland R. Co. v. Jumper*, 60 S. W. 797, 24 Tex. Civ. App. 671.

**Evidence as to Improper Condition of Car and Equipment.**—In an action for injuries to a passenger from an electric shock received from a charged street car, evidence of another person that he was shocked by the same car on the same day was admissible as tending to show that the car and equipment were not in proper condition, and that the company knew, or ought to have known, such fact by the use of ordinary care. *Dallas Consol. Electric St. Ry. Co. v. Broadhurst*, 68 S. W. 315, 28 Tex. Civ. App. 630.

On the issue of negligence of a railroad in maintaining a defective step on a passenger car, testimony that witness, some time following the event in question, called the attention of third persons to the condition of the step, was inadmissible. *Texas Midland R. R. v. Ellison*, 87 S. W. 213, 39 Tex. Civ. App. 172.

In an action for personal injuries, a railway company will not be permitted to show it had furnished its passengers with a more expensive road and equipment than its business would justify. *Gulf, C. & S. F. Ry. Co. v. Southwick* (Civ. App.), 30 S. W. 592.

#### (6) Duty as to Repairs.

A carrier owes a passenger that high degree of care to keep its engines and appliances in good repair which a very prudent and cautious person would use in similar circumstances. *Missouri, K. & T. Ry. Co. of Texas v.*

Flood, 79 S. W. 1106, 35 Tex. Civ. App. 197.

In an action for injury to a passenger, a charge to find for defendant if it had exercised "proper" care to keep the spark arrester in reasonably good repair and condition did not impose too high a degree of care upon defendant. *Missouri, K. & T. Ry. Co. of Texas v. Flood*, 79 S. W. 1106, 35 Tex. Civ. App. 197.

Charges in an action for injury to a passenger, caused by a cinder from an engine, made it the absolute duty of defendant to equip its engine with the best spark arrester in use, and to keep the same in good order. Held, erroneous for the reason that it is only liable for failure to exercise the highest degree of care in these respects. *Missouri, K. & T. Ry. Co. of Texas v. Mitchell*, 79 S. W. 94, 34 Tex. Civ. App. 394.

In *Dallas, etc., St. R. Co. v. Broadhurst*, 28 Tex. Civ. App. 630, 68 S. W. 315, affirmed in 95 Tex. 676, no op., it was held that a charge requiring the exercise by a carrier of "great care and caution" in keeping its machinery in repair, did not impose a higher degree of care upon the carrier than is required by law.

An instruction, in an action against a carrier for injury to a passenger, that it was defendant's duty to provide reasonably safe cars, and to cause them to be operated in a reasonably safe manner, is erroneous, it being its duty only to exercise a high degree of care to furnish safe cars, and operate them safely. *Citizens' Ry. Co. v. Sinclair*, 61 S. W. 399, 36 Tex. Civ. App. 266.

In an action for injuries to a passenger on a street car, an instruction that the defendant owed its passengers the duty of exercising "great care and caution" to keep the machinery and appliances of its cars in a reasonably safe condition and repair, was not objectionable as imposing on the company a higher degree of care than is

required by law. *Dallas Consol. Electric St. Ry. Co. v. Broadhurst*, 68 S. W. 315, 28 Tex. Civ. App. 630.

#### (7) Duty to Provide Seats for Passengers.

**In General.**—A carrier must provide passengers with seats, failure to do so being a breach of the contract of carriage, subjecting it to proximately resulting damages. *Texas & P. Ry. Co. v. Rea*, 27 Tex. Civ. App. 549, 65 S. W. 1115.

**Degree of Care Required.**—A carrier must exercise as high a degree of care for the safety of passengers in providing seats in its cars as it does in providing the car or the roadbed, or in the running of its trains. *International & G. N. R. Co. v. Anthony*, 57 S. W. 897, 24 Tex. Civ. App. 9.

A railroad company is bound to use a high degree of care in furnishing seats to passengers necessary to protect them from the danger of riding in a more exposed position. *International & G. N. R. Co. v. Williams*, 50 S. W. 732, 20 Tex. Civ. App. 587.

A railroad company is bound to exercise more than ordinary care to provide its passengers with seats. (*Civ. App.*), *Galveston, H. & S. A. Ry. Co. v. Morris*, 60 S. W. 813, judgment affirmed (*Sup.*), 61 S. W. 709, 94 Tex. 505.

Objection that a railroad company which carried plaintiff's wife and child in an unheated car in cold weather, without water, and compelled the wife to stand and hold the child, whereby they were made sick, was not required "to use that high degree of care which would have been exercised by very cautious, prudent, and competent persons under similar circumstances," was untenable. *St. Louis S. W. Ry. Co. of Texas v. Campbell*, 69 S. W. 451, 30 Tex. Civ. App. 35.

**Carrier Not Absolutely Bound to Furnish Safe Seats.**—A carrier of passengers is not absolutely bound to furnish passengers safe seats, but is



only chargeable with the exercise of a very high degree of care to provide reasonably safe seats. *Boyles v. Texas & P. Ry. Co.* (Civ. App.), 86 S. W. 936.

**Duty to Anticipate Demand for Extra Accommodations.**—In an action against a railway company for injuries to plaintiff's wife by negligent failure to furnish her a seat in its car, it appeared that the train was overcrowded, owing to an extra demand for transportation on that day, on account of a low excursion rate, and that this condition occurred annually at this period. Defendant had an extra train following in an hour or two, but plaintiff and his wife, when they boarded the crowded train, were not informed of this fact. Held, that the railroad company did not exercise proper diligence in anticipating the demanded extra accommodations, and hence a charge that defendant was only required to use such diligence in providing extra accommodations as a very prudent person would exercise under similar circumstances was properly refused, because not called for by the evidence. *Texas & P. Ry. Co. v. Rea*, 74 S. W. 939, affirmed in 97 Tex. 649, no op.

Where, in an action against a carrier for injuries to plaintiff's wife by providing an over-crowded, unlighted, and filthy coach, the uncontradicted testimony of the conductor was that, before plaintiff's wife boarded the train, four coaches were set out of the train because not needed, and that they had plenty of coaches to haul the crowds, a charge that the great demand on the carrier's facilities on account of a veterans' reunion should be considered in extenuation of its failure to provide a proper coach is properly refused as unsupported by the evidence. *Texas & P. Ry. Co. v. Bratcher* (Civ. App.), 78 S. W. 531.

**Failure to Furnish Seat as Negligence Per Se.**—Failure of a railroad

company to furnish every passenger with a seat, and allowing a passenger to board a car when there is no seat for him, is not negligence per se. *Houston & T. C. R. Co. v. Bryant*, 72 S. W. 885, 31 Tex. Civ. App. 483.

**(8) Duty to Heat, Light, and Otherwise Equip Cars for Comfort of Passengers.**

**Duty to Heat Cars.**—It is the duty of a railroad company to properly and comfortably warm its cars for the welfare and comfort of its passengers. *Ft. Worth, etc., R. Co. v. Hyatt*, 12 Tex. Civ. App. 435, 436, 34 S. W. 677; *St. Louis, etc., R. Co. v. Campbell*, 30 Tex. Civ. App. 35, 69 S. W. 451, affirmed in 97 Tex. 645, no op.; *Dillingham v. Hodges* (Civ. App.), 26 S. W. 86; *Texas, etc., R. Co. v. Kingston*, 30 Tex. Civ. App. 24, 68 S. W. 518, affirmed in 95 Tex. 688, no op.; *St. Louis, etc., R. Co. v. Haney* (Civ. App.), 94 S. W. 386, affirmed in 101 Tex. 656, no op.; *Duck v. St. Louis, etc., R. Co.* (Civ. App.), 63 S. W. 891.

Especially so when they were women and little children, and their discomfort was made known to the conductor or brakeman and fires requested. *Ft. Worth, etc., R. Co. v. Hyatt*, 12 Tex. Civ. App. 435, 34 S. W. 677.

In an action for damages for injury resulting in death, caused by the alleged negligence of defendant railway company in failing, though requested, to warm its coaches in cold weather, it is not necessary for plaintiff, in order to be entitled to recover, to allege and prove a universal custom on the part of railway companies to warm their coaches, as such is their duty towards their passengers. *Ft. Worth & D. C. Ry. Co. v. Hyatt*, 12 Tex. Civ. App. 435, 34 S. W. 677.

**Degree of Care Required.**—With regard to properly heating its cars it has been held that a railroad company must exercise that high degree of care which very cautious, prudent and competent persons would exercise under

the same circumstances. *St. Louis, etc., R. Co. v. Campbell*, 30 Tex. Civ. App. 35, 69 S. W. 451, affirmed in 97 Tex. 645, no op.

**Application of Rule to Mail Cars.—**

It is the duty of a railroad company to keep its mail cars so heated as to be safe and comfortable for the mail clerk while in the discharge of his duties. *International & G. N. Ry. Co. v. Davis*, 43 S. W. 540, 17 Tex. Civ. App. 340.

**Liability in Case of Connecting Carriers.—**

Where an initial carrier sells a ticket for transportation of a passenger over its own and connecting lines in a car furnished by the initial carrier, under an agreement with the connecting carriers, it is liable for injuries to the passenger occasioned by furnishing a car incapable of being made comfortably warm, irrespective of whether the injuries occur on its own line or on the line of a connecting carrier, for whose negligence the contract purports to exempt the initial carrier. *Missouri, etc., R. Co. v. Foster* (Civ. App.), 87 S. W. 879, affirmed in 101 Tex. 649, no op.

**Evidence Showing Employees' Knowledge of Condition of Cars.—**

Car employees were sufficiently shown to have known of the use of profane language by plaintiff's fellow passengers, and that plaintiff was suffering from its cold condition, where the conductor had passed through the car, taking up tickets, and other employees had swept it out, after plaintiff had become a passenger. *Texas & P. Ry. Co. v. Kingston*, 68 S. W. 518, 20 Tex. Civ. App. 24.

**Instructions in Actions for Injuries for Failure to Heat.—**

An instruction in an action against a carrier for injuries to a passenger in consequence of the failure to heat the coach, authorizing a recovery on finding that plaintiff was a passenger and entitled to be carried from one point to another, and that during the time he was

so carried the weather was cold and the employees in charge of the train neglected to keep the coach warm, in consequence of which plaintiff was injured, limits a recovery for the injuries received during the time the passenger traveled from the designated point to the other designated point, and was not open to the objection that it allowed a recovery for injuries resulting from exposure while he was a passenger between other points. *St. Louis Southwestern Ry. Co. of Texas v. Haney* (Civ. App.), 94 S. W. 386, affirmed in 101 Tex. 656, no op.

In an action by a passenger for injuries from an unwarmed car, the court, after instructing as to what facts would justify plaintiff's recovery, added: "But if you believe \* \* \* that the defendant furnished the plaintiff \* \* \* with a reasonably comfortable car to ride in, \* \* \* then the defendant performed all the duty it owed plaintiff; and, if you so believe, your verdict will be for defendant." Held, that the charge was not objectionable as making the defendant an insurer of the condition of the car. (Civ. App. 1903), *Missouri, K. & T. Ry. Co. v. Harrison*, 77 S. W. 1036, judgment reversed (1904), 80 S. W. 1139, 97 Tex. 611.

A charge that if plaintiff's wife and children were received by the defendant railway company as passengers, and the weather was cold, and defendant failed to properly heat the cars, and that by reason thereof plaintiff's wife and child were made sick, and that plaintiff, as a result of said sickness, was required to spend money for medical treatment, the jury should find for plaintiff, was erroneous, in requiring the jury to find that both the wife and child were sick, in order to warrant a recovery. *Duck v. St. Louis & S. W. Ry. Co.* (Civ. App.), 63 S. W. 891.

**Evidence Held Insufficient to Authorize Recovery for Plaintiff.—**Where, in an action against a railway company

for damages to a passenger, defendant denied generally the allegations that the coach was not properly heated, and that the passenger contracted a cold by reason thereof, and the passenger's only testimony that the coach was not sufficiently heated was contradicted by another passenger and the railway employees, the claim that the coach was not properly heated was denied by allegation and proof, thereby rendering a verdict for the company supported by the evidence. *Tyler v. Texas & P. Ry. Co.* (Civ. App.), 79 S. W. 1075.

Where, in an action against a railway for damages sustained to a passenger, the company's evidence showed that the coach in which the passenger was riding was heated by a stove in which the coal was replenished from time to time, that the cold was unprecedented, and that the illness of the passenger was not the result of the company's negligence, and the passenger testified that she was cold while riding in the coach, an instruction that, if the company's employees exercised the care very prudent persons would have exercised, the company was not liable, though the passenger suffered from cold and became sick therefrom, was not erroneous as not based on the evidence. *Tyler v. Texas & P. Ry. Co.* (Civ. App.), 79 S. W. 1075.

**Evidence Held Sufficient to Warrant Verdict for Plaintiff.**—In an action against a carrier for negligence in permitting its car to become cold, whereby a passenger became permanently injured and diseased, evidence considered, and held sufficient to warrant a verdict for plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. Byrd*, 89 S. W. 991, 40 Tex. Civ. App. 315.

Plaintiff, two years of age, was about to be taken by his mother on one of defendant's trains which left their place of residence early in the morning. Plaintiff was asleep when his parents got ready to start, and was taken to

the depot, a distance of  $2\frac{1}{2}$  blocks, in a baby buggy. The weather was cold, but plaintiff, before boarding the cars, was wrapped up, and was warm. The cars were cold, and without fire, and plaintiff contracted a severe cold, resulting in a serious disease of the head. Held, that the evidence warranted a finding that plaintiff's injuries were the result of defendant's negligence in failing to heat its cars, and not the result of his parents' negligence in taking him to the depot. *St. Louis Southwestern Ry. Co. v. Duck* (Civ. App.), 72 S. W. 445.

**Duty as to Lighting Cars.**—In Chicago, etc., *R. Co. v. Rhodes*, 35 Tex. Civ. App. 432, 80 S. W. 869, it was held that it is as much the duty of a common carrier of passengers, such as a railway company, to see that due care is taken in filling the tanks on its cars with inflammable gas as it is to see that its engines and coaches are properly equipped and are supplied with fuel and ice in a proper manner. In this case it was held it did not follow, because the explosion may have resulted alone from the awkward and careless manner in which the servant of the light and power company attempted to shut off the gas as the evidence would have warranted the jury in finding that this would excuse the railroad company for its failure to take proper care for the safety of its passengers.

**Duty to Provide Water.**—It is the duty of a railroad company to exercise the proper degree of care to provide water for the use of its passengers. *St. Louis, etc., R. Co. v. Campbell*, 30 Tex. Civ. App. 35, 69 S. W. 451, affirmed in 97 Tex. 645, no op.

Where, in an action for injuries to a passenger, she claimed that an insufficient amount of drinking water was furnished, but there was evidence that the water tank on the car was full when the train started, and that

after it had been consumed by the passengers drinking water was furnished to them from another car, and that there was no reason for plaintiff suffering thirst, whether the carrier performed its duty to furnish water was for the jury. *Peck v. Atchinson, T. & S. F. Ry. Co. (Civ. App.)*, 91 S. W. 323.

**(9) Duty to Examine Road, Equipment and Appliances.**

**In General.**—It is the duty of a railroad company engaged in the transportation of passengers to frequently and carefully examine its road bed, track, engines, cars, and other appliances necessary to carry on properly the business of the road to see that the same have been properly constructed and kept in safe repair. *International, etc., R. Co. v. Halloren*, 53 Tex. 46; *Levy v. Campbell (Sup.)*, 19 S. W. 438; *Galveston, etc., R. Co. v. Young*, 45 Tex. Civ. App. 430, 100 S. W. 993, affirmed in 102 Tex. 583, no op.; *Texas, etc., R. Co. v. Suggs*, 62 Tex. 323, 324; *Houston, etc., R. Co. v. Summers (Civ. App.)*, 49 S. W. 1106, affirmed in 92 Tex. 621.

A charge that it is the duty of a railroad to inspect its passenger trains is not erroneous where injuries complained of are alleged to have been caused by negligence of carrier in failing to furnish safe cars. *Texas, etc., R. Co. v. Suggs*, 62 Tex. 323, 324.

In an action for injuries to a passenger through the derailment of a train, a charge that if the derailment was caused by the breaking of a car wheel through a latent defect in the wheel when it was delivered to the carrier, it being conceded that, when it was so delivered, it was without defects, except latent defects, the carrier is not liable, is erroneous, as excluding the issue of the carrier's want of care in properly testing the wheel while it was in use. (Civ. App.), *Houston, E. & W. T. Ry. Co. v. Summers*, 49 S. W. 1106, affirmed 51 S. W. 324, 92 Tex. 621.

Though the uncontradicted evidence in a suit by a passenger injured in a train wreck caused by the breaking of a wheel shows that the highest degree of care by skilled persons was used in testing it at the factory, and that it was perfect when it left there, the court can not assume and charge that fact. *Houston, E. & W. T. Ry. Co. v. Greer*, 53 S. W. 58, 22 Tex. Civ. App. 5.

**Duty to Inspect between Regular Inspection Stations.**—That a railway company has its cars inspected by car inspectors at regular inspection stations does not relieve the train operatives, of all duty to watch and inspect the cars to discover any defects occurring between such stations rendering the cars dangerous to passengers. *Texas & St. L. Ry. Co. v. Suggs*, 62 Tex. 323.

**Liability for Defects Discoverable by Proper Inspection.**—Where a passenger injured by the breaking of a defective coupling and the parting of the train showed that an inspection of the coupling might have disclosed the defect, the company was required to show that it made an inspection, and a failure to do so warranted a recovery. *Galveston, H. & S. A. Ry. Co. v. Young*, 100 S. W. 993, 45 Tex. Civ. App. 430.

Where a carrier, in making an inspection of a car wheel, did not exercise due care, and thereby failed to discover a defect therein, which defect afterwards caused a wreck, the carrier is liable, though, previous to such insufficient inspection, it had made proper tests of the wheel in question, and failed to discover the defect. (Civ. App.), *Houston, E. & W. T. Ry. Co. v. Summers*, 49 S. W. 1106, affirmed 51 S. W. 324, 92 Tex. 621.

**Degree of Care Required in Inspection.**—If any certain and satisfactory test of the machinery, used by a railway company in transportation, is

known, which is within the reach of the company, it should be applied, and it is negligence in the company to rely upon a test which is clearly insufficient. *Texas & Pacific Ry. Co. v. Hamilton*, 66 Tex. 92, 17 S. W. 406.

Where the accident was caused by a wheel which had an old flaw in it which could not have been detected by striking the wheel with a hammer while the car was on the track, and it did not appear that an examination of the surface of the wheel was the only method of detecting the flaw, the company should not be excused by relying upon such a test. *Texas & P. Ry. Co. v. Hamilton*, 66 Tex. 92, 17 S. W. 406.

In an action for injuries through the derailling of a train by a broken car wheel, the court charged as to the care required in testing the wheel, and also that if the manufacturers applied proper and sufficient tests, without discovering a defect, and if such defect was unknown to the carrier, and could not have been discovered by the use of due diligence, there was no liability. Held, that the charge did not require tests sufficient to discover the defect, the word "sufficient" being limited by the previous instruction. *Houston, E. & W. T. Ry. Co. v. Richards*, 49 S. W. 687, 20 Tex. Civ. App. 203.

#### **d. Duties and Liabilities as to Operation.**

##### **(1) General Rule Stated and Construed.**

**Rule Stated.**—Every movement of a passenger train must be made with reference to the safety of passengers, and the utmost care exercised at all times to avoid injury to them. *St. Louis, etc., R. Co. v. Humphreys*, 25 Tex. Civ. App. 401, 62 S. W. 791, affirmed in 94 Tex. 710, no op.

A railroad company is required to use great care in running its passenger trains, or in stopping or starting trains where passengers get aboard or alight. *Missouri Pac. R. Co. v.*

*Foreman* (Civ. App.), 46 S. W. 834, affirmed in 93 Tex. 647, no op.

The fact that a passenger train carries the United States mail can not affect the obligation of the carrier in regard to its proper operation for the safety of passengers. *Williams v. International, etc., R. Co.*, 28 Tex. Civ. App. 503, 67 S. W. 1085.

**Application of Rule Regardless of Nature of Conveyance.**—The fact that a passenger accepting passage on a freight train assumes risks not incident to travel on a passenger train does not relieve the carrier from exercising the utmost care in the operation of the train for the safety of the passenger. *Hardin v. Ft. Worth & D. C. Ry. Co.*, 77 S. W. 431, 33 Tex. Civ. App. 448.

Generally, as to the degree of care as affected by the mode of conveyance, see ante, "Degree of Care as Affected by Mode of Conveyance." IV. A, 1, a, (3).

**Liability for Negligence in Operation Concurring with Unprecedented Rainfall to Cause Accident.**—Where, in an action for injuries to a passenger, the carrier was guilty of negligence in operating its train, which concurred with an unprecedented rainfall, constituting an act of God, in causing the wreck in which plaintiff was injured, the carrier was liable. *Chicago, R. I. & P. Ry. Co. v. Cain*, 84 S. W. 682, 37 Tex. Civ. App. 531.

##### **(2) Test as to Exercise of Proper Care.**

**General Rule.**—The usual rule that a carrier of passengers is required to exercise the "highest or utmost" degree of care for the safety of its passengers applies to the operation of its cars by a railroad company. *Houston, etc., R. Co. v. George* (Civ. App.), 60 S. W. 313; *Levy v. Campbell* (Sup.), 19 S. W. 438; *Dallas, etc., St. R. Co. v. Broadhurst*, 28 Tex. Civ. App. 630, 68 S. W. 315, affirmed in 95 Tex. 676, no op.; *Citizens R. Co. v. Sinclair*, 36 Tex. Civ. App. 266, 81 S. W. 329; *San*

Antonio, etc., R. Co. v. Muth, 7 Tex. Civ. App. 443, 27 S. W. 752, affirmed in 93 Tex. 719, no op.

The true criterion is such a high degree of care in handling a train such as the one in question, as would be exercised by very prudent, cautious, and competent persons under similar circumstances. *Herring v. Galveston, etc., R. Co.* (Civ. App.), 108 S. W. 977.

Street railways are common carriers of passengers with duties and responsibilities to those of a railroad company, and are required to exercise the highest degree of care and skill in the movement of their cars. *San Antonio, etc., R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752, affirmed in 93 Tex. 719, no op.

The court properly charged that "the railroad company was required to use the utmost practicable care in providing for the safety of passengers on its road, and to use that high degree of prudence, diligence, and care in building its road and in maintaining its track and in running its trains as would be used by very cautious, prudent, and competent persons under similar circumstances; and, if it failed to use such degree of care, such failure was \* \* \* negligence." *Levy v. Campbell* (Sup.), 19 S. W. 438.

A railroad company is not liable for injury to passenger in collision of trains, caused by failure of the air-brakes to work, if its employees, upon discovering that fact used such care and effort to prevent the collision, as persons of ordinary care and prudence would have exercised. *Missouri, etc., Ry. Co. v. Edling*, 18 Tex. Civ. App. 171, 174, 45 S. W. 406, affirmed in 93 Tex. 734, no op.

Defendant's freight cars on a side track were driven back by a violent storm, so as to project over the main track. Defendant's servant went to flag an incoming passenger train, but his lantern went out. He returned to the depot and relighted it, but it went out

again. It was then too late to return a third time to the depot, and the train on which plaintiff was a passenger collided with one of the freight cars, resulting in plaintiff's injury. Held, that a defense that the injury was caused by act of God was not well taken, since, notwithstanding the storm, the passenger train might have been flagged by the exercise of proper diligence. *Gulf, C. & S. F. Ry. Co. v. Bell*, 58 S. W. 614, 24 Tex. Civ. App. 679.

Generally, as to the degree of care required by carriers of passengers, see ante, "Degree of Care Required," IV, A, 1.

**Amount of Diligence Dependent upon Hazard.**—The amount of diligence to be exercised in each case depends upon the hazard. The greater the hazard the greater should be the diligence exercised. *Rapid Transit R. Co. v. Strong* (Civ. App.), 108 S. W. 394, citing *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 478, 3 S. W. 705; *Gulf, etc., R. Co. v. Hodges*, 76 Tex. 90, 93, 13 S. W. 64; *Houston, etc., R. Co. v. Boozer*, 70 Tex. 530, 537, 8 S. W. 119.

What would constitute a high degree of care in starting a street car stopped to turn a switch where passengers were not expected to alight might not constitute such a degree of care in starting a car stopped at a place for passengers to get aboard and alight, the amount of the diligence required depending on the hazard involved. *Rapid Transit Ry. Co. v. Strong* (Civ. App.), 108 S. W. 394.

**Operation in Customary or Ordinary Manner Not Proper Test.**—The highest degree of care is incumbent upon the railroad company to keep its track in condition for the operation of its trains, and whether or not said trains had been "usually and customarily" operated as the train at the time of the accident is not the test by which to measure the care of the railroad

company. *St. Louis, etc., R. Co. v. Boyer*, 44 Tex. Civ. App. 311, 97 S. W. 1070.

The fact that it was customary for the employees of a carrier, in the operation of its freight trains, to act as was done at the time a passenger on a freight train was injured did not relieve the carrier of the duty of exercising the degree of care imposed on it by law, under the circumstances existing at that time. *International & G. N. R. Co. v. Cruseturner*, 98 S. W. 423, 44 Tex. Civ. App. 181.

In *Herring v. Galveston, etc., R. Co.* (Civ. App.), 108 S. W. 977, in which the test given to the jury by the trial court in its charge was "the ordinary and usual movement of said train," that is, the freight train on which appellant was riding, the appellate court in disapproving such charge held that the ordinary and usual movements of that train might have been negligent in the highest degree as directed towards a passenger, and laid down the usual criterion as to the high degree of care required of passengers.

### (3) Application of Rule in Particular Instances.

#### (a) Sudden Movement or Stopping of Trains.

**In General.**—Sudden violent and unusual jerks or jars of a passenger train by which a passenger is injured may authorize the conclusion that the railroad company was negligent in the operation of such train, and render it liable to the passenger injured, in the absence of contributory negligence on the part of the latter. *Ft. Worth, etc., R. Co. v. White* (Civ. App.), 51 S. W. 855, affirmed in 93 Tex. 683, no op. See, also, *St. Louis, etc., R. Co. v. Humphreys*, 25 Tex. Civ. App. 401, 62 S. W. 791, affirmed in 94 Tex. 710, no op.; *Missouri Pac. R. Co. v. Foreman* (Civ. App.), 46 S. W. 834, affirmed in 93 Tex. 647, no op.

If the employees of the railroad company in charge of a passenger train

needlessly and carelessly give the train a sudden jerk whereby a passenger is injured, such passenger being where he has a right to be, and exercising ordinary prudence, such carelessness is negligence as to the passenger, and the company must be held liable. *St. Louis, etc., R. Co. v. Humphreys*, 25 Tex. Civ. App. 401, 62 S. W. 791, affirmed in 94 Tex. 710, no op.

It is not necessary for the train servants to know exactly how their negligence would operate to the injury of the passenger. It is sufficient if they do not exercise the care that very cautious and prudent men would exercise under the circumstances, and a passenger, not himself in fault, is thereby injured. *St. Louis, etc., R. Co. v. Humphreys*, 25 Tex. Civ. App. 401, 62 S. W. 791, affirmed in 94 Tex. 710, no op.

When the complaint alleges that plaintiff passenger was injured by the negligence of defendant, which consisted in the violent jerking of defendant's cars, caused by the sudden stopping of the train, throwing plaintiff from the platform, it is sufficient to prove the jerking, and it is immaterial whether it was done by starting or stopping the train, as alleged. (Civ. App.). *Houston & T. C. R. Co. v. Rowell*, 45 S. W. 763, affirmed 46 S. W. 630, 92 Tex. 147.

A charge that no deduction of negligence is to be made from the mere fact that a moving train gave a violent jerk, is properly refused where the jerk was of an unusual nature. *San Antonio, etc., R. Co. v. Choate*, 22 Tex. Civ. App. 618, 619, 56 S. W. 214, affirmed in 93 Tex. 718, no op.

In an action against a carrier for injuries received by a passenger while standing in the aisle, and caused by a sudden jerk of the train, it was competent for plaintiff to explain, as a reason for placing his hand on the arm of a seat at the time he was injured,

that he did it as a precaution to keep himself from falling. *Ft. Worth & R. G. Ry. Co. v. White* (Civ. App.), 51 S. W. 855, affirmed in 93 Tex. 683, no op.

**Injuries to Passengers Boarding Conveyance.**—See ante, "Duty to Afford Opportunity and Facilities for Boarding Trains," V, D, 5.

**Injuries to Persons in Charge of Stock.**—Where a trainman in authority tells a shipper of live stock that the train will remain standing for some time at a certain point, and directs him to look after the stock at that time, he may rely on it that the train will not be moved without notice to him, as it is customary for shippers to assume dangerous positions when caring for their stock. *Receivers International & G. N. Ry. Co. v. Armstrong*, 4 Tex. Civ. App. 146, 23 S. W. 236.

Where a drover, in charge of stock on a train, is told by the conductor that he will have time to punch up the cattle that are down, and he is injured by the sudden starting of the train, the company is liable, although he might have seen that the train was about to start. *Missouri, K. & T. Ry. Co. of Texas v. Jahn*, 43 S. W. 575, 18 Tex. Civ. App. 74.

In an action against a carrier for injuries received by a shipper of a horse in consequence of being kicked by it, while in the car with it, evidence examined, and held to justify a verdict that the carrier's movement of the car with the horse untied and the car door open was negligence which proximately caused the injuries complained of. *Houston & T. C. R. Co. v. Wilkins* (Civ. App.), 98 S. W. 202.

In an action against a carrier for injuries received by the shipper of a horse in consequence of being kicked by it while in the car with it, the proof showed that the horse was loaded into a car some distance from a railroad yard; that, before the shipper had time to fasten the doors of the car and

securely tie the horse, the car was taken to the yard. The shipper remained in the car. When the car stopped in the yard it was bumped into by other cars, frightening the horse and the shipper was injured while attempting to pacify it. Held, that an instruction that, if the carrier started with the car over the protest of the shipper, and before he had had time to securely tie the horse, and while the door of the car was open, and if, while the car was being moved to the yards, the horse became frightened, and if the shipper undertook to prevent injury to the horse and while doing so was injured, he was entitled to a recovery was not misleading, for the jury must have understood that they were to determine the question of negligence from all the circumstances after the horse was loaded. *Houston & T. C. R. Co. v. Wilkins* (Civ. App.), 98 S. W. 202.

**Injuries to Passengers Alighting.**—See post, "Duties and Liabilities as to Persons Alighting from Train," V, D, 14.

**Question Whether Sudden Movement Constituted Negligence One for Jury.**—In an action by a passenger for personal injuries, whether under the evidence a sudden starting of the car, if there was any, constituted negligence, held for the jury. *Northern Texas Traction Co. v. Moberly* (Civ. App.), 109 S. W. 483.

Where a passenger riding on the platform of a car was thrown off by a sudden and unusual jerk of the train, and there was evidence that the engineer was not negligent in applying the brakes, and that the roadbed and track were in a reasonably good condition, and that there was no defect in the train, the question whether the jerk was due to the carrier's negligence is for the jury. *Ebert v. Gulf, C. & S. F. Ry. Co.* (Civ. App.), 49 S. W. 1105.

Plaintiff, a passenger upon defendant's train, was injured while passing



from one coach to another as the train was, as he believed, about to stop for a station other than that of his destination, by being thrown from the platform of the coach by a sudden, jerking motion. There was no evidence that the jerk was an unusual one. Held, that the question of negligence was for the jury. 36 S. W. 247, 90 Tex. 82, reversed. *Choate v. San Antonio & A. P. Ry. Co.*, 37 S. W. 319, 90 Tex. 82.

Where, in an action for injuries received while alighting from a train, if the theory of plaintiff was true, the sudden movement of the train was the proximate cause of the injury, and such act was negligence as a matter of law, where the court had submitted to the jury all the issues of contributory negligence raised by the pleadings and evidence, it was not error to refuse to submit as an issue whether, "under all the circumstances of the case," the sudden movement of the train was negligence on the part of the defendant. *Galveston, H. & H. R. Co. v. Alberti*, 103 S. W. 699, 47 Tex. Civ. App. 32.

**Allegations in Petition Held to Admit Evidence of Sudden Movement of Train.**—In an action against a railway company for injuries received by a passenger in alighting from a train, an allegation in the petition that "the car was negligently and carelessly put in motion" was sufficient to admit proof that "the car gave a jerk" when plaintiff was in the act of alighting. *Houston & T. C. Ry. Co. v. Moss* (Civ. App.), 63 S. W. 894.

**Evidence in Actions for Injuries from Sudden Movement of Train.**—Plaintiff was traveling on defendant's train in charge of cattle, and, when the train stopped to take water, plaintiff, as was customary, left the caboose to lock after the stock. The train started before plaintiff returned to the caboose, whereupon he got on top of the train, started towards the caboose,

and was struck by a pipe attached to a water tank. In an action to recover for his injuries, held, that it was not error to admit evidence that plaintiff had no knowledge of the movement of the train in time to enable him to reach the caboose before the train started. *Missouri Pac. Ry. Co. v. Callahan* (Sup.), 12 S. W. 833.

In such an action it was not error to permit plaintiff to state the position of the pipe when it struck him, and that it would not have struck him had it been placed in its usual position when not used to conduct water. *Missouri Pac. Ry. Co. v. Callahan* (Sup.), 12 S. W. 833.

**(b) Putting Train in Motion without Previous Signal.**

In the absence of a statute requiring a signal to be given by bell or whistle, it is error for a court to instruct a jury that it is negligence to put a train in motion without a signal so given. There is no statute in force in Texas requiring a signal to be so given before a train is put in motion, after having stopped at a station where passengers are to alight. *Gulf, etc., R. Co. v. Williams*, 70 Tex. 159, 8 S. W. 78.

The starting of a train without the usual bell ringing or whistle from a flag station on a railway where trains do not usually stop unless signaled, whereby one who had left the train during its temporary stopping at midnight was injured in the effort to return to it, is not negligence per se. Whether negligence did in fact exist should be determined by the jury from a consideration of other facts in evidence. *Galveston, etc., R. Co. v. Cooper*, 70 Tex. 67, 8 S. W. 68.

In an action for injuries to a passenger by the starting of a train while she was in the act of alighting, an instruction that, when a train has been stopped to allow passengers to alight, it is negligence to start the train in motion without apprising the pas-

senger of the carrier's intention to do so, is erroneous. *Gulf, C. & S. F. Ry. Co. v. Booth* (Civ. App.), 97 S. W. 128.

An instruction that "it is not negligence in itself to start a train from a passenger depot without ringing a bell or blowing a whistle, or saying 'All aboard,'" is properly qualified by the further statement that the law does not undertake to declare what act or omission amounts to negligence, but it is for the jury to determine from the evidence. *Galveston, H. & S. A. Ry. Co. v. Cooper*, 2 Tex. Civ. App. 42, 20 S. W. 990.

**(c) Coupling Cars.**

In coupling cars onto a freight train, a railroad company owes passengers thereon the duty to use such degree of care, prudence, and foresight as would be used by very cautious, prudent, and competent persons under similar circumstances. *Chicago, R. I. & P. Ry. Co. v. Buie*, 73 S. W. 853, 31 Tex. Civ. App. 654.

Where plaintiff was injured by being in a freight car while defendant was switching the same, it was error to instruct that defendant was not liable for injuries done plaintiff by an unusual violent coupling if none of its servants knew or had notice of plaintiff's presence in the car, since this want of knowledge or notice may have been due to their negligence. *Hardin v. Ft. Worth & D. C. Ry. Co.* (Civ. App.), 100 S. W. 995.

**(d) Collisions.**

**In General.**—It is gross negligence for a brakeman to allow a switch-engine to be run against a train so violently as to endanger the safety of passengers when it was in his power to prevent such an occurrence. *East Line, etc., R. Co. v. Rushing*, 69 Tex. 306, 317, 6 S. W. 834.

A carrier is liable to a passenger for injuries from a collision while his train was backing out of a depot onto the main line, caused by the failure of the conductor to ascertain whether the

track was clear. *Chicago, R. I. & G. Ry. Co. v. Poore*, 108 S. W. 504, 49 Tex. Civ. App. 191.

Defendant's passenger train remained standing on the main track at the foot of a long grade for an hour, when it was struck by a freight train which the passenger conductor knew was following. It was dark, and the tracks were slippery. A flagman from the passenger train went back half a mile, and, on seeing him, the freight engineer called for brakes, but none were applied, and the train could not be stopped by the engine alone in time to avert the collision. From the testimony of the passenger conductor, it might be found either that he sent the flagman back immediately on stopping, or that he did not do so until 20 minutes before the collision. Held, that defendant was liable to a passenger injured by the collision. *Gulf, C. & S. F. Ry. Co. v. Brown* (Tex. Civ. App.), 40 S. W. 608, 16 Tex. Civ. App. 93.

**As to liability for collisions at crossings,** see the title CROSSINGS.

**Evidence in Actions for Injuries by Collisions.**—In an action against a railroad for damages for personal injuries sustained in a collision, there is no error in permitting witness to testify that no effort was made to check the colliding train that he knew of. *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579, 593, 58 S. W. 614, affirmed in 94 Tex. 700, no op.

In an action against a railroad for damages for personal injuries sustained in collision between passenger and freight trains, the refusal of the court to permit a witness to state as an expert that a freight train, viewed from the passenger track, would appear to be clear of the main track, was not error. *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579, 593, 58 S. W. 614, affirmed in 94 Tex. 700, no op.

In an action for death of an alleged passenger by collision, that witness

has been taken by the defendant to testify before the railroad commission as to "double headers" is properly excluded as irrelevant. *Crawleigh v. Galveston, H. & S. A. Ry. Co.*, 67 S. W. 140, 28 Tex. Civ. App. 260.

**(e) Negligent Handling of Engine.**

In an action against a carrier for injuries to a passenger from the discharge of hot cinders from locomotive, evidence held to show that the engine was negligently handled, and that such negligence was the proximate cause of the escape of the cinders. *Missouri, K. & T. Ry. Co. of Texas v. Mitchell* (Civ. App.), 87 S. W. 841, affirmed in 101 Tex. 649, no op.

In an action against a railroad for injuries to a passenger in consequence of a breaking of a coupling, thereby causing the train to part, evidence examined, and held to warrant a finding that the breaking of the coupling was the result of the negligent application of steam in the locomotives drawing the train, authorizing a recovery. *Galveston, H. & S. A. Ry. Co. v. Young*, 100 S. W. 993, 45 Tex. Civ. App. 430.

**(f) Open or Defective Switches.**

Where plaintiff's petition in an action against a railroad for damages for personal injuries to passengers alleged that plaintiff was injured by defendant's servants negligently running the train into a car on the siding, causing the collision in which plaintiff was injured, and it was shown on trial that the train ran into the car because the switch was left open, the charge that defendant would be negligent if the employees failed to take due care of tracks, is not error. *International, etc., R. Co. v. Bibolet*, 24 Tex. Civ. App. 4, 8, 57 S. W. 974, affirmed in 94 Tex. 691, no op.

In an action for injuries to a passenger by the wreck of a train, alleged to have been caused by an open and defective switch and the excessive speed of the train, held, that under the

evidence the questions of the negligence of the defendant in failing to use due care as to the condition of the switch, and of its employees in operating the train and allowing the switch to remain open, were for the jury. *Texas & N. O. R. Co. v. Clippenger*, 106 S. W. 155, 47 Tex. Civ. App. 510.

In an action for injuries to a passenger, the instruction that, if defendant was negligent in running its train over an open switch at an excessive speed, he failed to exercise due care and foresight in regard to the condition of a switch, and such conduct constituted negligence, then defendant was liable, was not erroneous as submitting to the jury defendant's negligence in permitting the switch to be and remain in bad condition and defective in construction. *Texas & N. O. R. Co. v. Clippenger*, 106 S. W. 155, 47 Tex. Civ. App. 510.

**(g) Excessive Speed.**

**Evidence as to Rate of Speed Held Admissible.**—In an action for injuries to a passenger, where plaintiffs in their petition charged as one of the elements of defendant's negligence, which resulted in the wreck of the train and the injuries sustained, the excessive and dangerous speed across a switch and in and upon a side track, it was proper to allow testimony as to the speed of the train at the time of its derailment and wreck. *Texas & N. O. R. Co. v. Clippenger*, 106 S. W. 155, 47 Tex. Civ. App. 510.

In an action for personal injury in a railway collision, testimony of passenger that the train was running so fast that it frightened her; that she knew it was running very fast and thought so before collision, because it frightened her, was admissible. *Galveston, etc., R. Co. v. Duelm* (Civ. App.), 23 S. W. 596, 598, affirmed in 86 Tex. 450.

In an action against a railroad for personal injuries to passenger sustained in collision, admission of testi-

mony as to speed of train of witness who had worked on the railroad and traveled on it for eleven months and claimed to be able to judge of the rate of speed of trains, was proper. *Campbell v. Warner* (Civ. App.), 24 S. W. 703, 704.

In an action for personal injuries, testimony concerning remarks of passengers relative to speed of train is admissible to prove rate of speed, when such fact is in issue. *Missouri Pac. R. Co. v. Collier*, 62 Tex. 318, 320, 321.

**Admissibility of Ordinance as to Speed of Street Cars.**—Where, in an action against a street railway company for injury to a passenger, who was knocked off the running board of a car by a bridge girder, the petition alleged negligence in running at excessive and unlawful speed, in violation of a certain ordinance, such ordinance was relevant to the issue, and properly admitted in evidence. *San Antonio Traction Co. v. Bryant*, 70 S. W. 1015, 30 Tex. Civ. App. 437.

In an action against a street railroad for injuries to a passenger evidence that the car was going "very fast" and "mighty fast" was sufficient to render it error to exclude an ordinance limiting the rate of speed of a street car to seven miles an hour. *Moore v. Northern Texas Traction Co.*, 95 S. W. 652, 41 Tex. Civ. App. 583.

**Evidence Held to Show Negligence in Running at Excessive Speed.**—Evidence held to support a finding that defendant railroad was negligent in running its train into a station at a high rate of speed, and at the same time inviting passengers to board another train by crossing the track of the one approaching. *Gulf, etc., Ry. Co. v. Morgan*, 26 Tex. Civ. App. 278, 64 S. W. 688.

Evidence, in an action for injury to a passenger while passing from one car to another, held to authorize a

finding, in view of the condition of the track, that the train was running at a negligent rate of speed. *Galveston, H. & S. A. Ry. Co. v. Patillo*, 101 S. W. 492, 45 Tex. Civ. App. 572.

Instance of evidence held sufficient to show negligence of railway company in suit for injury to passenger in not constructing and maintaining its track in proper condition, and running its cars at high rate of speed on a curve. *Galveston, etc., R. Co. v. Snead*, 4 Tex. Civ. App. 31, 33, 34, 23 S. W. 277.

In *Citizens R. Co. v. Wade*, 40 Tex. Civ. App. 561, 91 S. W. 645, affirmed in 101 Tex. 631, no op., it was held that the evidence was sufficient to show that the motorman operating the car immediately before and at the time of the accident, negligently ran the same at an excessive rate of speed, and that the appellee's injuries were the proximate result of such negligence on the part of appellant.

The defendant railway company agreed to carry a lumber company's employees to and from work, and, while one of its employees was riding on a car which was being pushed in front of the engine at a speed of 15 to 20 miles per hour, the car was derailed by running over a hog, and the employee was killed. Held, that the evidence was sufficient to sustain a verdict that defendant was guilty of negligence. *Trinity Val. R. Co. v. Stewart* (Civ. App.), 62 S. W. 1085.

In an action by a passenger against a railroad company for injuries caused by a car being thrown from the track by reason of the breaking of a wheel, it appeared that the train was running at the rate of 16 or 20 miles per hour, where the schedule rate was 4 miles; that the air brakes were defective, but for which the engineer might have stopped the train; that the rails were old and battered, the ties rotten, and the roadbed rough and uneven. Held, that these facts warranted the jury in

finding the company negligent. *Texas & P. Ry. Co. v. Hamilton*, 66 Tex. 92, 17 S. W. 406.

**Right to Prove Rule of Company as to Speed Though Not Pledged.**—In an action for injuries received while a passenger on defendant's train, it was not necessary to plead a rule of the company requiring engineers to use extra precaution and run slowly after a heavy rain, in order to let in proof of such rule and its violation. *Gulf, C. & S. F. Ry. Co. v. Bell*, 58 S. W. 614, 24 Tex. Civ. App. 579.

**Evidence of Warning to Engineer as to Rate of Speed.**—Evidence that the engineer had been warned, at a station where the train stopped before the accident, as to the reckless running of the train over the rough road, was improper, the rate of speed before reaching the neighborhood of the accident not being in issue. *San Antonio & A. P. Ry. Co. v. Robinson*, 73 Tex. 277, 11 S. W. 327.

**Instructions Held Proper Where Negligence Predicated on Excessive Speed.**—In an action against a street railroad company to recover for injuries received by the derailling of a car, where there is no negligence predicated on the grade of the track, or the size of the load of passengers, but these conditions were alleged and proved to show the degree of care required in operating the particular car at the time of the accident, but negligence was predicated on defective appliances and excessive rate of speed, a reference in the charge by the court to the heavy load and steep grade, which was simply a statement of conditions existing about which there was no controversy, and which were to be considered in determining the care required in operating the car, was no error. *Citizens' Ry. Co. v. Wade*, 91 S. W. 645, 40 Tex. Civ. App. 561.

**(4) Assumption of Risks Ordinarily or Usually Incident to Mode of Transportation.**

**In General.**—If the doctrine of as-

sumed risk has any applicability as between carrier and passenger, a passenger can not be held to have assumed any risk except that of accident not arising from any negligence of the carrier. (Civ. App.), *Herring v. Galveston, H. & S. A. Ry. Co.*, 108 S. W. 977, writ of error dismissed; *Galveston, H. & S. A. Ry. Co. v. Herring* (Sup.), 113 S. W. 521.

A passenger assumes only risks which may exist after the carrier has done its full duty to passengers. *Galveston, H. & S. A. Ry. Co. v. Patillo*, 101 S. W. 492, 45 Tex. Civ. App. 572.

Although a railroad company owes the same degree of care to passengers on its freight trains as on regular trains, a passenger, in boarding a freight train, acquiesces in the usual incidents and conduct of a freight train managed by prudent and competent men. *Mullen v. Galveston, etc., R. Co.* (Civ. App.), 92 S. W. 1000, affirmed in 101 Tex. 650, no op.

The liability of the carrier will not extend to increased risks necessarily incident to riding upon a freight train, since such increased risks are assumed by the passenger when he selects that mode of travel. *Missouri, etc., R. Co. v. Schroeder*, 44 Tex. Civ. App. 47, 100 S. W. 808, affirmed in 102 Tex. 588, no op.; *Trinity Val. R. Co. v. Stewart* (Civ. App.), 62 S. W. 1085; *Mullen v. Galveston, etc., R. Co.* (Civ. App.), 92 S. W. 1000, affirmed in 101 Tex. 650, no op.; *Hardin v. Ft. Worth, etc., R. Co.*, 33 Tex. Civ. App. 448, 77 S. W. 431.

A passenger accepts transportation on a freight train subject to the ordinary inconveniences and discomforts incident to the careful operation of such a train, and, if injured by the ordinary and usual movements of the train under its careful management and operation, can not recover. (Civ. App.), *Herring v. Galveston, H. & S. A. Ry. Co.*, 108 S. W. 977, writ of error dismissed. *Galveston, H. & S. A. Ry. Co. v. Herring* (Sup.), 113 S. W. 521. And

see *Texas, etc., R. Co. v. Bump*, 43 Tex. Civ. App. 297, 95 S. W. 29, affirmed in 101 Tex. 663, no op.

In an action for injuries to a passenger on a freight train, an instruction that he could not recover if the jerking by which he was injured was only such as was "necessary" held not erroneous. *Texas, etc., R. Co. v. Adams*, 32 Tex. Civ. App. 112, 72 S. W. 81, affirmed in 97 Tex. 648, no op.

Where a carrier furnishes a hand car, or other vehicle not adapted to the carriage of passengers, manned by a crew employed simply to work on the track and run the car for their own convenience, the carrier and its servants are bound to exercise no greater degree of care than is required in carrying passengers for hire on regular trains. *International & G. N. R. Co. v. Cock*, 68 Tex. 713, 5 S. W. 635.

The liability of a railway company for negligence will, to a degree, be limited by its capacity and fitness to transport passengers known to a passenger when he elects to be transported on it. Hence a short road, doing a small business and running only mixed trains, is not required to apply all the delicate checks and guards that are in use. *International & G. N. Ry. Co. v. Copeland*, 60 Tex. 325.

In an action by a passenger on a railroad train for personal injuries, a charge that "if defendant's road had not yet been opened for the running of regular passenger trains, and only mixed trains, such as plaintiff was on, were run thereon, and the road bed was new, and the plaintiff knew at the time he entered said train that such was the case, then the defendant would not be expected to apply all the checks and guards that are in use upon established passenger lines, and the passenger would be presumed to take such risks as were necessarily incident to the new condition of the track and

the train upon which he traveled," is as favorable to defendant as it has the right to expect; and it was not error to refuse a special request that "if you find from the evidence that defendant's road was new and properly constructed, and that the wrecked train was properly run by its employees, and if you further find from the evidence that the wreck was caused by the washing of the dirt from under the ties by recent rains, and that defendant did not know of the fact, and had no time to learn of the fact before the wreck occurred, by the exercise of reasonable diligence, you will find for the defendant." *San Antonio & A. P. Ry. Co. v. Robinson*, 79 Tex. 608, 15 S. W. 584.

In an action against a carrier for injuries received by the shipper of a horse, in consequence of being kicked by it while in the car with it, the shipper testified that he told an employee of the carrier that he would not remain in the car while it was being moved from the place of loading to a railroad yard a short distance away, and that the employee stated that he would go with him. Another witness testified to the same effect. Held, that the evidence authorized a charge that, if the shipper entered the car for the purpose of fastening the horse and that he agreed with the carrier's employee that they would carry the car to the yard with the horse untied and that he and the employee would hold the horse while it was being so transported, the shipper would assume the risk ordinarily resulting from carrying the horse not properly tied, authorizing a verdict for defendant. *Houston & T. C. R. Co. v. Wilkins* (Civ. App.), 98 S. W. 202.

Such charge was not erroneous because limiting the assumption of risk to a risk ordinarily incident to the carrying of the horse untied. *Houston & T. C. R. Co. v. Wilkins* (Civ. App.), 98 S. W. 202.

**Propriety of Instruction Using the Word "Usual" Instead of "Ordinary."**

—In *St. Louis, etc., R. Co. v. Morrow* (Civ. App.), 93 S. W. 162, affirmed in 101 Tex. 856, no op., it was contended that it was error for the court to tell the jury, in effect, that the appellee only assumed such risks as were usually incident to the coupling of cars. The complaint was directed against the use of the words "usual" and "usually" and in not using in their stead "ordinary" and "ordinarily." It was held that these words are regarded as synonyms.

**Propriety of Instruction Using Word "Necessarily" Instead of "Ordinarily."**

—Where a freight train on which plaintiff was riding as a passenger broke in two, and through the negligence of the train operatives a collision resulted, in which he was injured, and the court charged that a person taking passage on or riding on freight trains, where the company runs passenger trains on its road for the benefit of travelers, assumes the extra danger, if any, that is necessarily incident to traveling on freight trains, the instruction was not objectionable on the ground that the word "ordinarily" should have been substituted for "necessarily;" the evidence showing that, while it is usual for freight trains to break in two, if proper care had been taken by the operatives after the parting of the train there would have been no collision. *Ft. Worth & D. C. Ry. Co. v. Rogers*, 60 S. W. 61, 24 Tex. Civ. App. 382.

**Issue as to Assumed Risk for Jury.**

—Where, in an action for injuries to a passenger on a freight train while attempting to alight from the caboose at a place where the train stopped, the evidence was conflicting on the issue whether the stopping of the train with the caboose on a trestle was necessary in the operation of the train and therefore a risk incident to travel thereon, the issue was for the jury. Interna-

tional & G. N. R. Co. *v. Cruseturner*, 98 S. W. 432, 44 Tex. Civ. App. 181.

**Facts Held Not to Authorize Charge on Assumed Risks.**—Where a passenger was told by the ticket agent that his train was then standing on the track ready to go, and as he approached it the porter told him to go aboard, such facts were insufficient to call for a charge on assumed risk, in an action for injuries sustained while the carrier completed the making up of the train. *St. Louis Southwestern Ry. Co. of Texas v. Morrow* (Civ. App.), 93 S. W. 162, affirmed in 101 Tex. 856, no op.

In an action for injuries to a passenger, a requested instruction that, if plaintiff unnecessarily occupied a position of danger, he thereby assumed the risk and could not recover, was properly refused, where it did not require that such dangerous position should contribute to the injury. *Gulf, C. & S. F. Ry. Co. v. Carter* (Civ. App.), 71 S. W. 73, affirmed in 97 Tex. 634, no op.

**7. Duty to Protect Passengers from Injury by Other Passengers, Employees or Strangers.**

**a. General Rule Stated, Construed and Limited.**

**General Rule.**—It is the duty of a common carrier to use the utmost care and diligence to protect a passenger against assault and ill-treatment by those employed by it and under its control, and to exercise the utmost diligence and care in guarding the passenger against violence or insult from whatever source arising which might reasonably be anticipated or naturally expected to occur. *Dillingham v. Russell*, 73 Tex. 74, 11 S. W. 139; *Missouri, etc., R. Co. v. Russell*, 8 Tex. Civ. App. 578, 581, 28 S. W. 1042, affirmed in 93 Tex. 668, no op.; *Galveston, etc., R. Co. v. Long*, 13 Tex. Civ. App. 664, 36 S. W. 485; *Galveston, etc., R. Co. v. La Prelle*, 27 Tex. Civ. App. 496, 65 S. W. 488, affirmed in 95

Tex. 678, no op.; *St. Louis, etc., R. Co. v. Johnson*, 29 Tex. Civ. App. 184, 68 S. W. 58, affirmed in 95 Tex. 685, no op.; *Texas, etc., R. Co. v. Story*, 37 Tex. Civ. App. 156, 83 S. W. 852, affirmed in 101 Tex. 663, no op.; *Gulf, etc., R. Co. v. Conder*, 23 Tex. Civ. App. 488, 58 S. W. 58, affirmed in 93 Tex. 730, no op.; *Houston, etc., R. Co. v. Washington (Civ. App.)*, 30 S. W. 719; *International, etc., R. Co. v. Giesen (Civ. App.)*, 69 S. W. 653; *Texas, etc., R. Co. v. Johnson*, 2 App. Civ. Cases, § 185; *International, etc., R. Co. v. Kentle*, 2 App. Civ. Cases, §§ 303, 305; *Gulf, etc., R. Co. v. Adams*, 3 App. Civ. Cases, §§ 422, 423.

In performing its duty to protect its passengers from danger or insult, the carrier may use such means as may be necessary under the circumstances. *Gulf, etc., R. Co. v. Adams*, 3 App. Civ. Cases, §§ 422, 423. See, also, *Texas, etc., R. Co. v. Storey*, 37 Tex. Civ. App. 156, 83 S. W. 852, affirmed in 101 Tex. 663, no op.

In action by a lady passenger for injuries sustained by being pushed off car steps by quarreling men on car platform, a charge that the company must exercise high degree of care to protect passengers is correct. *Missouri, etc., R. Co. v. Russell*, 8 Tex. Civ. App. 578, 581, 28 S. W. 1042, affirmed in 93 Tex. 668, no op.

Generally, as to the right of a carrier to expel disorderly persons, see post, "Disorderly Conduct," V, D, 15, a, (1).

**Carrier Liable Only for Acts Which Might Reasonably Have Been Foreseen and Prevented.**—The carrier is not an insurer of the safety of the passenger and liable at all hazards, and if a passenger receives an injury through the willful act of his fellow passenger, the carrier is liable only when, by the exercise of the degree of care required of carriers, such act, in view of all the circumstances, might have been reasonably anticipated or

foreseen and prevented. *Texas, etc., R. Co. v. Storey*, 37 Tex. Civ. App. 156, 83 S. W. 852, affirmed in 101 Tex. 663, no op., citing *Galveston, etc., R. Co. v. Long*, 13 Tex. Civ. App. 664, 36 S. W. 485; *International, etc., R. Co. v. Williams*, 20 Tex. Civ. App. 587, 50 S. W. 732, affirmed in 93 Tex. 644, no op.

In *International, etc., R. Co. v. Giesen (Civ. App.)*, 69 S. W. 653, citing *Gulf, etc., R. Co. v. Shields*, 9 Tex. Civ. App. 652, 28 S. W. 709, 29 S. W. 652, affirmed in 93 Tex. 685, no op., the court held that the facts were sufficient to warrant the conclusion that the conductor in charge of the train would and should have anticipated that the assault complained of would be committed and were of opinion that a high degree of care rests upon a railway company to protect one of its passengers from an unjustifiable assault committed upon him by another passenger.

While the crew of a train which had stopped at a regular meal station were eating their dinner, a passenger, who had remained in the car, was assaulted by an intruder and another passenger. Held, that the company was not liable, as the leaving of the train with no one in charge while the crew were taking their meals was a reasonable regulation, and the assault one which could not reasonably have been anticipated by them. *Thweatt v. Houston, E. & W. T. Ry. Co.*, 71 S. W. 976, 31 Tex. Civ. App. 227.

A passenger on a railway train, who was somewhat intoxicated, and walked a number of times through the cars, looking for some one, though he conducted himself without offense towards the other passengers, accidentally stumbled over some baggage; and a revolver fell from his pocket and was discharged, wounding another passenger in the foot. Held, that the carrier had no reason to anticipate such an accident, and was not liable



for the injury. *Galveston, H. & S. A. Ry. Co. v. Long*, 13 Tex. Civ. App. 664, 36 S. W. 485.

Rev. St. 1895, art. 4509, requiring railroad companies to furnish separate coaches for white and negro passengers, does not make it negligence per se for a railroad company to permit a negro to enter a coach reserved for white passengers, and there assault a white passenger. *Segal v. St. Louis Southwestern Ry. Co. of Texas*, 80 S. W. 233, 35 Tex. Civ. App. 517.

A railway company is not liable for an assault committed by a negro on a white female passenger alone in a lighted coach while the train was stopping at a station, and while the company's employees were absent from the coach. *Segal v. St. Louis Southwestern Ry. Co. of Texas*, 80 S. W. 233, 35 Tex. Civ. App. 517.

#### **b. Applications of Rule in Particular Instances.**

##### **(1). Acts or Offensive Language of Fellow Passengers.**

**In General.**—It is the duty of carriers of passengers to protect them, in so far as this can be done by the exercise of a high degree of care, from the violence, ill-treatment and insults of other passengers. *Dillingham v. Russell*, 73 Tex. 47, 11 S. W. 139; *International, etc., R. Co. v. Kentle*, 2 App. Civ. Cases, §§ 303, 305; *Texas, etc., R. Co. v. Johnson*, 2 App. Civ. Cases, § 185.

The duty of protection which the carrier owes to a passenger includes responsibility for the unlawful acts of fellow passengers, when, by the exercise of the highest degree of care, those acts might have been foreseen and prevented. *Texas & P. Ry. Co. v. Johnson*, 2 Willson, Civ. Cas. Ct. App. §§ 185, 186, 188.

Where defendant railroad company permitted indecent and disorderly conduct on the part of passengers in a car in which plaintiff's wife was traveling, and failed to provide her with bet-

ter accommodations, and she was thereby frightened, shocked, and made sick, defendant was liable in damages. *Texas & P. Ry. Co. v. Hughes* (Tex. Civ. App.), 41 S. W. 821.

A woman who bought a first-class railroad ticket was compelled to travel in the same car with drunken men, who smoked, swore, sung indecent songs, and fired pistols in the car. She complained to the conductor, who gave her no relief. Held, that a verdict of \$500 damages against the company was not excessive. *Texas & P. Ry. Co. v. Sherbert* (Civ. App.), 42 S. W. 639, affirmed in 93 Tex. 741, no op.

Passengers in a second class car are entitled to protection against the acts of fellow passengers to the extent that good conduct must be exacted on the part of persons inclined to use of vulgar and offensive language and conduct. *The St. Louis, Arkansas & Texas Railway Co. v. Mackie*, 71 Tex. 491, 492, 9 S. W. 451.

Plaintiff, a negro passenger, was riding in the part of defendant's train set apart for negroes, when such apartment was invaded by several intoxicated white men, who immediately became boisterous and disorderly in the presence of plaintiff, his wife, and several colored women. Plaintiff remonstrated, whereupon, with the knowledge of the conductor and trainmen, plaintiff was vilified and compelled to march through the train at the point of pistols held by such white men, and was made to dance for the amusement of the passengers. He was also caused to leave the train, and, on informing the conductor, the latter stated that he could do nothing for him, and advised him to ride on the blind baggage car. Plaintiff again boarded the train, and was again compelled to walk to and fro at the point of pistols until another station was reached, when he was compelled to leave the train, and was not permitted to again board the same. from which station plaintiff was com-

pelled to walk a distance of 12 miles to his destination, in the night. Held, that plaintiff was not precluded from recovery on the ground that his damage consisted of mental anguish and humiliation only, unaccompanied by physical or bodily injury. *International & G. N. R. Co. v. Henderson* (Civ. App.), 82 S. W. 1065.

A passenger may recover for mental suffering, unaccompanied by physical pain, caused by vulgar, profane, and indecent language of others permitted to remain on the car. *Houston, E. & W. T. Ry. Co. v. Perkins*, 52 S. W. 124, 21 Tex. Civ. App. 508.

**Evidence as to Acts or Language Held Admissible under the Pleadings.**—Where a petition in an action against a carrier alleged that plaintiff, a girl, was insulted, and suffered mental anguish and pain while a passenger on one of defendant's trains, by reason of profane and indecent language on the part of other passengers in the car, and that the conductor permitted the same, plaintiff's testimony as to the language used by the passengers in question was admissible under the petition. *St. Louis Southwestern Ry. Co. of Texas v. Wright* (Civ. App.), 84 S. W. 270, affirmed in 101 Tex. 656, no op.

The petition was sufficient to admit testimony that some of the passengers were either drunk, or seemed to be so, and that they were rude and boisterous. *St. Louis Southwestern Ry. Co. of Texas v. Wright* (Civ. App.), 84 S. W. 270, affirmed in 101 Tex. 656, no op.

**No Liability in Absence of Conductor's Knowledge of Misconduct.**—Damages for the humiliation caused by profane language used by the negroes in the presence of plaintiff's wife can not be recoverable, where it is not shown that the misconduct of the negroes was known to the carrier's conductor. *Missouri, K. & T. Ry. Co. of Texas v. Ball*, 61 S. W. 327, 25 Tex. Civ. App. 500.

**Evidence Held to Show Employee's Knowledge of Improper Conduct of Passengers.**—Car employees were sufficiently shown to have known of the use of profane language by plaintiff's fellow-passengers, and that plaintiff was suffering from its cold condition, where conductor had passed through the car, taking up tickets, and other employees had swept it out, after plaintiff had become passenger. *Texas, etc., R. Co. v. Kingston*, 20 Tex. Civ. App. 24, 68 S. W. 518, affirmed in 93 Tex. 688, no op.

Where conductor, if exercising proper care, must have known of a disorderly conflict between two men on a car platform by reason of which a lady passenger was injured, the company is chargeable with knowledge of the danger threatening such passenger and the necessity of attempting to avert it. *Missouri, etc., R. Co. v. Russell*, 8 Tex. Civ. App. 578, 582, 28 S. W. 1042, affirmed in 93 Tex. 668, no op.

**Recovery Over by Railroad for Damages for Improper Language of Person on Pullman Car.**—The conductor of a train having control of a car of the Pullman Palace-Car Company attached to the train, the railroad company can not recover over against the other company for damages to a passenger on the palace car from mental suffering caused by the language of drunken persons permitted to enter and remain in the car. *Houston, E. & W. T. Ry. Co. v. Perkins*, 52 S. W. 124, 21 Tex. Civ. App. 508.

## (2) Assaults or Offensive Language of Employees.

**In General.**—A carrier is liable to a passenger thereof for injury inflicted on him by its servant, in whatever capacity the servant may be employed. *St. Louis, etc., R. Co. v. Franklin* (Civ. App.), 44 S. W. 701.

**Assaults by Employees.**—A carrier is liable for unwarranted assaults upon passengers by its servants or em-

ployees. *International, etc., R. Co. v. Kentle*, 2 App. Civ. Cases, § 303; *Galveston, etc., R. Co. v. McMonigal* (Civ. App.), 25 S. W. 341, 342.

A railroad company is liable for injury resulting to a passenger from an unprovoked assault made upon him by an employee of the company, though such employee is not acting in the line of his duty. *Houston & T. C. R. Co. v. Washington* (Civ. App.), 30 S. W. 719.

A railroad company, being bound to protect its passengers from the violence and insult of its servants, is liable for an assault on a passenger by the conductor, though the assault is made willfully and maliciously, and in no manner connected with the discharge of the conductor's duties. *Dillingham v. Anthony*, 73 Tex. 47, 11 S. W. 139, 3 L. R. A. 634, 15 Am. St. Rep. 753.

Where a passenger was arrested at a station before reaching his destination, on the mistaken idea that he was the person who had assaulted the conductor at another town some time prior thereto, the company was liable for the ejection, though the conductor acted contrary to orders not to make any arrests. *Gulf, C. & S. F. Ry. Co. v. Conder*, 58 S. W. 58, 23 Tex. Civ. App. 488.

"A common carrier undertakes absolutely to protect its passengers from the misconduct of its own servants while engaged in performing a duty which it owes to the passenger, and if the servant inflicts injury upon one of its passengers during the existence of the relation of carrier and passenger, the carrier is liable for the act and its natural consequences, no matter what may have been the motive which actuated the servant, and although the act was contrary to the express orders of the carrier." *Blake v. Kansas City, etc., R. Co.*, 38 Tex. Civ. App. 337, 85 S. W. 430.

The liability of a carrier for mental anguish suffered by a passenger in

consequence of insults offered by its servants does not depend on its negligence in employing the servants or the scope of their authority, where the insults were offered while employed about the carrier's business. *Gulf, C. & S. F. Ry. Co. v. Luther*, 90 S. W. 44, 40 Tex. Civ. App. 517.

If a passenger is forcibly expelled and removed from a train by the brakeman, the liability of the carrier could rest on the proposition that the forcible expulsion embraces an assault from which the carrier rests under the duty of protecting the passenger. *International & G. N. Ry. Co. v. Anderson*, 15 Tex. Civ. App. 180, 53 S. W. 606.

A carrier is liable to a passenger, waiting at a depot for a train, for injuries proximately resulting from the improper acts of the servant in charge of the depot, done in the discharge of the duties of the employment. *Gulf, C. & S. F. Ry. Co. v. Luther*, 90 S. W. 44, 40 Tex. Civ. App. 517.

Where the baggage master at a station, who was charged with the duty of checking baggage and attending to the waiting room, assisted an officer in unlawfully arresting a passenger while she was about to take a train, the carrier was liable, although the baggage master was not at the time actively doing anything in furtherance of the carrier's business. Judgment (Civ. App. 1904), 82 S. W. 524, reversed. *Texas Midland R. R. v. Dean*, 85 S. W. 1135, 98 Tex. 517, 70 L. R. A. 943.

A passenger unlawfully assaulted by the carrier's porter may recover for the physical, mental, and financial damage. *Galveston, H. & S. A. Ry. Co. v. McMonigal* (Civ. App.), 25 S. W. 341.

When a passenger, attempting to board a car, is pulled off the steps by a porter, without any notice, because he carries a jug, which the porter tells him he can not carry with him, and,

after breaking loose, he attempts to enter, and is again restrained, the railroad company is liable for the assault. *Galveston, H. & S. A. Ry. Co. v. McMonigal* (Civ. App.), 25 S. W. 341.

An instruction that even if the porter on a chair car refused to permit plaintiff to enter it, as alleged by her, defendant would not be liable, if it was without the scope of the porter's authority to so refuse, was properly denied, where the conductor testified that it was the porters' duty to direct the passengers which car to enter, and that they carried the keys to the respective cars. *Texas & P. Ry. Co. v. Kingston*, 68 S. W. 518, 30 Tex. Civ. App. 24.

An instruction, in an action for injuries to a passenger assaulted by a porter, that if the porter attacked the passenger not in the line of his duty to the carrier nor in the scope of his employment, but merely from personal motives of resentment or desire for mischief, a verdict for the carrier must be rendered, was properly refused. *Galveston, H. & S. A. Ry. Co. v. Bean*, 99 S. W. 721, 45 Tex. Civ. App. 52.

A railroad company is liable as a trespasser to a passenger for an unjustifiable assault made upon him by the conductor of the train; the conductor being engaged in the company's business, and in the conduct thereof making such assault. (*Tex. Civ. App. 1902*) *St. Louis S. W. Ry. Co. of Texas v. Johnson*, 68 S. W. 58, 29 Tex. Civ. App. 184.

In an action against a carrier by a passenger for an assault by a conductor, defendant can not complain of an erroneous instruction that the verdict should be for the plaintiff, if the jury found such facts as would constitute an assault, and that they constituted negligence, as the error was in favor of the company; it being liable without regard to negligence. *St. Louis S. W. Ry. Co. of Texas v. Johnson*, 68 S. W. 58, 29 Tex. Civ. App. 184.

The fact that a passenger on a railroad train has been drinking and is boisterous, though it may warrant his expulsion from the train, if his conduct is calculated to disturb other passengers, does not authorize an assault on the passenger by the conductor. *St. Louis S. W. Ry. Co. of Texas v. Johnson*, 68 S. W. 58, 29 Tex. Civ. App. 184.

A difference of opinion having arisen between plaintiff and a conductor of defendant railroad, the former struck the latter. The conductor did not then resent the assault, but went into another car, procured a pistol, returned, and, without further provocation, assaulted plaintiff. Held, that the jury were warranted in finding that the carrier had not exercised that high degree of care for the protection of plaintiff which the law imposes. *Galveston, H. & S. A. Ry. Co. v. La Prelle*, 65 S. W. 488, 27 Tex. Civ. App. 496.

The conductor was the agent and representative of the railroad company, and his act in assaulting plaintiff was the act of such company. *Galveston, H. & S. A. Ry. Co. v. La Prelle*, 65 S. W. 488, 27 Tex. Civ. App. 496.

Where passenger on defendant's train is assaulted by brakeman, and knocked down, causing him to fall off the train, because he has no ticket, though he stated he was ready to pay his fare, defendant is liable for his injury. *Houston, etc., R. Co. v. Washington* (Civ. App.), 30 S. W. 719, 720.

Where, in an action against a railroad for an assault on a passenger, a boy of 16, it appeared that the boy boarded the train with a ticket, but was accused by the conductor, in the presence of others, of trying to beat the road, and that while the boy was trying to get his ticket out of his pocket the conductor cursed, and struck him, knocking him over a seat, a verdict for \$1,000 was not excessive. *Missouri, K. & T. Ry. Co. of Texas v.*

Gaines, 79 S. W. 1104, 35 Tex. Civ. App. 257.

Where, in an action for injuries sustained by a conductor's assault, it appeared that other servants of defendant were present and made no attempt to stop the assault, an instruction declaring it the carrier's duty, through the other servants, to protect the passenger from assault, and holding it responsible for failure, was not erroneous. *Houston & T. C. R. Co. v. Batchler*, 83 S. W. 902, 37 Tex. Civ. App. 116.

The fact that three passengers had been pointed out to the conductor as suspicious characters by the depot watchman does not excuse the railroad from liability for a wrongful assault upon them by such conductor. *Texas, etc., R. Co. v. Graves*, 2 Posey 306, 307.

In an action against a railroad for an assault on a passenger by a conductor, facts held sufficient to warrant a verdict for plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. Gaines*, 79 S. W. 1104, 35 Tex. Civ. App. 257.

Where a street car conductor claimed that his assault on a passenger was in rightful self-defense, his act must be considered in the light of his duty to exercise that high degree of care to avoid injury to passengers which very cautious and prudent persons would have exercised under the same circumstances. *Dallas Consol. Electric St. Ry. Co. v. Pettit*, 105 S. W. 42, 47 Tex. Civ. App. 354.

In a suit against a railroad company, it appeared that plaintiff had paid his fare, and was standing on the lower step of the coach just as the train started, when he was kicked off by the train porter; that he had but one hand, with which he clung to the car railing, expecting the train to stop, and was dragged some distance. Held that, although plaintiff was drunk at the time, a judgment in his favor was warranted. *Texas & P. Ry. Co. v. Edmond* (Civ. App.), 29 S. W. 518.

Railroad is liable where its conductor commences expulsion of plaintiff who had previously ridden on baggage-car platform unknown to conductor, with an assault, while plaintiff was quietly sitting in smoking-car, followed by demand for his fare which was tendered, but not accepted by the conductor, who continued the assault by cutting, striking and finally throwing plaintiff off from the car. *Fordyce v. Beecher*, 2 Tex. Civ. App. 29, 34, 35, 21 S. W. 179.

A conductor of a train has no right to force a passenger to remain in a particular seat because he had on previous trips solicited of the passengers patronage of his hotel, contrary to the rules of the company, where he was not on that trip so engaged, and showed no intention of so doing. *Texas & P. Ry. Co. v. Pearl*, 3 Willson, Civ. Cas. Ct. App. § 4.

Plaintiff was rightfully on defendant's train as a passenger. The conductor in charge of the train mistook plaintiff for a suspicious character, and in the discharge of what he considered his duty in preventing plaintiff, as he thought, from robbing another passenger, he pulled him from his seat, and, on a show of resistance, struck him over the head with a pistol. Held, that the mistake of the conductor did not exempt the company from liability for the actual damage resulting to plaintiff from the wrongful acts of the conductor. *Texas & P. R. Co. v. Graves*, 2 Posey, Unrep. Cas. 306.

**Insulting Conduct or Offensive Language.**—A passenger on a street car may recover damages where she is carried past her destination against her will, and thereafter the motorman addresses her in an insulting manner, and shakes his fingers and an iron bar in her face. *San Antonio Traction Co. v. Crawford* (Civ. App.), 71 S. W. 306.

A passenger may recover from a carrier for the misconduct and insulting language of its conductor without

proof that such misconduct and insulting language were "negligently done." *San Antonio Traction Co. v. Davis* (Civ. App.), 101 S. W. 554.

Where a street car conductor was guilty of insulting conduct toward a passenger while engaged in operating the car in the furtherance of the street car company's business, it was liable therefor. *San Antonio Traction Co. v. Lambkin* (Civ. App.), 99 S. W. 574.

The gist of an action against a street car company for insults offered by a conductor to a female passenger is the wrongful act of the conductor independent of negligence. *San Antonio Traction Co. v. Lambkin* (Civ. App.), 99 S. W. 574.

In an action by a passenger for personal injuries and indignities alleged to have been received from the conductor before the passenger was given an opportunity to pay his fare, evidence held sufficient to support a verdict in favor of plaintiff. *St. Louis Southwestern Ry. Co. of Texas v. Fussell* (Civ. App.), 97 S. W. 332.

A railroad conductor, in a loud and insulting manner, addressed a passenger, in the hearing of her children and other passengers: "The idea of a woman trying to board a train with her child without a ticket! You can go on this time, but don't undertake such a thing again." Held, that a charge of dishonesty, in that she was attempting to have her child transported without paying fare, could reasonably be inferred, and his language was actionable. *Texas & P. Ry. Co. v. Tarkington*, 66 S. W. 137, 27 Tex. Civ. App. 353.

Even if it did not imply dishonesty, the language was insulting and calculated to humiliate and mortify. *Texas & P. Ry. Co. v. Tarkington*, 66 S. W. 137, 27 Tex. Civ. App. 353.

It was immaterial that the conductor did not intend to charge her with dishonesty. *Texas & P. Ry. Co.*

*v. Tarkington*, 66 S. W. 137, 27 Tex. Civ. App. 353.

A statement of a conductor in ejecting a passenger that pass on which he was attempting to ride was "bogus" and had "been scratched," but that he regarded the passenger as a gentleman, does not constitute abusive language or insults to the passenger's person or character. *Kansas, etc., R. Co. v. Scott*, 1 Tex. Civ. App. 1, 4, 20 S. W. 725.

Where, in an action for damages for the alleged humiliation of plaintiff's wife by language used to her by a conductor on defendant's train, the evidence raises no issue as to the passenger's temperament, an instruction that, if the language was not reasonably calculated to cause a person of ordinary prudence and temper to be so humiliated under like circumstances, she could not recover, was properly refused. *Texas & P. Ry. Co. v. Tarkington*, 66 S. W. 137, 27 Tex. Civ. App. 353.

#### **Provocation by Passenger or Self-Defense as Justifying Act of Employee.**

—In an action by a passenger against a carrier for injuries inflicted by a servant, evidence of the plaintiff's conduct provoking the assault is admissible in mitigation of exemplary damages. *Galveston, H. & S. A. Ry. Co. v. La Prelle*, 65 S. W. 488, 27 Tex. Civ. App. 496.

Where a passenger insults a servant of his carrier in the discharge of his duties in such manner that an insult may reasonably be expected to follow, and the servant, under immediate influence of passion excited by such insults, assaults the passenger, such insult may be considered, not in justification, but in mitigation, of damages; but the provocation must be so recent as to induce the belief that the violence was committed under the immediate influence of passion. *Houston & T. C. R. Co. v. Batchler*, 83 S. W. 902, 37 Tex. Civ. App. 116.

Where a passenger had used insulting language to the conductor, who assaulted the passenger after leaving the car, the jury should be permitted to consider such conduct in assessing his damages. *Houston, etc., R. Co. v. Batchler*, 32 Tex. Civ. App. 14, 73 S. W. 981.

Where the conductor of a street car assaulted a passenger, but claimed that he acted in self-defense, evidence held to require submission of such issue to the jury. *Dallas Consol. Electric St. Ry. Co. v. Pettit*, 105 S. W. 42, 47 Tex. Civ. App. 354.

The employment in which a street car conductor was engaged at the time he was charged to have assaulted a passenger did not deprive him of the right of self-defense; he being entitled if assaulted to repel the assault and prevent injury to himself, provided his defense did not become offensive and exceed the bounds of prevention. *Dallas Consol. Electric St. Ry. Co. v. Pettit*, 105 S. W. 42, 47 Tex. Civ. App. 354.

In an action against a carrier for an assault on a passenger, evidence held sufficient to show that the force exercised upon plaintiff was justified by actual or apparent danger of defendant's brakeman from an unjustified assault on him by plaintiff. *Friar v. Orange & N. W. Ry. Co.*, 101 S. W. 274, 45 Tex. Civ. App. 564.

Where an intoxicated passenger, on being requested by a brakeman to deliver up a pistol which he was brandishing, gave it to his wife who placed it under her, whereupon the brakeman reached under her for it, it did not constitute an assault upon her. *Friar v. Orange & N. W. Ry. Co.*, 101 S. W. 274, 45 Tex. Civ. App. 564.

A showing that plaintiff was guilty of provoking conduct which falls short of justifying a conductor in inflicting the injuries complained of is insufficient to defeat plaintiff's entire cause of action. *Galveston, H. & S. A. Ry.*

*Co. v. La Prelle*, 65 S. W. 488, 27 Tex. Civ. App. 496.

Insulting language used by the passenger, if provoked by the insulting words of the conductor, ought not to be considered in mitigation of damages in a suit by the passenger against the company for an assault by the conductor. *Houston & T. C. R. Co. v. Batchler*, 83 S. W. 902, 37 Tex. Civ. App. 116.

In an action for injuries sustained by a conductor's assault, where the issue was whether the assault was committed under the influence of passion aroused by insulting words, an instruction was proper which required the jury to find both that sufficient time elapsed between the use of insulting words by plaintiff and the time of the assault for cool reflection, and that the assault was the result of cool deliberation of the conductor, before they could ignore the mitigating effect of the insulting words by plaintiff to the conductor. *Houston & T. C. R. Co. v. Batchler*, 83 S. W. 902, 37 Tex. Civ. App. 116.

The prior assault on the conductor by the plaintiff, which had terminated, is no defense to the railway company in an action for damages. *Galveston, H. & S. A. Ry. Co. v. La Prelle*, 65 S. W. 488, 27 Tex. Civ. App. 496.

**Liability for Injuries in Fight between Passenger and Conductor.**—In an action for injuries sustained by a conductor's assault, an instruction that if, at the time assaulted, plaintiff was waiting on the platform to have a fight with the conductor, by mutual agreement previously entered into, and the fight between them at the time and place where it occurred was the result of the mutual agreement to fight at that time and place, the company would not be liable, was not erroneous, as requiring the jury to find that they agreed to have a personal combat at the time and place it occurred. *Houston & T. C. R. Co. v.*

Batchler, 83 S. W. 902, 37 Tex. Civ. App. 116.

**Evidence in Actions for Misconduct of Employees—Admissibility.**—In an action for insulting conduct offered by a street car conductor toward plaintiff, a passenger, it was proper to permit proof of the presence of others on the car at the time. *San Antonio Traction Co. v. Lambkin* (Civ. App.), 99 S. W. 574.

Where a petition, in an action by a passenger against a carrier, alleged that defendant's conductor told plaintiff's wife in an insulting manner that she must pay fare for her child or get off the car, and, on her refusal to pay, he became abusive, and repeated his abusive conduct two or three times before she reached her destination, evidence that the conductor told her that unless she paid the fare he would turn her over to an officer, and that at a certain point in the journey, he brought a person to her who claimed to be an officer, and who told her that she had best pay the fare, was admissible. *St. Louis Southwestern Ry. Co. of Texas v. Granger* (Civ. App.), 100 S. W. 987.

In an action against a street railway company for misconduct of its conductor towards plaintiff and her companions, evidence was admissible on plaintiff's part to show that she reported the misconduct to the company as soon as she arrived home, as tending to show she was aggrieved. *San Antonio Traction Co. v. Davis* (Civ. App.), 101 S. W. 554.

In an action against a street railway company for misconduct of its conductor towards plaintiff and her companions, evidence that plaintiff reported the misconduct to the company as soon as she arrived home was not inadmissible because she did not plead having made the report. *San Antonio Traction Co. v. Davis* (Civ. App.), 101 S. W. 554.

In an action for alleged insulting conduct by a street car conductor toward plaintiff, evidence that the con-

ductor was standing in the presence of negroes on the platform at the time it was claimed the insulting remarks were made by him was admissible though not pleaded. *San Antonio Traction Co. v. Lambkin* (Civ. App.), 99 S. W. 574.

In an action against a carrier for humiliation to a passenger resulting in sickness, etc., caused by a conductor's angry, etc., manner, evidence respecting the conductor's appearance and manner and the passenger's physical condition was admissible. *Trinity & B. V. Ry. Co. v. Bradshaw* (Civ. App.), 107 S. W. 618.

Where, in an action for insulting conduct offered by a street car conductor toward plaintiff, a passenger, the petition alleged that a certain conversation occurred between plaintiff and the conductor, evidence as to such conversation, which occurred between the conductor and another passenger, was inadmissible. *San Antonio Traction Co. v. Lambkin* (Civ. App.), 99 S. W. 574.

Where, in an action against a street car company for insulting conduct by one of defendant's conductors toward plaintiff, the petition attempted to allege a number of circumstances, each forming part of a series of insults offered by the conductor to plaintiff, an allegation that the conductor failed and refused to stop the car at a certain point to allow plaintiff to alight in accordance with her request was proper, as part of the conductor's misconduct. *San Antonio Traction Co. v. Lambkin* (Civ. App.), 99 S. W. 574.

In an action against a street railway company for the angry and insulting way in which its conductor replaced a sign on the seat in front of plaintiff after her companion had replaced it where it had been before another passenger jestingly removed it, it was not error to exclude a question asked plaintiff whether the affair would have happened if her companion had not moved the sign. *San Antonio*



*Traction Co. v. Davis* (Civ. App.), 101 S. W. 554.

In an action against a street railway company for misconduct of its conductor towards plaintiff and her companions, it could be shown that the car was started before one of the companions alighted. *San Antonio Traction Co. v. Davis* (Civ. App.), 101 S. W. 554.

Where plaintiff sued for injuries occasioned by his wife and child being compelled by defendant to ride in a cold, filthy car, in company with passengers who used vile and indecent language, the exclusion of testimony of a passenger that the cars were crowded and uncomfortable, and that some of the passengers were swearing and drinking, on the ground that it was not shown that plaintiff's wife was in the same car with the witness, was erroneous, since the testimony referred to all the cars in the train. *Duck v. St. Louis & S. W. Ry. Co.* (Civ. App.), 63 S. W. 891.

Where a passenger was refused admittance to a car because he carried a jug, evidence that passengers often carried articles which the porter of the car had stated were prohibited is admissible to disprove such statements. *Galveston, H. & S. A. Ry. Co. v. McMonigal* (Civ. App.), 25 S. W. 341.

In a suit by a passenger for injuries from an assault by railway conductor, in the absence of allegation of his retention by company with knowledge thereof, evidence that such conductor was a man of violent temper is inadmissible. *Galveston, etc., R. Co. v. La Prelle*, 22 Tex. Civ. App. 593, 595, 55 S. W. 125.

**Evidence Held Sufficient to Authorize Submission of Issue to Jury.**—Evidence in an action against a carrier for injuries to plaintiff's wife by reason of negligence in failing to require proper conduct on the part of her fellow passengers examined, and held sufficient to warrant submission to the

jury of the question whether her fellow passengers were smoking, drinking whisky, cursing, and crowding up against her. *Texas & P. Ry. Co. v. Bratcher* (Civ. App.), 78 S. W. 531.

**Instructions as to Mitigation of Damages.**—In an action for insults to a female passenger on a street car by the conductor of the car, an instruction that if plaintiff and her companions willfully insulted the conductor, and such insults provoked the acts and language of the conductor, such fact might be considered in mitigation of damages, was properly refused for failure to confine the matter to language or conduct of the conductor which arose from insults first given to him by the passengers which was in immediate response to such insults. *San Antonio Traction Co. v. Lambkin* (Civ. App.), 99 S. W. 574.

In an action against a street railway company for insults to a passenger by its conductor, it was proper to refuse an instruction as to the mitigation of damages if the conductor's rude conduct and language was responsive to insulting language by plaintiff and her companions where it did not confine such responsive insults to those offered under the influence of sudden passion. *San Antonio Traction Co. v. Davis* (Civ. App.), 101 S. W. 554.

### 8. Duty to Warn of Danger.

**In General.**—In an action against a railroad for personal injuries, there was no error in charging that if plaintiff, who was accompanying his shipment of cattle, was off train at station prodding up cattle which were down in the cars, and if other facts were so, it was defendant's duty to warn plaintiff before starting the train and to give him reasonable time to get on. *Atchison, etc., R. Co. v. Worley* (Civ. App.), 25 S. W. 478, 479, 480.

Where plaintiff could by terms of the contract under which he was riding on a freight car alight at every sta-

tion where the train stopped, the conductor was negligent in not warning him of danger in alighting at a certain place when he saw plaintiff's intention so to do. *International, etc., R. Co. v. Downing*, 16 Tex. Civ. App. 643, 649, 650, 41 S. W. 190, affirmed in 93 Tex. 643, no op.

Where a passenger is injured, while riding in a stock car, in a railroad collision between the train in which he was riding and another section which ran into plaintiff's train, which was stopped on account of the air brakes getting out of order, if the conductor, in the exercise of reasonable care, should have known of plaintiff's danger, and with the exercise of reasonable care could have warned him in time for him to avoid injury, his failure to warn plaintiff renders the company liable, though plaintiff was negligent in riding in the car. *Missouri, K. & T. Ry. Co. of Texas v. Cook*, 12 Tex. Civ. App. 203, 33 S. W. 669.

A railroad company which has provided a safe exit from its cars, while at the same time there exists another way which is not safe, and which is in such general use by its passengers as to induce the belief that it was provided in part at least for that purpose, is liable for injury received by a passenger using such unsafe exit without warning from the company's servants. *Missouri Pac. Ry. Co. v. Long*, 81 Tex. 253, 16 S. W. 1016.

**No Duty Where Danger Apparent.**—Where a passenger goes on the platform of a car in motion, and notices that the train is running at an unusual and dangerous rate of speed, an employee of the carrier who knows of his presence on the platform need not warn him of the danger. *Ebert v. Gulf, C. & S. F. Ry. Co. (Civ. App.)*, 49 S. W. 1105.

**Duty to Warn Question for Jury.**—Whether it was negligence for trainmen in charge of a cattle train and ca-

boose containing passengers accompanying the cattle, knowing that the caboose had stopped on a bridge, where it would be dangerous for any one to leave it, and knowing that it was the duty of passengers to get off the car at stops to attend to the cattle, or knowing that they might get off to attend to a call of nature, for the relief of which the caboose was not provided, to fail to warn a passenger, whom they saw leave the car, of the danger which he would encounter, was a question for the jury. *Cruse-turner v. International & G. N. R. Co.*, 86 S. W. 778, 38 Tex. Civ. App. 466.

What omission on the part of a carrier to warn passengers of a dangerous place of exit, or assist them in alighting, is negligence, is for the jury. *San Antonio Traction Co. v. Flory*, 100 S. W. 200, 45 Tex. Civ. App. 233.

**Evidence Properly Considered on Question as to Duty.**—In an action for injuries to passengers on a freight train while attempting to alight to respond to a call of nature, the absence of a water-closet in the caboose may be considered, in passing on the question whether the employees in charge of the train were bound to know that the passenger would be likely to leave the car at stops, and would be negligent if they failed to warn him of the dangerous position of the car at stops. *International & G. N. R. Co. v. Cruse-turner*, 98 S. W. 423, 44 Tex. Civ. App. 181.

In an action for injuries to a passenger on a freight train, while alighting therefrom, at a place where the train stopped to respond to a call of nature, the act of the brakeman in going out of the car for a like purpose immediately before the passenger attempted to alight was properly considered on the question of due care by the passenger in leaving the car at the time he did, and on the question as to whether it was the duty of the carrier to anticipate that he might

leave the car and to warn him of the danger in so doing. *International & G. N. R. Co. v. Cruseturner*, 98 S. W. 423, 44 Tex. Civ. App. 181.

#### 9. Duty to Announce Stations.

By its contract to carry, a carrier of passengers undertakes to give reasonably sufficient notice of stations. *Missouri, etc., R. Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496; *Central, etc., R. Co. v. Hoard* (Civ. App.), 49 S. W. 142; *Texas, etc., R. Co. v. Alexander* (Civ. App.), 30 S. W. 1113; *Missouri, etc., R. Co. v. Kendrick* (Civ. App.), 32 S. W. 42; *Houston, etc., R. Co. v. Cohn*, 22 Tex. Civ. App. 11, 53 S. W. 698; *Texas, etc., R. Co. v. Pollard*, 2 App. Civ. Cases, § 481; *Fanning v. St. Louis, etc., R. Co.*, 38 Tex. Civ. App. 513, 86 S. W. 354, affirmed in 101 Tex. 635, no op.

Ordinarily the duty of the carrier to the passenger, in respect to giving notice of the arrival of its trains at the stations upon its line, is performed when the carrier has caused the name of the station to be distinctly and audibly announced in each car, and given those desiring to leave the train reasonable time and opportunity to alight therefrom. *Texas, etc., Railroad v. Terry*, 27 Tex. Civ. App. 341, 65 S. W. 697.

It is the duty of a railroad company to have the names of stations properly announced, and to stop the train a sufficient time to allow passengers to alight with safety, but it need not give passengers personal notice that their station is reached. *Houston & T. C. R. Co. v. Cohn*, 53 S. W. 698, 22 Tex. Civ. App. 11.

A railroad company, in the absence of a statute requiring it to announce on its passenger trains the arrival of such trains at stations, is not negligent, as a matter of law, in failing to make such announcement. *Houston & T. C. R. Co. v. Goodyear*, 66 S. W. 862, 28 Tex. Civ. App. 206.

Where through defendant's negli-

gence in not calling the names of stations, a passenger is carried by her station, making it necessary for her to walk back from the point where the train stopped, defendant is liable for her injuries, notwithstanding the train stopped at the station. *Texas & P. Ry. Co. v. Pollard*, 2 Willson, Civ. Cas. Ct. App. § 481.

Where the question whether defendant's porter invited a passenger to alight at a wrong station is in issue, evidence is admissible that the duties of the porter only required him to announce the stations, and to assist passengers to alight when requested to do so by the latter, and did not require him to notify the particular passengers of the places where they should get off. *Texas Midland R. Co. v. Terry*, 65 S. W. 697, 27 Tex. Civ. App. 341.

A passenger was hard of hearing, but such fact was not disclosed to the company or its employees, and she alighted at a wrong station, though the porter had twice announced its name. The plaintiff testified that the porter took her grip, and told her to sit still until the train stopped, which was denied by the porter, and that she left the car when the train stopped, and the porter deposited her grip on the ground. Held not sufficient to sustain a judgment for plaintiff for negligently setting her down at a wrong station. *Texas Midland R. Co. v. Terry*, 65 S. W. 697, 27 Tex. Civ. App. 341.

**Instructions as to Notice.**—Where, in an action against a carrier for carrying a passenger beyond her station, the issue was whether the station was called, the passenger stating that it was not called, and the carrier proving that it was called, a charge that the carrier's employees were required to call the station in a sufficiently loud tone of voice to appraise the passenger of the fact was erroneous, as imposing a duty not required by statute and one not essential to the safety of passengers. *Missouri, K. & T. Ry. Co. of*

*Texas v. Morgan*, 108 S. W. 724, 49 Tex. Civ. App. 212.

#### 10. Duty to Awaken Sleeping Passengers.

**General Rule.**—A carrier is not liable for carrying a sleeping passenger beyond his station, notice of arrival thereat and time to alight having been given, it not being its duty to arouse him, and see that he gets off. *Texas & P. Ry. Co. v. Alexander* (Civ. App.), 30 S. W. 1113.

A carrier is not liable for failure of a conductor to waken a passenger at a station where she was to change trains, though he had promised to do so. *Missouri, K. & T. Ry. Co. of Texas v. Kendrick* (Civ. App.), 32 S. W. 42.

Such duty might, however, be imposed by exceptional circumstances. *Missouri, etc., R. Co. v. Kendrick* (Civ. App.), 32 S. W. 42.

**As to this duty in case of sleeping car companies**, see post, "Duty to Awaken Passengers within Proper Time before Reaching Destination," VI, E.

#### 11. Liability for Carrying Passenger beyond Destination.

**In General.**—If a carrier negligently fails to afford a passenger reasonable opportunity and facilities to alight from the train at his destination and carries him by it is liable for such injury as the passenger may sustain as the proximate result of such negligence. *Texas & P. R. Co. v. Woods*, 8 Tex. Civ. App. 462, 28 S. W. 416.

A railroad company is liable for the act of its conductor in carrying a passenger, who was traveling at night, beyond the point where he had agreed to put such passenger off, in consequence of which the latter, while attempting to find the road which led to a friend's house, fell into a ditch, and was injured, without fault on his part. *Houston & T. C. R. Co. v. Smith* (Civ. App.), 32 S. W. 710.

Evidence in an action against a carrier for personal injuries through negligence in carrying plaintiff beyond her station held to sustain a verdict for plaintiff. *International, etc., R. Co. v. Sampson* (Civ. App.), 64 S. W. 692.

Where a passenger suffered from fright and hunger, by being negligently carried beyond her station, and immediately afterward became sick, a finding that her sickness was proximately caused by defendant's negligence was justified. *Texas, etc., Railway v. Gott*, 20 Tex. Civ. App. 335, 338, 50 S. W. 193, affirmed in 93 Tex. 741, no op.

Where carrier breached its contract with middle-aged female passenger, by negligently failing to stop at her station, whereby she was kept up all night in cold car and forced to leave train at early hour in morning and became sick, a finding that such conditions were proximate cause of her illness was justified. *Missouri, etc., R. Co. v. Hennesey*, 20 Tex. Civ. App. 316, 319, 49 S. W. 917.

In an action against a carrier for negligently carrying a passenger by her station, it can not complain that it did not know the weather would be cold, and that plaintiff would be thinly clad, and would suffer by reason of not having friends to meet her; it being charged with notice thereof. *Missouri, K. & T. R. Co. of Texas v. Hennesey*, 49 S. W. 917, 20 Tex. Civ. App. 316.

Where a railroad negligently carries a passenger by her station, it is charged with notice that her family, by reason of its negligence, could not know when she would arrive, and hence when to meet her. *Missouri, K. & T. Ry. Co. of Texas v. Hennesey*, 49 S. W. 917, 20 Tex. Civ. App. 316.

**Duty to Back Train Where Passenger Carried Past Station.**—A train must be stopped at a station long enough to allow passengers to alight safely, and, if not, and they are car-

ried past, the train should, if necessary, be backed; and in the case of a woman traveling with four children, all less than six years old, it was negligence to set them down 600 yards beyond the station, in a wet place, at 5 a. m., in cold winter weather. *Fordyce v. Dillingham* (Civ. App.) 23 S. W. 550.

Plaintiff took the train late in the afternoon, traveling alone. She had traveled over the road frequently, and knew that she would arrive at Wills Point (her destination) after dark. The train stopped at Wills Point long enough for her to get off. She was talking to another lady sitting by her when the train stopped, and did not hear them call the station, and was listening for them to do so, and did not inquire the cause of the stopping. The names of the stations were not called. As soon as plaintiff found she was passing her destination, she had the cars immediately stopped, and requested that the train be backed to the depot, a distance of some three or four hundred yards, which request was refused, and she was obliged to get off where it stopped. Held, that the negligence of defendant in not backing the train to the station, when requested, was the proximate cause of plaintiff's injuries, and defendant was liable therefor. *Texas & P. Ry. Co. v. Pollard*, 2 Willson, Civ. Cas. Ct. App. § 484.

Where conductor, upon discovering that a passenger had been carried past a station, offered to back the train, the passenger by declining and stating willingness to alight, changed carrier's obligation and released it from liability for injury in absence of further negligence. *Conwill v. Gulf, etc., R. Co.*, 85 Tex. 96, 100, 19 S. W. 1017.

In an action against a railroad company for personal injuries sustained in alighting from a train which had been run past the depot platform, an instruction that if the conductor had

offered to back up to the platform for plaintiff, but was requested by her not to do so, and had thereupon assisted her with ordinary care, there could be no recovery, was not objectionable, in including only the defense of contributory negligence. *Conwill v. Gulf, C. & S. F. Ry. Co.*, 85 Tex. 96, 19 S. W. 1017.

**No Liability Where Proper Notice Given and Opportunity to Alight Afforded.**—The station having been called, and reasonable time given for alighting, a carrier is not liable for taking a passenger by her station, though the conductor had promised to specially notify her and assist her from the train. *St. Louis S. W. Ry. Co. v. McCullough* (Civ. App.), 33 S. W. 285.

A railway company is not answerable for carrying a person past station of his destination, where it stopped its train there long enough for passenger to get off. *Galveston, etc., R. Co. v. Crispi*, 73 Tex. 236, 238, 11 S. W. 187.

Where a passenger knows when a train stops at the depot where she wishes to alight, and fails to get off the train, it is immaterial whether the railroad employees were guilty of negligence or not in informing her of the arrival. *Missouri, K. & T. Ry. Co. of Texas v. Miles*, 50 S. W. 168, 20 Tex. Civ. App. 570.

It is ordinarily the duty of a passenger to use his senses and take notice of the usual announcement of stations, and if by reason of being asleep, unknown to the carrier, he fails to hear the notice given of the arrival of the train at his place of destination and remains on the train, the fault is his, and the carrier is not liable therefor. *Missouri, K. & T. Ry. Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496.

In an action for ejecting plaintiff from a railroad train, it appeared that plaintiff was asleep when the station at which he should have changed cars was reached; that he had been admonished by the conductor not to go

to sleep; that the station was properly announced, and the train stopped there; that, upon discovering he had been carried past the station, plaintiff asked the conductor to stop the train, which he refused to do until reaching a station 13 miles beyond. Plaintiff was told to get off at this point, and, after waiting three hours after midnight for a train to carry him back, started to walk. Held, that any damage plaintiff received was the result of his own negligence, and not that of the railroad company. *Houston & T. C. R. Co. v. Cohn*, 53 S. W. 698, 22 Tex. Civ. App. 11.

A charge making a carrier's freedom from liability for carrying a passenger by her station depend, not only on the station being called and reasonable time given to alight, but also on her being put off at a place where she suffered no inconvenience, is erroneous. *St. Louis S. W. Ry. Co. v. McCullough* (Civ. App.) 33 S. W. 285.

Where, in an action for injury sustained by a passenger in jumping from a moving train, there was evidence that the train had stopped at the station, but that the passenger was engaged in conversation, and his attention was not called to the fact, and he was consequently carried beyond the station, a charge should have been given, on request, covering the facts; and this though the court had charged on the general rule of law as to the duty of the carrier in stopping its trains and giving notice to passengers. *Central Texas & N. W. Ry. Co. v. Hoard* (Civ. App.), 49 S. W. 142.

In an action by the passenger to recover for being carried past her destination, a charge that it was the duty of a passenger to use her senses, and take notice of the usual announcement of stations, and if, by reason of negligence, she failed to hear the announcement, and remained aboard, and was carried past her destination, the company was not liable therefor, should have been given. *St. Louis &*

*S. W. Ry. Co. of Texas v. Ricketts*, 54 S. W. 1090, 22 Tex. Civ. App. 515.

A charge that if the employees on a train gave usual notice of the approach of and arrival at a station which was a passenger's destination, and gave such notice in a manner reasonably calculated to inform plaintiff of such arrival, and plaintiff failed to leave the train, though it stopped long enough for her to do so, then the plaintiff would not be entitled to recover, and the jury should find a verdict for the defendant, should have been given without any qualification, since it fully stated the law on the point to which it was directed. *St. Louis & S. W. Ry. Co. of Texas v. Ricketts*, 54 S. W. 1090, 22 Tex. Civ. App. 515.

Where plaintiff sued a railroad for being carried past her destination, a charge that it was the company's duty to keep the depot at the place where plaintiff alighted warmed for a certain period after the arrival of trains, and if, from its failure to do so, plaintiff was injured, the company was liable, was erroneous, in that it failed to make liability depend upon the question as to whether or not the carrier was guilty of negligence in carrying plaintiff by her destination, since the company owed no duty to plaintiff after arrival at such wrong destination. *St. Louis & S. W. Ry. Co. of Texas v. Ricketts*, 54 S. W. 1090, 22 Tex. Civ. App. 515.

A requested charge that if the train stopped at the station, but the passenger was so engaged in conversation that his attention was not called to the fact, then no negligence could be imputed to the carrier in carrying him beyond, while not strictly correct, because omitting the duty of the train employees to give notice of the approach to the station, was sufficient to direct the court's attention to this phase of the case. *Central Texas & N. W. Ry. Co. v. Hoard* (Civ. App.), 49 S. W. 142.

Where a passenger was injured while alighting from train beyond her station, and evidence was conflicting how long the train stopped at the station, if at all, a charge that the carrier was liable if plaintiff was carried beyond station and put off at an unusual place, was error. *Texas, etc., R. Co. v. Woods*, 15 Tex. Civ. App. 612, 614, 40 S. W. 846.

The law of the case was not as clearly and distinctly stated as it should have been where a paragraph of the charge authorized a recovery if plaintiff's wife was carried beyond her destination and injured in alighting, even though the train may have stopped at the station a sufficient time for her to have gotten off, and while in another paragraph the qualification that should have been stated was given, the two were entirely disconnected. *Texas & P. Ry. Co. v. Woods*, 15 Tex. Civ. App. 612, 40 S. W. 846.

If a passenger, when a train stops at a water tank, is informed that it is not her station, but that the next stop will be, and her informant, an employee, tells her that he will notify her of the arrival of the train at the station, and fails to do so, the question whether he is guilty of negligence is for the jury. *Missouri, K. & T. Ry. Co. of Texas v. Miles*, 50 S. W. 168, 20 Tex. Civ. App. 570.

**As to liability where names of stations not called**, see ante, "Duty to Announce Stations," V, D, 9.

**Evidence in Action for Carrying Past Station.**—Where, in an action against a carrier for carrying a female passenger beyond her station, the evidence showed that she had requested the employee in charge of the train to let her off at the station, evidence that the husband of the passenger asked the employee on the arrival of the train at the station whether his wife was on board was admissible, though the employee did not know that the person asking was the pas-

senger's husband. *Missouri, K. & T. Ry. Co. of Texas v. Morgan*, 108 S. W. 724, 49 Tex. Civ. App. 212.

In an action by a passenger against a railroad company for being carried past her station, evidence held not to justify a judgment for plaintiff. (*Tex. Civ. App. 1901*) *International & G. N. R. Co. v. Sampson* (Civ. App.), 64 S. W. 692.

## 12. Duty to Inform Passengers as to Change of Cars.

A railroad was negligent where the conductor in charge of the train failed to inform a passenger that there were coaches attached to the train in which he might continue his journey, and he was injured in alighting to change cars. (*Civ. App. 1902*) *Gulf, C. & S. F. Ry. Co. v. Shelton*, 30 Tex. Civ. App. 72, 69 S. W. 653, 70 S. W. 359, affirmed (1903) 72 S. W. 165, 96 Tex. 301.

Plaintiff had a ticket over a railroad which formed a junction with defendant's road. On arriving at the junction, the train switched off on defendant's road. Plaintiff inquired of the conductor who took charge at that point if she was on the right road, and was told to keep her seat, and a short distance on was ejected by the same conductor. Held, that it was the conductor's duty to examine plaintiff's ticket or inquire as to her destination, and his failure to do so was negligence. *International & G. N. Ry. Co. v. Gilbert*, 64 Tex. 536.

## 13. Duties as to Passengers Boarding Wrong Train by Mistake.

**In General.**—Generally, where a passenger by mistake boards the wrong train, it is the duty of the railroad to return him to the place where the mistake occurred, or to leave him at some point where he will not be subjected to any serious annoyance, and to return him to the place where he took the wrong train by the first returning train. *St. Louis, etc., R. Co. v. Pruitt*

(Civ. App.), 79 S. W. 598, affirmed in 98 Tex. 630, no op.

Where a carrier sold a ticket to a passenger to a station where its train did not stop it was its duty after finding it impossible to put her off there, to leave her at the nearest station where she could obtain comfortable accommodations, and from which she could travel with the least delay to her destination. *Texas & Pacific Ry. Co. v. Cole*, 66 Tex. 562, 1 S. W. 629.

Where a passenger informed the conductor of her destination and route, and was told by him that his was the train which she was to take, and he helped her to board the same, but when he saw her ticket, after the train had started, discovered that she was on the wrong train, and compelled her to get off at the next station, in spite of her advanced age, her protests that she had no money, and her information that if he would carry her to a point some six miles distant she would be subjected to no inconvenience, as she had friends and relatives there, whereas by being compelled to get off at the next station she was greatly delayed and caused much suffering and anguish, on account of lack of accommodation, hunger, etc., the duty of the railroad was not discharged by causing the passenger to get off at the next station, and permitting her to return without charge to the place where she got on, but it was the railroad's duty to carry her to the station where her friends and relatives were. *St. Louis, etc., Ry. Co. v. Pruitt* (Civ. App.), 79 S. W. 598, affirmed in 98 Tex. 630, no op.

In an action for injuries to a passenger resulting from her being carried on the wrong train, the court's charge that if, after the mistake was discovered, she asked to be carried to a certain point, from which she could readily reach her intended destination, and this was refused, she might recover, did not charge that it was neg-

ligence not to grant her request. Writ of error. (Civ. App.) 79 S. W. 598, denied. *St. Louis Southwestern Ry. Co. of Texas v. Pruitt*, 80 S. W. 72, 97 Tex. 487.

Plaintiff got on defendant's train without a ticket to go to a place which he knew was not a stopping place. The auditor collected his fare, but upon being informed by the conductor that the train did not stop at that station, informed plaintiff of his mistake, and gave him an opportunity to get off at the next station one mile before reaching the one to which he wished to go. Held, that defendant was under no obligation to stop its train at a place which was not a stopping place to allow plaintiff to alight. *St. Louis Southwestern Ry. Co. of Texas v. Townsend*, 101 S. W. 455, 45 Tex. Civ. App. 616.

**Where Passenger Negligently Failed to Ascertain Proper Train.**—Where passenger, through his own mistake, boarded the wrong train and elected to be put off rather than pay his fare to the next station, the railroad company owed him no duty to take him to the next station nor to a place where he could rest in comfort and return on the next train. *Missouri, etc., R. Co. v. Dawson*, 10 Tex. Civ. App. 19, 21, 29 S. W. 1106.

"It was the duty of the plaintiff to ascertain the right train before taking passage upon it, and if he negligently failed to do so and got upon the wrong train, the railway company only owed him the duty of ordinary care to refrain from injuring him. *Texas Pac. R. Co. v. James*, 82 Tex., 306, 18 S. W. 586; *Railway v. Powell*, 40 Ind. 37; *Railway v. Beauchamp*, 9 Am. and Eng. Ry. Cases 307; *Rorer on Rys.* 984." *Missouri, etc., R. Co. v. Dawson*, 10 Tex. Civ. App. 19, 29 S. W. 1106.

It is the duty of a passenger, upon learning en route that she must change cars to reach her destination, to as-



certain where she should make such change, and where, by reason of her failure to find out where such change should be made, she is carried over the wrong line, the railway company is not liable unless she was misled by its agent or servants. *St. Louis S. W. Ry. Co. v. McCullough*, 45 S. W. 324, 18 Tex. Civ. App. 534.

In an action against a carrier for damages for refusal to stop a train and permit plaintiff to alight at a point to which she had purchased a ticket, evidence considered, and held, that plaintiff was not misled into getting upon the wrong train. *Texas & P. Ry. Co. v. Bell*, 87 S. W. 730, 39 Tex. Civ. App. 412.

The mere fact that a railroad company receives a passenger on a train without protest, and that the passenger does not know that the train does not stop at the station for which he holds a ticket, does not entitle the passenger to damages, but he must also show that he exercised ordinary care to ascertain that the train was the proper train. *St. Louis S. W. Ry. Co. of Texas v. Campbell*, 69 S. W. 451, 30 Tex. Civ. App. 35.

A passenger, before boarding a train, is bound to inform himself as to whether, under the regulations of the carrier, it will stop the train at his destination, unless the carrier, by habitually stopping the train at that place, has induced the passenger to believe that its rule that the train should not stop there except under exceptional circumstances had been abrogated. *Albin v. Gulf, C. & S. F. Ry. Co.*, 95 S. W. 589, 43 Tex. Civ. App. 170.

In an action for ejection of a passenger, who boarded one of defendant's through trains to be carried to a station at which the train was not scheduled to stop, an instruction that, if the jury believed that plaintiff boarded the train without making inquiry to ascertain whether or not it

would stop at her destination, and without reasonable grounds to believe that the train would stop to permit her to alight, the jury should find for defendant, was proper. *Albin v. Gulf, C. & S. F. Ry. Co.*, 95 S. W. 589, 43 Tex. Civ. App. 170.

In an action for ejection of a passenger before arrival at her destination, an answer alleged that, though defendant operated a daily train, offering ample passenger accommodations, that stopped at plaintiff's destination, the train plaintiff boarded was a fast passenger train which did not stop there, except on signal or to let off through passengers according to its regular published time card, and that defendant refused to accept plaintiff's fare for transportation on such train except to a station at which the train was scheduled to stop, and plaintiff, having refused to pay fare to such station, was ejected. Held, to state a sufficient defense. *Albin v. Gulf, C. & S. F. Ry. Co.*, 95 S. W. 589, 43 Tex. Civ. App. 170.

#### 14. Duties and Liabilities as to Persons Alighting from Train.

##### a. As to Passengers.

##### (1) General Rule as to Duty of Company to Exercise Care.

**In General.**—The contract of carriage being in force, and transit not having been ended until the passenger has left the car, the duty of a carrier to exercise the proper degree of care for the safety of its passengers continues until the passenger alights, or has been afforded a reasonable opportunity to do so. *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 83, 15 S. W. 264; *St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, 88, 15 S. W. 266; *Missouri, etc., R. Co. v. Russell*, 8 Tex. Civ. App. 578, 28 S. W. 1042, affirmed in 93 Tex. 668, no op.; *Ft. Worth, etc., R. Co. v. Kennedy*, 12 Tex. Civ. App. 654, 656, 35 S. W. 335; *Houston, etc., R. Co. v. Dotson*, 15 Tex. Civ. App. 73, 38 S. W. 642, affirmed in 93 Tex. 686, no op.;

Ft. Worth, etc., *R. Co. v. Spear* (Civ. App.), 107 S. W. 613.

It is as much the duty of a railroad company, by the exercise of a high degree of care, to safely land as it is to safely carry its passengers. *Missouri, etc., R. Co. v. Russell*, 8 Tex. Civ. App. 578, 28 S. W. 1042, affirmed in 92 Tex. 668, no op.

**Degree of Care Required.**—The degree of care required of carriers as to alighting passengers is proportionate to the nature and risk of the business, and is such as would ordinarily be exercised by persons of great care under similar circumstances. *Missouri, etc., R. Co. v. Russell*, 8 Tex. Civ. App. 578, 28 S. W. 1042, affirmed in 93 Tex. 668, no op.; *Houston, etc., R. Co. v. Dotson*, 15 Tex. Civ. App. 73, 38 S. W. 642, affirmed in 93 Tex. 686, no op.; *Missouri, etc., R. Co. v. Wolf*, 40 Tex. Civ. App. 381, 89 S. W. 778.

It is the duty of a railroad company to give its passengers such reasonable time as will enable them to alight in safety at their destinations, under the usual and ordinary circumstances. *Chicago, R. I. & T. Ry. Co. v. Armes*, 74 S. W. 77, 32 Tex. Civ. App. 32.

In an action for injuries received while alighting from defendant's street car, a charge that, if the jury found that the place where defendant's car stopped and plaintiff attempted to alight was not the usual place to alight, the conductor should have used the same care to avoid injuring passengers by starting the car which he should have used had the place been a usual stopping place, was misleading, as tending to lead the jury to believe that the conductor owed plaintiff the same degree of care in starting the car under all circumstances. *Rapid Transit Ry. Co. v. Strong* (Civ. App.), 108 S. W. 394.

It is proper to instruct that it is the duty of a carrier to stop a reasonably sufficient time at a depot to enable passengers to get off safely, and

also in the night time to provide sufficient light to enable them to get off with safety, and that a failure to use such care and diligence to perform such duties as a person of ordinary prudence would exercise under the circumstances would be negligence. *Texas & P. Ry. Co. v. Lee*, 51 S. W. 351, 21 Tex. Civ. App. 174.

Generally, as to the degree of care required of carriers of passengers, see ante, "Degree of Care Required," IV, A, 1.

**Exercise of Due Care Question for Jury.**—Whether carrier has exercised due care in providing means for passenger to alight is a question for the jury. *St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, 88, 15 S. W. 266.

The evidence showed that the train stopped at a station, and that plaintiff used every effort to alight in proper time; that the conductor had gone off, while the brakeman did nothing to warn those in charge of an approaching engine that its collision with the car in which plaintiff was might injure passengers. Held, that the court was justified in submitting the question of gross negligence of defendant's servants to the jury. *East Line & R. Ry. Co. v. Rushing*, 69 Tex. 306, 6 S. W. 834.

In an action for injuries received while getting off defendant's street car at a certain building, the conductor not having been notified that plaintiff wished to alight at that point, which was not a regular stopping place, the car having stopped there only for the purpose of throwing a switch, a charge that if the conductor failed to exercise such care as a very cautious, etc., person would have exercised under like circumstances to see that no one attempted to alight from the car when it started, such failure would be negligence, was erroneous, as stating, in effect, that such was the conductor's duty as a cautious person, instead of leaving that question for the jury. *Rapid*

*Transit Ry. Co. v. Strong* (Civ. App.), 108 S. W. 394.

**(2) Duty to Afford Reasonable Opportunity to Alight.**

**In General.**—It is the duty of the railroad company to stop its trains a sufficient time for passengers to alight without danger or injury. *Hull v. East Line, etc., R. Co.*, 66 Tex. 619, 620, 2 S. W. 831; *East Line, etc., R. Co. v. Rushing*, 69 Tex. 306, 6 S. W. 834; *St. Louis, etc., R. Co. v. Burns*, 71 Tex. 479, 481, 9 S. W. 467; *Galveston, etc., R. Co. v. Crispi*, 73 Tex. 236, 11 S. W. 187; *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264; *Gulf, etc., R. Co. v. Rowland*, 82 Tex. 166, 18 S. W. 96; *Texas, etc., R. Co. v. Bingham*, 2 Tex. Civ. App. 278, 279, 21 S. W. 569; *Texas, etc., R. Co. v. Woods*, 8 Tex. Civ. App. 462, 28 S. W. 416; *Missouri, etc., R. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905; *Houston, etc., R. Co. v. Dotson*, 15 Tex. Civ. App. 73, 80, 38 S. W. 642, affirmed in 93 Tex. 686, no op.; *International, etc., R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102, 38 S. W. 401, affirmed (see 93 Tex. 711, no op.); *Missouri, etc., R. Co. v. Miller*, 15 Tex. Civ. App. 428, 39 S. W. 583, affirmed in 93 Tex. 715, no op.; *Missouri, etc., R. Co. v. McElree*, 16 Tex. Civ. App. 182, 41 S. W. 843, affirmed in 93 Tex. 735, no op.; *Texas, etc., R. Co. v. Born*, 20 Tex. Civ. App. 351, 50 S. W. 613, affirmed in 93 Tex. 740, no op.; *Texas, etc., R. Co. v. Lee*, 21 Tex. Civ. App. 174, 51 S. W. 351, 57 S. W. 573, affirmed in 93 Tex. 722, no op.; *Houston, etc., R. Co. v. Cohn*, 22 Tex. Civ. App. 11, 53 S. W. 698; *St. Louis, etc., R. Co. v. Ricketts*, 22 Tex. Civ. App. 515, 54 S. W. 1090; *Texas, etc., Railroad v. Terry*, 27 Tex. Civ. App. 341, 65 S. W. 697; *Houston, etc., R. Co. v. Harris*, 30 Tex. Civ. App. 179, 70 S. W. 335, affirmed in 97 Tex. 636, no op.; *Chicago, etc., R. Co. v. Armes*, 32 Tex. Civ. App. 32, 74 S. W. 77, affirmed in 97 Tex. 628, no op.; *St. Louis, etc., R. Co. v. Harrison*, 32

*Tex. Civ. App.* 368, 73 S. W. 38, affirmed in 97 Tex. 645, no op.; *Galveston, etc., R. Co. v. Hubbard*, 33 Tex. Civ. App. 343, 345, 76 S. W. 764, affirmed, no op.; *International, etc., R. Co. v. Clark*, 36 Tex. Civ. App. 195, 81 S. W. 821, affirmed in 98 Tex. 620, no op.; *Fanning v. St. Louis, etc., R. Co.*, 38 Tex. Civ. App. 513, 86 S. W. 354, affirmed in 101 Tex. 635, no op.; *Houston, etc., R. Co. v. Easton*, 44 Tex. Civ. App. 95, 97 S. W. 833, affirmed in 102 Tex. 585, no op.; *Galveston, etc., R. Co. v. Alberti*, 47 Tex. Civ. App. 32, 103 S. W. 699, affirmed in 102 Tex. 582, no op.; *Galveston, etc., R. Co. v. Berry*, 49 Tex. Civ. App. 521, 109 S. W. 393, affirmed, no op.; *Atchison, etc., R. Co. v. Frier* (Civ. App.), 22 S. W. 6; *Fordyce v. Dillingham* (Civ. App.), 23 S. W. 550; *Gulf, etc., R. Co. v. Vinson* (Civ. App.), 24 S. W. 956; *International, etc., R. Co. v. Flores* (Civ. App.), 26 S. W. 899; *Texas, etc., R. Co. v. McGilvary* (Civ. App.), 29 S. W. 67; *Ft. Worth, etc., R. Co. v. Viney* (Civ. App.), 30 S. W. 252; *Texas, etc., R. Co. v. Alexander* (Civ. App.), 30 S. W. 1113; *Houston, etc., R. Co. v. Hubbard* (Civ. App.), 37 S. W. 25; *San Antonio, etc., R. Co. v. Dykes* (Civ. App.), 45 S. W. 758; *Texas, etc., R. Co. v. Goldman* (Civ. App.), 51 S. W. 275; *Martin v. St. Louis, etc., R. Co.* (Civ. App.), 56 S. W. 1011; *Houston, etc., R. Co. v. Moss* (Civ. App.), 63 S. W. 894; *St. Louis, etc., R. Co. v. Byers* (Civ. App.), 69 S. W. 1009, affirmed in 97 Tex. 645, no op.; *St. Louis, etc., R. Co. v. Martin* (Civ. App.), 87 S. W. 387, affirmed in 101 Tex. 656, no op.; *St. Louis, etc., R. Co. v. Rose* (Civ. App.), 93 S. W. 1105; *Gulf, etc., R. Co. v. Booth* (Civ. App.), 97 S. W. 128; *St. Louis, etc., R. Co. v. Bryant*, 46 Tex. Civ. App. 601, 103 S. W. 237 (see 101 Tex. 655, no op.); *Texas, etc., R. Co. v. Pollard*, 2 App. Civ. Cases, § 481.

A failure of employees and agents in charge of a passenger train to stop

at stations long enough for passengers to get off with safety is negligence, and the carrier will be liable for injuries resulting therefrom without the fault of the passenger. *Ft. Worth, etc., R. Co. v. Viney* (Civ. App.), 30 S. W. 252. And see case cited to preceding paragraph.

Failure to give a passenger an opportunity to board or leave train at an established station gives a cause of action to any person injured thereby. *Hull v. East Line, etc., R. Co.*, 66 Tex. 619, 620, 2 S. W. 831.

In *St. Louis, etc., R. Co. v. Byers* (Civ. App.), 69 S. W. 1009, affirmed in 97 Tex. 645, no op., it was held that the defendant company was guilty of negligence in not stopping its train a reasonable length of time for passengers to alight, and in starting its train while passengers were on the platform attempting to alight.

**Negligence of Conductor in Leaving Train before Passengers Have Opportunity to Alight.**—It is negligence for a conductor to leave the train upon stoppage at a station before the passengers have reasonable time to alight. *East Line, etc., R. Co. v. Rushing*, 69 Tex. 306, 317, 6 S. W. 834.

**Application of Rule to Stops at Flag Stations.**—It is the duty of a railroad company to stop its passenger train at a flag station a reasonable time to allow a passenger to alight. *San Antonio & A. P. Ry. Co. v. Dykes* (Civ. App.), 45 S. W. 758.

**Application of Rule to Street Railways.**—Where, in an action for injuries to a person in alighting from a moving street car, his testimony that he rang the bell a number of times for the car to stop before he alighted was uncontradicted, and other passengers on the car testified, but failed to state anything with reference to the ringing of the bell, and the motorman was not called to answer whether he heard the bell or not, the court was justified in assuming that the company was guilty

of negligence in failing to stop the car in response to the signal. Judgment, *Dallas Rapid Transit Ry. Co. v. Payne* (Civ. App.) 78 S. W. 1085, reversed. *Dallas Rapid Transit Co. v. Payne*, 82 S. W. 649, 98 Tex. 211.

**Motive of Passenger in Alighting or Conductor's Notice of Desire to Alight Immaterial.**—A railroad company which does not stop its train at a station long enough to permit a passenger to alight therefrom with safety is guilty of negligence, and it is immaterial what the passenger's motive in alighting may be, or whether the conductor had notice of his desire to alight. *Texas & P. Ry. Co. v. Goldman* (Civ. App.), 51 S. W. 275.

**Carrier Liable Only Where Neglect of Duty Proximate Cause of Injury.**—A railroad company, negligently failing to stop its train a reasonable length of time for its passengers to disembark, and to provide reasonable facilities for that purpose, is not liable for injuries sustained by a boy four years old, who, after the train had started, was put off by a passenger, where the act of such passenger was not the probable result of defendant's negligence. *Texas & P. Ry. Co. v. Beckworth*, 11 Tex. Civ. App. 153, 32 S. W. 347.

**Liability of Carrier after Allowance of Proper Time to Alight.**—In an action against a railroad company for damages resulting from defendant's alleged failure to stop its train at a certain station, long enough to allow plaintiff to alight, it was only necessary for defendant to show that it stopped the train a reasonably sufficient length of time to allow plaintiff to alight, and an instruction requiring it to also show that her failure to alight was caused by a failure on her part to use reasonable dispatch was erroneous. *St. Louis Southwestern Ry. Co. of Texas v. Rose* (Civ. App.), 93 S. W. 1105.

Where a railway company stops its

train at a station for a sufficient length of time to enable passengers, in the exercise of ordinary dispatch, to alight, it is not negligent in starting the train, unless it knows or has reason to believe that a passenger is attempting to alight. *St. Louis Southwestern Ry. Co. of Texas v. Haynes* (Civ. App.), 86 S. W. 934.

In an action for injuries received in getting off a car after it started to leave the station at which plaintiff wished to alight, it is error to refuse to charge that, if the train stopped long enough for a passenger to get off, the person in charge of the train would have a right to start it, unless he knew that some one desired to get off, where the jury may have understood that, though the train stopped a reasonable length of time, plaintiff was entitled to recover, if she was careful in her attempt to get off. *Texas & P. Ry. Co. v. Mitchell* (Civ. App.), 26 S. W. 154.

Where, in an action for injuries to a passenger while attempting to alight after the train had started, defendant's testimony was that the train stopped a sufficient length of time to enable plaintiff to alight with reasonable diligence, and the court did not present such issue in its main charge, the refusal of a request that if plaintiff failed to use proper diligence to leave the train before it started from the station, and thereafter alighted therefrom, she thereby assumed the risk, was improperly refused. *Texas & P. Ry. Co. v. McKenzie*, 70 S. W. 237, 30 Tex. Civ. App. 293.

In an action for damages for being carried past a station, plaintiff contended that the train did not stop long enough for her to leave it, and the evidence was conflicting. There was evidence that plaintiff was on the alert, ready to leave the train if it stopped. Held, that a charge that if the train stopped at the station for a time reasonably long enough for the passengers,

including plaintiff, to get off, plaintiff can not recover, is not subject to the objection by defendant that plaintiff did not know when she arrived, and made no effort to leave the train. *Galveston, H. & H. Ry. Co. v. Crispi*, 73 Tex. 236, 11 S. W. 187.

In an action for injuries to a passenger in attempting to alight, an instruction that if the station was distinctly called in her presence and hearing just before the train arrived, and she negligently failed to hear the same, and the train was held a reasonable time for passengers to alight, and she attempted to alight without the knowledge of defendant's employees, and was injured in such attempt, she was not entitled to recover, was improperly refused. *Galveston, H. & S. A. Ry. Co. v. Mathes* (Civ. App.), 73 S. W. 411.

In an action against a railroad company for damages caused by failure to stop its train at a certain station long enough to allow plaintiff to alight, a requested instruction that defendant's employee, announced the station, and thereafter the train was stopped at the station a reasonably sufficient length of time for plaintiff to get off, and that she delayed getting off in waking her children, or talking to some other passengers, or from any other cause, and that this delay was unknown to defendant, it was not liable, should have been given; and the necessity of giving it was not obviated by a charge in general terms that, if the train had stopped a sufficient length of time to enable plaintiff by the use of reasonable diligence to alight, the jury should find for defendant. *St. Louis Southwestern Ry. Co. of Texas v. Rose* (Civ. App.), 93 S. W. 1105.

**Liability for Injuries to Passenger Caused by Sudden Movement of Vehicle While Alighting.**—A railroad company is required to use great care in starting its trains when passengers are alighting. *Missouri Pac. R. Co. v.*

Foreman (Civ. App.), 46 S. W. 834, affirmed in 93 Tex. 647, no op.

It is negligence on the part of a railroad company to start train after stopping at a station without giving passengers a reasonable time to alight. *Gulf, etc., R. Co. v. Williams*, 70 Tex. 159, 161, 8 S. W. 78; *Galveston, etc., R. Co. v. Crispi*, 73 Tex. 236, 238, 239, 11 S. W. 187; *San Antonio, etc., R. Co. v. Dykes* (Civ. App.), 45 S. W. 758; *Texas, etc., R. Co. v. Goldman* (Civ. App.), 51 S. W. 275, 276; *St. Louis & R. Co. v. Turner* (Civ. App.), 84 S. W. 1094, affirmed in 101 Tex. 656, no op.

Where a train has stopped at a station and the passengers have begun to get off, it is negligence to suddenly back the train without warning the passengers; and ringing the bell is not sufficient to relieve the company from liability to a passenger injured by such negligence. *Texas & P. Ry. Co. v. Bryant* (Civ. App.), 26 S. W. 167.

In *Galveston, etc., R. Co. v. Alberti*, 47 Tex. Civ. App. 32, 103 S. W. 699, affirmed in 102 Tex. 582, no op., the court held that for a common carrier, without giving its passengers time to alight, to suddenly place its train in motion knowing at the time that one of its female passengers was in the act of stepping therefrom, so clearly showed the absence of that high degree of care due from such a carrier to its passenger as to make its negligence as a matter of law. Citing *Galveston, etc., R. Co. v. Hubbard*, 33 Tex. Civ. App. 343, 76 S. W. 764, affirmed, no op.; *Chicago, etc., R. Co. v. Armes*, 32 Tex. Civ. App. 32, 74 S. W. 77, affirmed in 97 Tex. 628, no op.

In *Houston, etc., R. Co. v. Harris*, 30 Tex. Civ. App. 179, 70 S. W. 335, affirmed in 97 Tex. 636, no op., it was held that, the defendant was negligent in not stopping its train a sufficient length of time to allow the plaintiff and his wife to alight, and in starting it again with a jerk so violent

as to cause her to be thrown against some part of the car and to injure her, without fault on the part of either plaintiff or his wife.

An instruction that if at the time of his injury plaintiff was a passenger on one of defendant's trains, and, on arrival at his destination, plaintiff, without negligence or unreasonable delay, attempted to alight, and while so doing the train was moved, whereby plaintiff was thrown to the ground and injured, and the train was not stopped at the station a reasonably sufficient time to enable plaintiff to alight in safety, the movement of the train was negligence, and plaintiff's injuries were the proximate result thereof, for which he was entitled to recover, was proper. *Galveston, H. & S. A. Ry. Co. v. Berry*, 109 S. W. 393, 49 Tex. Civ. App. 521.

In an action by a passenger for injuries sustained in alighting from the train, the evidence considered and held to sustain a finding that the injury was the result of defendant's negligence in causing its train to suddenly move while plaintiff was attempting to alight, without notice to her, and in the failure of the conductor to assist her in alighting after he saw that she needed assistance; and that plaintiff was not negligent. *St. Louis Southwestern Ry. Co. of Texas v. Kennedy* (Civ. App.), 96 S. W. 653.

Where plaintiff was induced by a statement of the conductor that the train had stopped at the station, was injured by a sudden jerk of the train while starting to alight, and the jerking of train was not shown to have been by itself, an act of negligence, the act of the conductor and the jerking of train are both chargeable to defendant, and must be considered together in determining negligence. *International, etc., R. Co. v. Downing*, 16 Tex. Civ. App. 643, 651, 41 S. W. 190, affirmed in 93 Tex. 643, no op.

If a street car conductor knew or

had reason to believe that plaintiff was about to alight, and with such knowledge permitted the car to be started so as to cause plaintiff while alighting to be thrown down and injured, the company is liable for the injury if plaintiff was free from fault contributing to the injury. *El Paso Electric Ry. Co. v. Boer*, 108 S. W. 199, 49 Tex. Civ. App. 25.

In an action for personal injuries to plaintiff while alighting from a railway train after bidding a passenger goodbye, it is error to refuse to charge that, in order to found a verdict for plaintiff on the fact that the station was not properly lighted, the jury must first find that defendant, in starting its train, violated some duty it owed to plaintiff. *Missouri, K. & T. Ry. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905.

**Duty to Notify Passenger of Starting of Train.**—It has been held that when a train stops at a passenger depot there is an implied invitation to alight, and in starting the train again, every reasonable precaution should be taken to prevent injury to a passenger who should alight while getting off or back on the train, such as giving warning of the starting of train by customary signal. *Atchison, etc., R. Co. v. Worley* (Civ. App.), 25 S. W. 478, citing *Galveston, etc., Co. v. Cooper*, 2 Tex. Civ. App. 42, 51, 20 S. W. 990, affirmed in 85 Tex. 431.

While a carrier is bound to stop its trains at stations for a time reasonably sufficient to allow passengers to alight, a train having stopped for such a reasonable time, the carrier owes no further duty to notify passengers of the starting of the train, unless its employees knew that passengers had not availed themselves of the opportunity to alight and were then in the act of so doing. *Gulf, etc., R. Co. v. Booth* (Civ. App.), 97 S. W. 128.

In the absence of a statute requiring a signal to be given by bell or whistle,

it is error for a court to instruct a jury that it is negligence to put a train in motion without a signal so given. There is no statute in force in Texas requiring a signal to be so given before a train is put in motion after stopping at a station where passengers are to alight. *Gulf, etc., R. Co. v. Booth* (Civ. App.), 97 S. W. 128; *Gulf, etc., R. Co. v. Williams*, 70 Tex. 159, 8 S. W. 78.

Though it would ordinarily be negligence for railway company after stopping at a station for a passenger to alight to again put the train in motion before a sufficient and reasonable time to leave the train has elapsed; yet if after the lapse of such reasonable time the train is again put in motion without giving signal of an intention to move, by whistle or otherwise, such act would not be negligence, per se. *Gulf, C. & S. F. Ry. Co. v. Williams*, 70 Tex. 159, 8 S. W. 78.

Plaintiff was injured while alighting at a depot, and the court charged that he was entitled to recover if defendant's servants did not stop the train a reasonably sufficient time, or did not give signal of starting again, by whistle or bell. Held error, in that the jury would have been compelled to find for plaintiff if no such signal had been given, even though the train may have stopped a sufficient length of time, thus inducing the belief that plaintiff might leave the train without negligence at any time before signal of intention to start again. *Gulf, C. & S. F. Ry. Co. v. Williams*, 70 Tex. 159, 8 S. W. 78.

In *Gulf, etc., R. Co. v. Booth* (Civ. App.), 97 S. W. 128, the trial court charged the jury that "when a train has been stopped to allow passengers to get off, it is negligence to set the train in motion without apprising such passengers of the intention to do so." The court of civil appeals, in disapproving such charge, said: "That charge is clearly erroneous. It was virtually an instruction to the jury to find for

appellee, because there was no evidence of any signal being given of the intended departure of the train. No matter how long the train may have stopped at the station, under the terms of the charge, appellant was liable if it did not give notice of the moving of the train. No such duty rested on appellant, unless created by circumstances surrounding the case, and in that event it would be a question of fact to be ascertained by a jury." In this case the court cited *Gulf, etc., R. Co. v. Williams*, 70 Tex. 159, 8 S. W. 78; *Texas, etc., R. Co. v. Mitchell* (Civ. App.), 26 S. W. 154; *Texas, etc., R. Co. v. Mayfield*, 23 Tex. Civ. App. 415, 56 S. W. 942, affirmed in 93 Tex. 674, no op.

**Liability for Injury to Passenger by Collision While Alighting.**—For injuries sustained by reason of the running of a switch engine against a car from which plaintiff attempted to alight, plaintiff may recover, if the collision occurred before he had reasonable time to alight. *East Line & R. R. Co. v. Rushing*, 69 Tex. 306, 6 S. W. 834.

**Evidence Held to Authorize Submission of Issue as to Sudden Starting of Train.**—In an action for injuries to a passenger, the material issues were whether the train stopped at a station a reasonable length of time for plaintiff's wife, who was injured, to alight, and whether she was negligent in failing to use reasonable diligence to alight. The evidence showed that as soon as the train stopped plaintiff and his wife, who were sitting in the rear of the coach, got up and started out, plaintiff carrying a child. He got off safely, and deposited the child upon the platform. His wife was standing on the platform of the car with a child in her arms. Plaintiff took the child and set it down while his wife stepped down to the second step, when the train moved forward, jerking her backwards. She

cought hold of the rail and jumped to keep from falling, which caused her to alight on her left foot, injuring it. Held, that an instruction submitting the issue whether the train started suddenly and unexpectedly was warranted. *Texas Midland R. R. v. Ritchey*, 108 S. W. 732, 49 Tex. Civ. App. 400.

**Allowance of Time for Alighting Passenger to Return for Baggage.**—A railroad company does not perform its whole duty by stopping its train long enough for a passenger to alight. If he has so many bundles that he is required to return for the balance, and does so with reasonable dispatch, and with the knowledge of the conductor, the train should be held a reasonable time for him to alight with the balance. *Texas & P. Ry. Co. v. Born*, 50 S. W. 613, 20 Tex. Civ. App. 351.

**Pleadings in Action for Failure to Allow Reasonable Opportunity to Alight.**—Plaintiff alleged that, on the train's stopping at his destination, "plaintiff immediately proceeded to alight. \* \* \* Said train was crowded, quite a number of people getting off at said point, which unavoidably caused plaintiff to be longer in getting off, by reason of said crowd being in front of him,"—and that defendant, "disregarding the contract to safely carry plaintiff, without sound of bell or signal suddenly and recklessly started said train, thereby throwing plaintiff to the ground," etc. Held, on general demurrer, that the petition sufficiently alleged that the train was not stopped a sufficient length of time to allow plaintiff to alight with safety. *Houston & T. C. R. Co. v. Hubbard* (Tex. Civ. App.), 37 S. W. 25.

In a suit against a railway company for injuries received in alighting from a train, where petition alleged the train did not stop long enough to allow the plaintiff to alight with safety and that he was thrown by its sudden starting, the defendant's negligence is



predicated on both allegations, and a charge on its not stopping long enough is properly based on pleadings. *Missouri, etc., R. Co. v. McElree*, 16 Tex. Civ. App. 182, 186, 41 S. W. 843, affirmed in 93 Tex. 735, no op.

**Evidence in Actions for Failure to Allow Opportunity to Alight—Admissibility.**—The petition alleged that plaintiff was injured, while disembarking at his station from defendant's train, through the negligence of defendant's servants in moving the train without stopping a sufficient time. The answer was a general denial, and plea of contributory negligence. Defendant introduced testimony that the train on the day in question stopped "as long" or "longer than usual." Held, that evidence was admissible in rebuttal to show how long the train had been in the habit of stopping before the day of the accident. *Gulf, C. & S. F. Ry. Co. v. Rowland*, 82 Tex. 166, 18 S. W. 96.

In an action against a railroad company for injuries to a passenger received while disembarking, owing to the distance from the step of the car to the ground below, a witness could testify as to the existence of a fill at the place of the accident, the evidence tending to show that there was no platform, and to show the distance to the ground. (Civ. App. 1902) *International & G. N. R. Co. v. Clark*, 71 S. W. 587, judgment reversed on another point (Sup. 1903) 72 S. W. 584, 96 Tex. 349.

Under an allegation in the petition that the distance from the step of the car to the ground was too great to make the step with safety, testimony that there was a ditch at the place of the accident was admissible. (Civ. App. 1902) *International & G. N. R. Co. v. Clark*, 71 S. W. 587, judgment reversed on another point (Sup. 1903) 72 S. W. 584, 96 Tex. 349.

Though the only negligence averred was the statement of the conductor

that the train was at a station, relying on which plaintiff attempted to alight and was injured, the train being in fact over a trestle, the fact that the conductor was in the caboose, and might have seen plaintiff attempting to alight, was admissible, as an attending circumstance characterizing such statement as negligence. *International & G. N. R. Co. v. Downing*, 41 S. W. 190, 16 Tex. Civ. App. 643.

Where plaintiff's petition alleged that, as he was attempting to alight from defendant's train, it started to move, thereby throwing plaintiff with great force to the ground, and that such movement was negligence, plaintiff was entitled to prove the nature of the movement, and to show that the train was suddenly started with a jerk. *Galveston, H. & S. A. Ry. Co. v. Berry*, 109 S. W. 393, 49 Tex. Civ. App. 521.

Where, in an action for injuries to a passenger while in the act of alighting from defendant's train, there was no proof that she had knowledge of the existence of a warrant for her arrest, evidence that a deputy marshal held a warrant for plaintiff was inadmissible as bearing on defendant's contention that plaintiff undertook to get off the train before it reached the station to avoid arrest. *St. Louis & S. F. R. Co. v. Smith*, 79 S. W. 340, 34 Tex. Civ. App. 612.

In an action against a railroad company for injuries sustained by a passenger by the starting of the train while alighting therefrom, evidence that on another occasion the train started while another passenger was attempting to alight is irrelevant, and it can not be assumed that its admission was harmless. *Gulf, C. & S. F. Ry. Co. v. Rowland*, 82 Tex. 166, 18 S. W. 96.

In an action against a railroad for wrongful death resulting from defendant's failure to stop its train at decedent's station so as to enable him to alight, evidence that there was no usual

or customary place for stopping at that station two years prior to the time of the accident, was not evidence that there was no such place when the accident occurred. *De Castillo v. Galveston, H. & S. A. Ry. Co.*, 95 S. W. 547, 42 Tex. Civ. App. 108.

In a suit against a railroad company for injuries received while alighting from a moving train when the defendant charged the plaintiff with negligence, evidence of the plaintiff that he thought it safe to get off as the yard was lighted and the platform was smooth and even was properly admitted. *International, etc., R. Co. v. Satterwhite*, 19 Tex. Civ. App. 170, 172, 47 S. W. 41, affirmed in 93 Tex. 643, no op.

In an action against a street railway for injuries sustained by plaintiff in attempting to alight from a car while it was in motion, in consequence of the motorman's failure to stop the car when signaled to do so, plaintiff offered evidence that before arriving at the point where he wished to alight he had a misunderstanding with the motorman, who also acted as conductor, as to the payment of plaintiff's fare, and that the motorman appeared angry. Plaintiff testified that when he got off the car had passed the point at which he wished to alight; that he got off because he thought the motorman would carry him still further. Held, that the evidence was relevant as tending to show ground for plaintiff's belief that the motorman would carry him further unless he got off at the time he did. *Fuller v. Denison & S. Ry. Co.*, 74 S. W. 940, 32 Tex. Civ. App. 399.

**Evidence Showing That Plaintiff's Ticket Called for Stop at Station Where Injured.**—In an action by a passenger against a carrier for injuries caused by alleged negligence of defendant in failing to stop at a station long enough to allow plaintiff to alight in safety, evidence examined, and held sufficient to sustain a finding that plain-

tiff's ticket called for a stop at the station where he was injured in alighting. *St. Louis Southwestern Ry. Co. of Texas v. Turner* (Civ. App.), 84 S. W. 1094, affirmed in 101 Tex. 656, no op.

**Evidence Held to Show Negligence on Part of Carrier.**—Plaintiff's wife was injured by a fall while alighting from a train. She testified that she had several bundles, and, when the train stopped, she started to get off as soon as she could, and that while she was alighting the train started suddenly, and threw her down. The evidence was conflicting as to the time the train stopped at the station. Held, that the evidence of negligence was sufficient to sustain a verdict against the railroad company. *Texas & P. Ry. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

Evidence in an action to recover for personal injuries to plaintiff's wife through the sudden starting of defendant's train while she was attempting to alight, held to sustain a finding that the accident was caused by the negligence of defendant's servants in the operation of the train. *Houston & T. C. R. Co. v. Harris*, 70 S. W. 335, 30 Tex. Civ. App. 179.

Where, in an action against a railroad company for personal injuries caused by the sudden motion of defendant's train while plaintiff was alighting therefrom, after being carried past the station to which he had paid his fare, without fault on his part, the evidence is conflicting as to whether the train could or could not be suddenly started, and there is testimony authorizing the jury to find that defendant's servants failed to exercise proper care, by starting the train suddenly, while plaintiff was alighting, and before he had time to alight with safety, a judgment for plaintiff will not be disturbed. *Atchison, T. & S. F. Ry. Co. v. Frier* (Civ. App.), 22 S. W. 6.

Evidence tending to show that when the train stopped at the station where plaintiff was injured the conductor was on the platform of the rear end of the rear coach, taking a farewell drink with several persons, and that when they alighted the signal to start was given the engineer, was sufficient to sustain a finding that defendant was negligent. *St. Louis Southwestern Ry. Co. of Texas v. Turner* (Civ. App.), 84 S. W. 1094, affirmed in 101 Tex. 656, no op.

Where the train on which plaintiff and his son were riding was 10 hours late when it arrived at plaintiff's destination, and the train started without giving plaintiff sufficient time to alight with his family, and his son was injured by the train starting while he was in the act of alighting, and his wife and another child were carried to the next station, defendant was guilty of such negligence as entitled plaintiff to recover for injuries to his son. *St. Louis S. W. Ry. Co. of Texas v. Byers* (Civ. App.), 69 S. W. 1009.

In an action by a passenger for injuries alleged to have been caused by the negligent starting of a train as he was about to alight therefrom because of fear of a collision with a freight train approaching from the rear, evidence considered, and held to justify submission to the jury of the issue as to defendant's negligence. *Williams v. Galveston, H. & S. A. Ry. Co.*, 78 S. W. 45, 34 Tex. Civ. App. 145.

**Instructions as to Allowance of Proper Time.**—It is the duty of a railway company transporting passengers to stop their passenger trains at the station a time reasonably sufficient to enable such passengers to alight at the station of their destination in safety, and a charge so stating is not subject to objection as imposing an onerous burden of proof. *Galveston, etc., R. Co. v. Hubbard*, 33 Tex. Civ. App. 343, 76 S. W. 764, affirmed, no op.

A charge that if the jury believed

that plaintiff attempted to alight from a car after it had stopped, etc., is not objectionable as assuming the fact to be that the car had stopped when she attempted to alight. *San Antonio, etc., Co. v. Welter* (Civ. App.), 77 S. W. 414, affirmed in 98 Tex. 631, no op.

In an instruction that it was the duty of defendant to give the plaintiff "a reasonable time to leave said train in safety," the words "in safety" are, in effect, the same as "without injury," and the instruction is not erroneous, as making the company an insurer. *Missouri, K. & T. Ry. Co. v. Miller* (Tex. Civ. App.), 39 S. W. 583, 15 Tex. Civ. App. 428.

The use of the word "ample" instead of the word "sufficient" in an instruction as to the time a train should stop at a station to permit passengers to alight is not reversible error, though the word "sufficient" is more appropriate. *St. Louis Southwestern Ry. Co. of Texas v. Haynes* (Civ. App.), 86 S. W. 934.

In an action against a railway company for injuries received by a passenger in alighting from a train, a charge that the company must stop its trains at stations a sufficient length of time to allow the passengers to alight with safety was not erroneous as omitting the word "reasonably" before the word "sufficient," where the omission was supplied by a subsequent part of the instruction. *Houston, etc., R. Co. v. Moss* (Civ. App.), 63 S. W. 894.

In an action for damages for injuries to a passenger while alighting from defendant's train after it had started, it appeared that the train stopped only 1 minute, or 1½ minutes, and the usual stop was 2½ minutes, and that the conductor knew such passenger had three small children and a heavy valise, and also knew that her destination was at that station. Held, that it was proper to instruct the jury on the diligence of the passenger in getting off the train "under the cir-

cumstances and conditions by which she was surrounded." *St. Louis & S. F. R. Co. v. Ross* (Civ. App.), 89 S. W. 1105, affirmed in 101 Tex. 655, no op.

In a suit for personal injuries suffered while plaintiff was attempting to alight from defendant's train, an instruction that if the jury believe "the employees in charge of the train negligently and carelessly failed to stop said train a sufficient length of time to allow plaintiff to leave the same in safety, and that by reason of said negligence, if any, the plaintiff was injured," they shall find for plaintiffs, does not make the defendant company an insurer of the safety of the passenger in attempting to alight. *Missouri, K. & T. Ry. Co. of Texas v. McElree* (Tex. Civ. App.), 41 S. W. 843, 16 Tex. Civ. App. 182.

In an action against a carrier for injuries to a passenger owing to the starting of the train while she was alighting, the court instructed that it was the duty of carriers to exercise the degree of care commonly used by very prudent and cautious persons to afford the passengers an opportunity to safely alight, and to stop the train long enough for passengers, by the use of ordinary care and promptness of departure, to get off the train without being injured in the act, and that the failure to use such care with reference to the persons in charge of the train or the passengers would be negligence. Held, that the instruction was not erroneous on the theory that it made the carrier liable as an insurer of the absolute safety of passengers. *St. Louis Southwestern Ry. Co. of Texas v. Martin* (Civ. App.), 87 S. W. 387, affirmed in 101 Tex. 656, no op.

The phrase, "without being injured in the act," in the instruction, was not improper if it was proper for the court to give any illustration at all. *St. Louis Southwestern Ry. Co. of Texas v. Martin* (Civ. App.), 87 S. W. 387, affirmed in 101 Tex. 656, no op.

In an action against a railroad company for personal injuries, an instruction that the failure of employees and agents in charge of a passenger train to stop at stations long enough for passengers to get off with safety is negligence, and that the company is liable for injuries resulting therefrom without the fault of the passenger, is proper. *Ft. Worth & D. C. Ry. Co. v. Viney* (Civ. App.), 30 S. W. 252.

In an action for injuries to a passenger, alleged to have been caused by a premature start, an instruction that it was the carrier's duty to stop its train at the station a reasonably sufficient length of time to enable plaintiff's wife to alight therefrom in safety, and that a failure to use that high degree of care in the discharge of such duty which very prudent persons would usually have exercised under the circumstances would be negligence, for which defendant would be liable, if it was the proximate cause of the injuries to plaintiff's wife, and she was not guilty of contributory negligence, was not erroneous, as charging, as a matter of law, that the failure to use such care to stop the train a reasonably sufficient length of time to enable plaintiff's wife to alight in safety was negligence. *St. Louis Southwestern Ry. Co. v. Harrison*, 73 S. W. 38, 32 Tex. Civ. App. 368.

A charge that if the conductor knew a passenger was re-embarking to get his baggage, and failed to hold the train a reasonable time, by reason of which the passenger was put to the election of jumping from the moving train or being carried by, and that if, in jumping, he was not guilty of contributory negligence, and was injured as a result of such failure to hold the train, he could recover, was not faulty as making the failure to hold the train a reasonable time negligence as matter of law, nor as encroaching on the province of the jury in submitting the question of the passenger's being put to an election, nor in not defining a

reasonable time. *Texas & P. Ry. Co. v. Born*, 50 S. W. 613, 20 Tex. Civ. App. 351.

Where, in an action by a passenger against a carrier, the negligence alleged was the failure of defendant to stop the train a sufficient length of time to permit plaintiff to alight, and, while he was attempting to alight, in so suddenly increasing the speed of the train that he was thereby thrown to the ground and injured, an instruction that, if defendant failed to stop the train a sufficient time, or if, as plaintiff was attempting to alight, the speed of the train was increased, whereby he was injured, and the failure to stop or the sudden increase of speed was negligence, and that either of such acts was the proximate cause of such injury, plaintiff was entitled to recover was not erroneous on the theory that plaintiff was not entitled to recover for a sudden increase in the speed of the train independently of defendant's failure to stop a reasonable length of time. *Houston & T. C. R. Co. v. Easton*, 97 S. W. 833, 44 Tex. Civ. App. 95.

In an action against a carrier, a paragraph of the charge stated that carriers were held to the high degree of care which very prudent persons would use under the same or similar circumstances, and a subsequent paragraph stated that, if defendant failed to stop the train on which plaintiff was a passenger a reasonable length of time to enable him to alight, or if, as plaintiff was attempting to alight, the speed of the train was suddenly increased, and either of such acts was negligence proximately causing plaintiff's injuries, he was entitled to recover. Held, that a contention that the paragraphs, when taken together, imposed on defendant the degree of care due from a common carrier to a passenger, though the jury might have found that the relation of carrier and passenger had terminated, was without merit, in view of the fact that the issue

as to whether defendant stopped the train a reasonable length of time was presented by a special charge directing a verdict for defendant in case such issue should be found in the affirmative. *Houston & T. C. R. Co. v. Easton*, 97 S. W. 833, 44 Tex. Civ. App. 95.

In an action against a carrier for failure to stop its train a sufficient length of time to enable a passenger thereon to alight in safety, it appeared that, when plaintiff's station was called, he attempted to leave the car through the door by which he had entered, and found it locked, whereupon he was obliged to go to the other end of the car. Held, that it was proper to refuse a requested instruction that, if plaintiff would have been able to leave the train safely and without injury if he had gone through the door by which he entered, and if it was not customary to have such door fastened, and defendant's servants did not know it was fastened and waited a sufficient time to enable plaintiff to have left the door if it had not been fastened, a verdict should be returned for defendant. *Houston & T. C. R. Co. v. Easton*, 97 S. W. 833, 44 Tex. Civ. App. 95.

Where plaintiff claimed that he was injured by the premature starting of defendant's train with a sudden jerk as he was attempting to alight, the court properly refused to charge that defendant was free from liability if it stopped the car for a sufficient time to have enabled plaintiff to alight in the exercise of reasonable care, as defendant might have been chargeable with negligence leading to the injury, notwithstanding the train was stopped for a reasonable time. *Galveston, H. & S. A. Ry. Co. v. Berry*, 109 S. W. 393, 49 Tex. Civ. App. 521.

Where, in an action against a railroad company for injuries to plaintiff's wife, the court properly instructs that the company is not an insurer of its passengers, and repeatedly instructs that the burden of proving negligence

is on plaintiff, it is error to also instruct that the company did not undertake to insure that its train would stop at a certain station for a time reasonably sufficient to allow plaintiff's wife to alight, since such instruction, while probably correct in the abstract, might convey to the jury an erroneous idea as to the extent of defendant's obligation to so stop its train. *Martin v. St. Louis S. W. Ry. Co. of Texas* (Civ. App.), 56 S. W. 1011.

Where plaintiff was injured while attempting to alight from a train which was put in motion before a reasonable time had elapsed to enable plaintiff to alight, and plaintiff was also interfered with by a passenger attempting to board the train, the situation was one which the carrier was bound to anticipate, and the court properly refused to charge that if the person attempting to board the train was standing on the last step of the car, and by reason of his position plaintiff was unable to make a safe departure from the train and was caused to fall, plaintiff could not recover. *St. Louis Southwestern Ry. Co. of Texas v. Bryant* (Civ. App.), 103 S. W. 237.

In an action for damages for injuries to a passenger who had not been allowed sufficient time to get off defendant's train with her three children and a valise, the court properly refused to give a charge which conditioned plaintiff's right of recovery on the question whether she told the conductor that she had with her three children and a valise; the uncontradicted evidence showing that the conductor saw her children and baggage. *St. Louis & S. F. R. Co. v. Ross* (Civ. App.), 89 S. W. 1105, affirmed in 101 Tex. 655, no op.

In an action for injuries to a passenger in attempting to alight, a requested instruction that if the station was distinctly called in her presence and hearing just before the train arrived, and she negligently failed to

hear the same, and the train was held a reasonable time for passengers to alight, and she attempted to alight without the knowledge of defendant's employees, and was injured in such attempt, was not covered by a charge that if plaintiff negligently failed to hear the station announced, and, under the impression that she had reached her destination, attempted to alight, without the knowledge of defendant's employees, after the train had been held at the station a reasonable time for passengers to alight, "and that said train, when started, was started without any jerk," the finding should be for defendant. *Galveston, H. & S. Ry. Co. v. Mathes* (Civ. App.), 73 S. W. 411.

In an action for injuries received while alighting from defendant's street car, a charge that, if the jury found that the place where defendant's car stopped and plaintiff attempted to alight was not the usual place to alight, the conductor should have used the same care in avoiding injuring passengers by starting the car which he should have used had the place been a usual stopping place, having been fully given in the prior charge, its repetition gave undue prominence to the question, and was error. *Rapid Transit Ry. Co. v. Strong* (Civ. App.), 108 S. W. 394.

**Allowance of Reasonable Time a Question for Jury.**—What is a reasonable time to allow a passenger to alight from a train, considering age, sex or infirmity, is a matter for the jury. *St. Louis, etc., R. Co. v. Burns*, 71 Tex. 479, 481, 482, 9 S. W. 467.

It is the duty of railroad employees to stop the train a sufficient and reasonable length of time to allow a passenger to get off the train, and whether or not the train is stopped such a length of time is a question of fact. *Gulf, C. & S. F. Ry. Co. v. Rowland*, 90 Tex. 365, 38 S. W. 756.

In *International, etc., R. Co. v. Fol-*

liard, 66 Tex. 603, 1 S. W. 624, the evidence upon the question whether the train stopped at the station or not, was decidedly conflicting. It was held that it was the peculiar province of the jury to weigh the testimony and determine the question, and their verdict would not be disturbed in the appellate court, in such case, where there was sufficient evidence to support the finding.

**(3) Duty to Furnish Proper Place for Passengers to Alight and to Stop at Same.**

**In General.**—It is the duty of the railroad company transporting passengers for hire to furnish a reasonably safe place for the passenger to alight from its train. *International, etc., R. Co. v. Clark*, 36 Tex. Civ. App. 195, 81 S. W. 821, affirmed in 98 Tex. 620, no op.; *Texas, etc., R. Co. v. Woods*, 15 Tex. Civ. App. 612, 40 S. W. 846; *International, etc., R. Co. v. Smith* (Sup.), 14 S. W. 642.

A railroad must exercise such a high degree of care as would be used by very cautious, prudent, and competent persons under similar circumstances, in selecting a suitable place for a passenger to alight, who had, by mistake, entered a wrong train, and in stopping the train and assisting her off. *Gary v. Gulf, etc., R. Co.*, 17 Tex. Civ. App. 129, 42 S. W. 576.

In *International, etc., R. Co. v. Smith* (Sup.), 14 S. W. 642, it was held to be negligence for the defendant to stop its train for passengers to get off at an unusual place for receiving passengers, where no provision has been made for the safety of passengers in alighting from its cars.

A railroad company is liable for injury to a passenger caused by negligence of the trainmen, in putting her off in the nighttime at a rough place, more dangerous than the crossing where passengers were usually put off, and where she supposed she was being put off, there being no depot in

the neighborhood. *Houston & T. C. R. Co. v. Smith* (Civ. App.), 33 S. W. 896.

**Liability for Injury to Alighting Passenger by Obstacle on Platform.**—

Plaintiff, a passenger alighting from defendant's train on its regular depot platform, stepped from the last step of the car onto a railroad spike. The head of the spike had a thin, sharp edge, which injured the ball of plaintiff's foot. Held, that defendant was liable for the injury. *Ft. Worth & D. C. Ry. Co. v. Davis*, 4 Tex. Civ. App. 351, 23 S. W. 737.

**Carrier Not an Insurer as to Absolute Safety of Alighting Place.**—

A railroad company is required to furnish passengers only a reasonably safe place to alight from trains, and not an absolutely safe place. *Texas & P. Ry. Co. v. Woods* (Tex. Civ. App.), 40 S. W. 846, 15 Tex. Civ. App. 612.

**Calling of Station as Invitation to Alight.**—

It would seem that the calling of the name of a station, on coming to a stop, is to be regarded as an invitation to alight; and a passenger who, on such summons, leaves the car, exercising due caution in so doing, may recover from the railroad company for injuries sustained by him by ignorantly stepping on an unsuitable place. *Texas, etc., R. Co. v. Garcia*, 62 Tex. 285.

The calling of a station by the employees of a carrier is notice to passengers bound for that station to alight when the train stops there. *Houston & T. C. R. Co. v. Dotson* (Tex. Civ. App.), 38 S. W. 642, 15 Tex. Civ. App. 73.

A train stopped on a dark night away from the platform, and a passenger's station was called. He was told by the conductor to hurry, as he would be carried by if he did not. So urged, he stepped from the car, and fell several feet into a pile of wood. Held negligence for which the company was

liable. *International & G. N. R. Co. v. Smith* (Sup.), 14 S. W. 642.

**Right of Passenger to Rely on the Furnishing of Safe Place to Alight.—**

On alighting from defendant's train in the dark at a flag station, where the track was fenced by a barbed-wire fence, the only exit being by way of a stile over the fence, or along the track, plaintiff failed to see the stile, and in attempting to get out of the inclosure she fell on a cattle guard and was injured. Held, that plaintiff had a right to rely on defendant's furnishing her a reasonably safe place to alight from the train, and the fact that she was old, crippled, and deaf, and was traveling alone, and had not arranged for any one to meet her, did not, as a matter of law, constitute contributory negligence. *Texas & P. Ry. Co. v. Reid* (Civ. App.), 74 S. W. 99.

The train was not stopped at the platform of the station, and a passenger carrying an infant and a valise was injured in alighting. He thought the train had arrived at the usual stopping place, the night being dark. He was familiar with such place, and could have alighted there with safety, incumbered as he was. He did not discover his mistake until he had placed one foot where he thought the platform should have been, when he attempted to recover himself, but could not, and had to step to the ground. Held, that he was not guilty of contributory negligence. *Texas & P. Ry. Co. v. Porter* (Tex. Civ. App.), 41 S. W. 88.

It is a question of fact, ordinarily, from the circumstances, whether a passenger on a train was justified in supposing that he was alighting in the nighttime at a proper place. *Texas & P. Ry. Co. v. Garcia*, 62 Tex. 285.

A passenger who, in leaving a train on a clear night, falls into an opening 17 inches wide between the car and the platform, is not necessarily guilty of contributory negligence in attempting to leave the car at that point. Mis-

souri Pac. Ry. Co. *v. Long*, 81 Tex. 253, 16 S. W. 1016.

**Liability for Injury to Passenger Alighting at Direction or Suggestion of Carrier's Employee.—**A passenger is not guilty of contributory negligence in leaving the car where he is reasonably authorized to believe, from the language used, that it was the intention of the conductor that he should do so when the train stopped. *Texas, etc., R. Co. v. Garcia*, 62 Tex. 285, 292.

Where a passenger was negligently carried beyond her destination and the train was stopped for her to alight at a place not affording facilities to alight safely, or after stopping the train, the operatives urged her to hurry and jump and she did as directed, and the act was such as an ordinarily prudent person would have done under the circumstances, the company is liable for injuries resulting therefrom. *Texas, etc., R. Co. v. Woods*, 8 Tex. Civ. App. 462, 467, 28 S. W. 416.

In an action against a railroad company for injuries sustained by a passenger while alighting from a train which was still in motion, an instruction that the suggestion of defendant's employees to alight would not alone justify plaintiff in alighting, but was a circumstance to be considered with all the other evidence to determine whether he was in the exercise of due care in attempting to alight, while perhaps on the weight of the evidence because stating that the suggestion of defendant's servants would not alone justify plaintiff in alighting, contains nothing of which defendant could complain. *Texas & P. Ry. Co. v. Whiteley*, 96 S. W. 109, 43 Tex. Civ. App. 346.

In an action by a passenger injured while alighting from a moving train, evidence that the porter who directed plaintiff to get off the train at the time he did, assisted in helping passengers off at stations such as that where plaintiff alighted, was sufficient to justify a finding that it was within



the scope of the porter's duty to direct passengers to alight. *Texas & P. Ry. Co. v. Whiteley*, 96 S. W. 109, 43 Tex. Civ. App. 346.

On evidence tending to establish the allegations of a petition that the conductor of defendant's train stated that the train was at a station, in reliance on which plaintiff attempted to alight, when the train, not being at the station, but over a trestle, started, and plaintiff was injured, instructions confining the issue to the statement of the conductor, or to the sudden movement of the train, were properly refused, as such movement, though not of itself negligence, was to be considered in connection with the situation in which the conductor's negligence had placed plaintiff. *International & G. N. R. Co. v. Downing* (Tex. Civ. App.), 41 S. W. 190, 16 Tex. Civ. App. 643.

An instruction that plaintiff could not recover for an injury received in attempting to alight from a train in the night, acting on a statement of the conductor that the train was at a station, which was incorrect, if the danger of getting off the train was as open to his observation as to that of the conductor, was properly refused as misleading, since their situation and information in respect to the danger were unequal. *International & G. N. R. Co. v. Downing* (Tex. Civ. App.), 41 S. W. 190, 16 Tex. Civ. App. 643.

In a suit by a passenger for injury received in jumping from a train at another's direction, at a certain place, the safety of such place for alighting is only incidentally involved, the carrier's liability being only in case its servants had so directed. *Texas, etc., Ry. v. Woods*, 15 Tex. Civ. App. 612, 614, 615, 40 S. W. 846.

Jury must determine as a fact whether a passenger is authorized from the words or acts of the carrier's agent that it was intended he should alight from a car at a given time and place.

*Texas, etc., R. Co. v. Garcia*, 62 Tex. 285, 292, 293.

Where a passenger was injured in jumping from a train at a place where there was no platform, at the instance of a person on the train, and there was no testimony that such person was dressed in the uniform in which the employees of the company were dressed, or that he was an employee of the company, it was error to submit the question of his service to the jury. *Texas & P. Ry. Co. v. Woods* (Tex. Civ. App.), 40 S. W. 846, 15 Tex. Civ. App. 612.

#### (4) Duty to Furnish Proper Facilities and Appliances for Alighting.

**In General.**—A railroad company is charged with a high degree of care in furnishing the safest appliances for use by passengers in alighting. *Missouri, etc., R. Co. v. Dunbar*, 49 Tex. Civ. App. 12, 108 S. W. 500; *Missouri, etc., R. Co. v. Buchanan*, 31 Tex. Civ. App. 209, 72 S. W. 96, affirmed in 97 Tex. 640, no op.

A carrier must exercise the care which a very prudent person would exercise to keep its car platforms and steps in a safe condition for its passengers to alight. *San Antonio, etc., R. Co. v. Flory*, 45 Tex. Civ. App. 233, 100 S. W. 200, affirmed in 102 Tex. 592, no op.

An instruction that it was not defendants' duty to assist plaintiff to alight if reasonably safe and proper appliances were supplied, so that she could with reasonable care have alighted safely, and that if the platform or depot ground at the time of the injury had been in daily use for years, and had proved adequate and safe, then defendants could use the same without the imputation of negligence, and verdict should be for defendants, was properly refused, as the company is bound to furnish the safest appliances. *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368.

If a person alighting from a railroad car is injured by stepping on a box provided for passengers to step on while alighting, and without negligence on his part, a right of action exists, though such a box had been safely used by others, if such appliance was less safe than the safest which had been used and tested. *Missouri Pac. R. v. Wortham*, 73 Tex. 25, 28, 29, 10 S. W. 741.

Although death of a passenger could not reasonably be anticipated from the use of a stool used to alight from a train, yet if the use of the stool was negligence on the part of the defendant, without contributory negligence by the deceased, and the injury was the proximate result of that negligence, the defendant is liable. *Gulf, C. & S. F. Ry. Co. v. Southwick* (Civ. App.), 30 S. W. 592.

A railroad company was liable for injuries to one of its passengers, sustained after alighting from a train at a station by slipping down an incline on a platform leading to the waiting room, because of the failure of the railroad to use ordinary care to keep it in safe condition for the use of passengers, or to warn them that it was not a proper way for them to take in going to and from the train, though another and safe way to the waiting room had been provided by the company, where the platform on which the injury occurred was usually used by passengers going to and from the train, and where such use had been continued for such a length of time that the railroad company necessarily knew of the use. Judgment (Civ. App. 1907), 103 S. W. 695, affirmed. *Missouri, K. & T. Ry. Co. of Texas v. Criswell*, 108 S. W. 806, 101 Tex. 399.

A judgment for injuries received by a woman in alighting from a train will not be disturbed, as contrary to the evidence, where she was obliged to step down onto a box about 11 inches square at the top, and somewhat larger

at the bottom; and plaintiff and several witnesses testify that she was unassisted, that the box was standing on rough stones, and that it tipped as she stepped on it, though several witnesses for defendant testify that plaintiff was assisted in alighting, that the box stood on level gravel, that the accident was due to her stepping on its edge, and that several others alighted by means of the box with safety. *Missouri Pac. Ry. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368.

**"Means to Alight" as Including Acts of Porter in Assisting Passenger.**—In an action for injuries to a female passenger as she was alighting from a train, the court charged that it was defendant's duty to exercise great care in providing "safe means" for passengers to alight, and that if defendant negligently and carelessly failed to provide safe means for passengers to alight, and by reason thereof plaintiff was injured, she was entitled to recover. Held, that the term "safe means" was not alone referable to defendant's failure to provide a step for plaintiff to alight, as alleged, of which there was no proof, but was also applicable to the alleged negligence of defendant's negro porter in jerking her from the train while assisting her to alight. *Texas & P. Ry. Co. v. Beezley*, 101 S. W. 1051, 46 Tex. Civ. App. 108.

**Defective Appliances or Negligent Use Thereof Must Be Proximate Cause of Injury.**—In an action for injuries to a passenger, where the plaintiff predicated his case on the negligence of a porter in removing a stool for passengers to alight on, just as he was stepping from the car, and the answer contained a general denial, the defendant was entitled to a verdict, if the moving of the stool was not the cause of the accident. *St. Louis, etc., Ry. Co. v. Johnson*, 100 Tex. 237, 97 S. W. 1039, reversing 94 S. W. 162.

In an action for injuries to a passenger, where the cause of the injury

was alleged to be the negligence of a porter in moving a footstool, error in refusing an instruction that if the plaintiff stumbled or fell while alighting from the train, from any cause except the moving of the footstool by the porter, he could not recover, is not cured by a charge that if, as plaintiff was coming down the steps, he stumbled and started to fall, and was caught by defendant's servants and prevented from falling, the jury should find for defendant. *St. Louis, etc., R. Co. v. Johnson*, 100 Tex. 237, 97 S. W. 1039, reversing 94 S. W. 162.

**Evidence in Actions for Injuries from Defective Appliances—Admissibility.**—In an action for injuries to a passenger while attempting to alight, resulting from the stool on which he stepped turning over, evidence was admissible which tended to show that the stool was improperly constructed, and as to the frequency with which such stools turned and caused passengers to fall. *Missouri, K. & T. Ry. Co. of Texas v. Dunbar*, 108 S. W. 500, 49 Tex. Civ. App. 12.

**Evidence as to Condition of Appliance at Subsequent Time.**—In an action for injury to a passenger through an alleged defective car step, evidence of the condition of the step at times after the date of the accident is immaterial, in the absence of proof that it was in the same condition as when the accident occurred. *Walling v. Trinity & Brazos Valley Ry. Co.*, 106 S. W. 417, 48 Tex. Civ. App. 35.

**Sufficiency of Evidence to Authorize Submission of Issue as to Cause of Injury.**—Where plaintiff was injured in alighting from a railroad car, evidence that the step box was too small, and the ground on which it was placed was slanting and uneven, was sufficient to support an instruction submitting the issue whether the size of the box or condition of the ground was the proximate cause of the fall. *Missouri, K. & T. Ry. Co. of Texas v. White*, 55 S. W. 593, 22 Tex. Civ. App. 424.

**Instructions.**—In an action for injuries against a railroad company, received by a female passenger in alighting from the train, there was evidence that she was obliged to step down onto a box about 11 inches square at the top and somewhat larger at the bottom; that she was unassisted; that the box was standing on rough stones; and that it tipped as she stepped on it. Held an instruction, in such case, that if defendant failed to furnish such facilities or assistance to plaintiff in alighting as prudent and competent persons in the same business would commonly employ in like circumstances and the injury resulted therefrom, plaintiff should recover, unless guilty of contributory negligence, is not erroneous. *Missouri Pac. Ry. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368.

Where plaintiff was injured in alighting from a car, and the evidence showed that the step box was too small, and was placed too far under the car steps, on slanting and uneven ground, an instruction to the jury to find for plaintiff if they believed that defendant's servants were negligent in failing to furnish plaintiff a safe means for alighting from the train was not erroneous, as making defendant an insurer of the safety of its passengers. *Missouri, K. & T. Ry. Co. of Texas v. White*, 55 S. W. 593, 22 Tex. Civ. App. 424.

The court having charged that if the company furnished suitable means of egress at proper points, and properly lighted, and plaintiff did not exercise proper care, he could not recover, and defendant having failed to ask for such charge in a disjunctive form, it can not complain thereof. *Texas & P. Ry. Co. v. Brown*, 78 Tex. 397, 14 S. W. 1034.

In an action for injuries sustained by a passenger after alighting from a train at a station by slipping down an incline on the platform leading to the waiting room, a requested instruction

which ignored entirely the fact that the platform upon which the injury occurred had been used for a great length of time by passengers in going to and from the train, and which made the liability of the railroad company depend upon whether or not the appearance of the passway taken by the passenger was such as to mislead her and induce her to go that way, was properly refused. Judgment (Civ. App. 1907), 103 S. W. 695, affirmed. *Missouri, K. & T. Ry. Co. of Texas v. Criswell*, 108 S. W. 806, 101 Tex. 399.

In an action against a railroad company for injuries received by a passenger in alighting from a train wherein it appeared that she was obliged to step down onto a box, 11 inches square at the top, and somewhat larger at the bottom, and that the box was standing on rough stones, and tipped as she stepped on it, a charge, requested by defendant, that if the stepping stool was a reasonably safe appliance, and was properly placed on ground sufficiently smooth to prevent it from turning by the use of due care by passengers, the jury should find for defendant, was properly qualified by adding the condition that defendant should not be guilty of negligence in using it, nor otherwise guilty of negligence. *Missouri Pac. Ry. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368.

**Questions for Jury.**—Whether failure of a carrier to provide a stool for passengers in getting on and off trains is negligence is a question for the jury. *Missouri, K. & T. Ry. Co. of Texas v. Sherrill*, 72 S. W. 429, 32 Tex. Civ. App. 116.

In an action for injuries to a passenger, evidence held to present a question for the jury whether the fall of the plaintiff was caused by the moving of the stool placed for passengers to alight on. *St. Louis, etc., R. Co. v. Johnson*, 100 Tex. 237, 97 S. W. 1039, reversing 94 S. W. 162.

**Evidence as to Customary Use of Similar Appliances Not Conclusive.**—

In an action against a carrier for injuries to a passenger who in alighting from a car stepped upon a box provided for her to use in alighting and who was injured by the overturning of the box, evidence that boxes of such a make were in general use on railroads to assist passengers in alighting and that several passengers had used the same box on the occasion in question without injury, did not require the jury to find that the carrier in using the box exercised that high degree of care which their duty to the passenger required. *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741.

**(5) Duty to Assist Passengers.**

**In General.**—Ordinarily a carrier of passengers is under no obligation to furnish personal assistance to a passenger in alighting from its conveyance. *Flory v. San Antonio, etc., R. Co.* (Civ. App.), 89 S. W. 278; *Ft. Worth, etc., R. Co. v. Work* (Civ. App.), 100 S. W. 962; *Missouri, etc., R. Co. v. Buchanan*, 31 Tex. Civ. App. 209, 72 S. W. 96, affirmed in 97 Tex. 640, no op.

In *Missouri Pac. v. Wortham*, 73 Tex. 25, 10 S. W. 741, it was held that it might be conceded that, if appellants had had a proper platform at the station upon which passengers could have alighted, their duty as to the matter would have been discharged, and that they were not called upon to render personal assistance.

It can not be said as a matter of law that the failure of a carrier to assist a female passenger to alight from a train is negligence. *Ft. Worth, etc., R. Co. v. Spear* (Civ. App.), 107 S. W. 613.

It is always a question of fact, to be determined from all the circumstances, whether such duty arises in any given case. *Ft. Worth, etc., R. Co. v. Work* (Civ. App.), 100 S. W. 962.

Under certain circumstances, the

exercise of that high degree of care exacted from carriers of passengers may impose upon the carrier the duty of furnishing such assistance. *Missouri, etc., R. Co. v. Buchanan*, 31 Tex. Civ. App. 209, 72 S. W. 96, affirmed in 97 Tex. 640, no op.; *St. Louis, etc., R. Co. v. Kennedy* (Civ. App.), 96 S. W. 653, affirmed in 101 Tex. 656, no op.; *Ft. Worth, etc., R. Co. v. Spear* (Civ. App.), 107 S. W. 613.

A carrier of passengers owes to the passenger, until he has safely alighted from its car, the highest degree of care for his safety. If the full measure of such care in a given case required assistance to the passenger in alighting, it would be bound to furnish such assistance. But the legal duty to do so would exist because facts calling for its exercise existed. *Ft. Worth, etc., R. Co. v. Spear* (Civ. App.), 107 S. W. 613.

A female passenger having been injured by the train starting while she was getting off, the company is not entitled to a charge that its contract was performed on the arrival of the train, if the station was announced, and the train stopped a sufficient time to give her an opportunity to alight, and that its servants were not bound to assist her in alighting. *St. Louis, A. & T. Ry. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266.

In order for a railroad company to claim immunity for its failure to have a proper platform at the station upon which passengers may alight and for the use of an appliance less safe, it is its duty at least to render such assistance to passengers as to make the use of the appliance (in this instance a stool) as safe as a platform would have been. *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741.

A passenger has the right, if he desires to exercise it, to leave the train and abandon it as a passenger at a station on his route short of his destination as called for in his ticket; and

if this purpose is made known to the brakeman he is under the same duty to render such assistance to the passenger in alighting from the train as his physical condition requires as he should extend to the passenger if leaving the train at the point called for in his ticket. *International & G. N. Ry. Co. v. Anderson*, 15 Tex. Civ. App. 180, 53 S. W. 606.

**Duty of Carrier to Furnish Assistance a Question for Jury.**—Whether the circumstances rendered the carrier negligent by the omission to assist a passenger to alight from the train is a question for the jury. *Campbell v. Alston* (Civ. App.), 23 S. W. 33.

When a carrier sees fit to maintain a place of exit that is dangerous, other duties then become entailed upon it, such as warning or assisting the passenger, in the exercise of proper care due to that situation. What omissions in such a situation would amount to negligence, are questions of fact for the jury, and under the Texas system, where all matters of fact are required to be submitted to the jury, such a question is never for the court, unless the facts and circumstances are plainly such that admit of no issue on the subject. *San Antonio, etc., Co. v. Flory*, 45 Tex. Civ. App. 233, 100 S. W. 200, affirmed in 102 Tex. 592, no op.

It is for the jury to determine whether the duty of the carrier extended in a particular case to assist a woman laden with packages to alight from a train. *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 84, 15 S. W. 264.

Where, in an action for injuries to a female passenger while alighting from a street car, negligence was charged in that the car platform and steps were wet, muddy, and slippery, rendering them dangerous for ladies unassisted to alight, whether the carrier owed plaintiff a duty either to warn or assist her was for the jury. *Flory v. San Antonio Traction Co.* (Civ. App.), 89 S. W. 278.

**Allegations as to Negligence in Failure to Furnish Assistance.**—Pleading charging that station platform was too low and negligently constructed, that no stool was used to assist in alighting and no assistance rendered to a woman getting off a train incumbered with parcels, was sufficient to authorize a charge permitting recovery if the assistance furnished for alighting was not reasonably safe. *Missouri, etc., R. Co. v. Buchanan*, 31 Tex. Civ. App. 209, 72 S. W. 96, affirmed in 97 Tex. 640, no op.

**Admissibility of Evidence as to Negligence in Failure to Assist.**—Where, in an action for injuries to a female passenger while alighting from a street car, the issue was whether the conductor was negligent in failing to assist her, and it appeared that the car was not an open one with several seats, proof that it would be impossible, when running an open car with several seats, to help all the female passengers off when they were all attempting to alight at once, was properly excluded, as not bearing on the question of negligence. *San Antonio Traction Co. v. Flory*, 100 S. W. 200, 45 Tex. Civ. App. 233.

**Evidence as to Custom of Rendering Assistance.**—Testimony of witnesses who have traveled considerably that they had observed defendant's conductors and porters assist ladies off and on the trains is insufficient to establish such a custom as would bind the railway company. *St. Louis S. W. Ry. Co. v. McCullough*, 45 S. W. 324, 18 Tex. Civ. App. 534.

Such evidence was incompetent where there was no evidence that plaintiff contracted for passage with reference to such custom. *St. Louis S. W. Ry. Co. v. McCullough*, 45 S. W. 324, 18 Tex. Civ. App. 534.

**Instructions as to Duty to Assist.**—Where the undisputed evidence showed that defendant's servants undertook to furnish plaintiff personal assistance in

alighting from its train, an instruction submitting the issue whether or not defendant, in undertaking to furnish such personal assistance, was guilty of negligence, in not furnishing such assistance as was necessary to prevent plaintiff from falling, was not erroneous, as imposing on defendant the duty of furnishing its passengers personal assistance in alighting from its trains. *Missouri, K. & T. Ry. Co. of Texas v. White*, 55 S. W. 593, 22 Tex. Civ. App. 424.

A charge, in an action against a railroad for pushing a passenger off a train, that, when a conductor interferes in any way with a passenger leaving his train, he must use the highest care to assist him to alight in safety, is not erroneous, in connection with a charge that unless the jury found that he kicked, pushed, or shoved the passenger off the train, or if the passenger fell and was hurt, and was not pushed or kicked off, the latter could not recover. *Texas & P. Ry. Co. v. Humphries*, 48 S. W. 201, 20 Tex. Civ. App. 28.

In an action for injuries sustained by plaintiff's wife in attempting to board defendant's train, it was alleged that, having failed to provide a suitable platform and to have its depot grounds properly lighted, and having permitted the steps to the platform of its coaches to be covered with ice and sleet, it was negligence for the defendant to fail to have some person present, at the point where it received its passengers, to assist plaintiff's wife in boarding the train and to warn her of the dangerous condition of its steps and platform of its coaches. Held, that it was error to submit to the jury, as an independent ground of recovery, the negligence of defendant in failing to provide an employee to assist plaintiff's wife to board its train. *Ft. Worth & D. C. Ry. Co. v. Work* (Civ. App.), 100 S. W. 962.

In an action by a passenger for in-

juries sustained in alighting because of the alleged movement of the train, where it appeared that plaintiff was carrying a handbox and holding her skirts; that when she reached the last step the train suddenly moved back throwing her backward and then moved forward, causing plaintiff to jump to the platform about three feet, and that the conductor did nothing to assist her, except to put his hand on her arm and give her a slight push, an instruction predicated defendant's liability on the negligence of its servants in failing to assist her to alight, if there was such failure, and if by reason thereof she was caused to fall, was not erroneous as authorizing a verdict for plaintiff, if she was caused to stumble for some other reason than a movement of the train as she alleged, and if the conductor failed to assist her in alighting from the train. *St. Louis Southwestern Ry. Co. of Texas v. Kennedy* (Civ. App.), 96 S. W. 653.

The court charged that, taking into consideration the fact that plaintiff's wife did not ask for assistance, the jury should determine whether the failure to assist her was want of that measure of care which was due her as a passenger. Held, that the question was properly submitted, and that the company was not entitled to a charge that it was not the duty of its servants to assist her, unless they knew that from disability or infirmity she was unable to get off readily without assistance. *Texas & P. Ry. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

Plaintiff testified that in alighting from defendant's car she was forced against the railing of the car, and pushed from the steps and injured, by two men who were quarreling on the platform. It was shown to be defendant's usual custom to have some one standing at the foot of the steps to assist passengers to alight, but that no one was there when plaintiff alighted.

Held, that it was proper to charge that it is the duty of railway companies to exercise a high degree of care to enable their passengers to safely alight from their trains, and that the degree of care required is proportionate to the nature and risk of the business, and is such as would ordinarily be exercised by persons of great care under similar circumstance. *Missouri, K. & T. Ry. Co. of Texas v. Russell*, 8 Tex. Civ. App. 578, 28 S. W. 1042.

**Instances in Which Failure to Furnish Assistance Held to Constitute Negligence.**—A carrier must exercise the care which a very prudent person would exercise to keep its car platforms and steps in a safe condition for passengers to alight, and, where it maintains a dangerous place of exit, it must warn or assist passengers. *San Antonio Traction Co. v. Flory*, 100 S. W. 200, 45 Tex. Civ. App. 233.

Plaintiff's wife was injured by a fall in alighting from a train. When she entered the train, plaintiff requested the conductor to assist her and her child in alighting, and advised him that she had a large valise and bundle with her. Before the train arrived at her destination, she requested the conductor to have the porter take out her valise. After waiting for the porter, but who did not come, she left her seat, holding a valise and bundle behind her in one hand, and directing her child in front with the other. When reaching the step of the car, she felt her way down it with her foot, and fell. Held, that the jury were warranted in finding that defendant was negligent in not assisting her to alight. *Missouri, K. & T. Ry. Co. of Texas v. Buchanan*, 72 S. W. 96, 31 Tex. Civ. App. 209.

Plaintiff started to alight from her train at station on the usual side of the car and seeing a freight train there went to the other side. The train started. She had two valises. There was no one to assist her and no

platform on either side. The train did not stop a reasonable length of time. She was injured in alighting. Held, plaintiff was injured through defendant railroad's negligence without her fault and should recover. *Gulf, etc., R. Co. v. Vinson* (Civ. App.), 24 S. W. 956.

In an action by a passenger for injuries sustained in alighting from the train, the evidence considered and held to sustain a finding that the injury was the result of defendant's negligence in causing its train to suddenly move while plaintiff was attempting to alight, without notice to her, and in the failure of the conductor to assist her in alighting after he saw that she needed assistance, and that plaintiff was not negligent. *St. Louis, etc., R. Co. v. Kennedy* (Civ. App.), 96 S. W. 653, affirmed in 101 Tex. 656, no op.

In an action for injuries sustained in alighting from a train, proof that the step-box was placed too far under the car step and that the trainmen assisting the lady did not take sufficient hold of her, sustains a verdict ascribing negligence to the railroad company in that respect. *Missouri, etc., R. Co. v. White*, 22 Tex. Civ. App. 424, 425, 55 S. W. 593.

**(6) Liability for Injury to Alighting Passenger Caused by Disorderly Fellow Passengers.**

Where disorderly passengers are close to another passenger as she was about to descend from the car to the platform and the situation was so obvious that it could not reasonably have escaped the notice of the carrier's servant had he been according to custom at the usual place to see passengers safely landed, the carrier can not escape the responsibilities for injuries received by the passenger by reason of such disorderly passengers because of the absence of its servant from his post of duty. *Missouri, K. & T. Ry. Co. of Texas v. Russell*, 8 Tex. Civ. App. 578, 28 S. W. 1042.

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**(7) Liability for Injury of Passenger after Alighting by Negligent Moving of Trains.**

Where a passenger, on alighting at a regular station, crosses the track at a public crossing in the rear of the train, and is run over by the train backing up without notice, the railroad company is liable. *Dallas & O. C. Ry. Co. v. Reeman* (Civ. App.), 32 S. W. 45.

Defendant railroad company's train passed, at a rate of 30 miles per hour, over a side track between the main track and the depot at a junction where trains met, and no signal was given of its approach. Persons who had come in on a train just preceding it had to pass over the side track to reach the depot. Held, where a person was struck by the train on the side track, that the facts were sufficient to show negligence on the part of the company. *Sanchez v. San Antonio & A. P. Ry. Co.*, 3 Tex. Civ. App. 89, 22 S. W. 242.

A passenger, on leaving a depot, passed along the platform, which ran parallel with a side track, and in descending found his way obstructed by a pile of shells deposited by the railroad company, making it necessary for him to step aside upon the cross-ties of the side track, and in so doing he was struck by a passing train. Steam was escaping from an engine on the main track, so he could not hear the noise of the train which struck him. He was not warned by defendant's servants, nor did he know, or have any reason to know, that a train was due to arrive. Held not conclusive of contributory negligence. *Sanchez v. San Antonio & A. P. Ry. Co.*, 3 Tex. Civ. App. 89, 22 S. W. 242.

**b. Persons Accompanying or Assisting Passengers.**

**General Rule as to Necessity for Notice to Carrier of Intention to Alight.**—It may be laid down as a general rule that the liability of a car-



rier to a person entering its vehicle to assist a passenger is dependent on notice to the carrier of an intention to enter the vehicle and return again to the station platform; if such notice is given the carrier is bound to exercise ordinary care not to injure such person; but if there was no notice, actual or constructive, it owes no duty to him. *Missouri, etc., R. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905; *International, etc., R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102, 38 S. W. 401, affirmed (see 93 Tex. 711, no op.); *Missouri, etc., R. Co. v. Miller*, 15 Tex. Civ. App. 428, 39 S. W. 583, affirmed in 93 Tex. 715, no op.; *Texas, etc., R. Co. v. Crockett*, 27 Tex. Civ. App. 463, 66 S. W. 114; *Oxsher v. Houston, etc., R. Co.*, 29 Tex. Civ. App. 420, 67 S. W. 550, affirmed in 93 Tex. 684, no op.; *Texas, etc., R. Co. v. Funderburk*, 30 Tex. Civ. App. 22, 68 S. W. 1006, affirmed in 95 Tex. 688, no op.; *St. Louis, etc., R. Co. v. Cunningham*, 48 Tex. Civ. App. 1, 106 S. W. 407, affirmed, no op.; *Texas, etc., R. Co. v. McGilvary* (Civ. App.), 29 S. W. 67, 68 (see 93 Tex. 741, no op.); *Dillingham v. Pierce* (Civ. App.), 31 S. W. 203; *Bullock v. Houston, etc., R. Co.* (Civ. App.), 55 S. W. 184.

It is the duty of a person boarding a train to assist a passenger to take notice of the usual length of time allowed for persons to board and alight from a train, and if it is necessary for him to go on the train, in order to place upon the company the duty of holding the train specially for him to disembark, he must have given notice of his intention. *Missouri, etc., R. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905; *International, etc., R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102, 38 S. W. 401, affirmed (see 93 Tex. 711, no op.); *Texas, etc., R. Co. v. McGilvary* (Civ. App.), 29 S. W. 67 (see 93 Tex. 741, no op.).

"At stations where the journey begins and ends, it is decided that one

may accompany a passenger to a seat on the train, and while so engaged is entitled to reasonable precaution for his safety in going upon and alighting from the train; but, even in such cases, this duty does not arise, unless defendant's servants are in some manner informed of the presence of such person on the train and of his purpose. *International, etc., R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102, 103, 38 S. W. 401, affirmed (see 93 Tex. 711, no op.)." *Bullock v. Houston, etc., R. Co.* (Civ. App.), 55 S. W. 184.

Unless so notified, a railway company is not charged with knowledge that a person intends to leave its train as soon as he has bidden good-by to a passenger. *Missouri, K. & T. Ry. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905.

A person who boards a train merely to assist another to a seat must give notice of his intention to get off, to hold the company liable for not giving him time therefor; the train having stopped the usual and a reasonable time for passengers to get on and off, and he having of his own volition jumped off after it had started. *Dillingham v. Pierce* (Civ. App.), 31 S. W. 203.

Where a person boards a train to assist a friend thereon, intending to get off as soon as his friend was settled, but the company has no notice of his intention, and after the train starts he is injured in alighting, the company is not liable, where the train stopped the usual time, and plaintiff, before attempting to alight, did not request the employees to stop the train. *Texas & P. Ry. Co. v. McGilvary* (Civ. App.), 29 S. W. 67.

Where a passenger left her train, and boarded another at a meeting point, to converse with her sister, she can not recover for injuries sustained in leaving the latter train, in the absence of proof that the employees

operating such train knew of her presence, and that it was only temporary. *Bullock v. Houston, E. & W. T. Ry. Co.* (Civ. App.), 55 S. W. 184.

Where a boy 18 years old, and carrying baggage, boarded a passenger train to assist certain relatives who were going away, but without indicating to the train employees that he was not himself going on the train, and was injured in getting off after the train had commenced to move,—it having remained at the station from three to five minutes, and long enough to allow passengers to get off and on the car,—the railroad company was not negligent, and a verdict was properly directed in its favor. *Oxsher v. Houston, E. & W. T. Ry. Co.*, 67 S. W. 550, 29 Tex. Civ. App. 420.

**Liability as Affected by Failure to Stop for the Usual and Reasonable Time.**—Failure to stop a train the usual and reasonable time to enable passengers exercising ordinary diligence to get on and off is not negligence as to a person who gets on to assist a passenger, and is injured in getting off after the train has started. *International & G. N. R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102, 38 S. W. 401.

"In *Missouri, etc., R. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905, which is a case of the same character as the one under consideration, Mr. Justice Finley says: 'The company was under obligation to passengers to stop the train a sufficient length of time for those desiring to get off and those desiring to take passage to do so with safety. It was the duty of the appellee to take notice of the usual length of time given for this purpose, and if it was not sufficient, and it was necessary for him to go on the train, in order to place upon the company the duty of holding the train specially for him to disembark, he must have given notice of his intention' From this it may be inferred (1) that it is

not obligatory upon one boarding a train to assist a passenger to give notice of his intention to get off, unless the usual time give passengers to enter and leave the train is insufficient for that purpose; and (2) that, if the usual time given for that purpose is sufficient, the company will be liable to such assistant, without notice of his intention to get off, if such usual time is not given. No doubt this construction of the opinion was given by the trial judge, and induced him to give the charge complained of. We do not believe, from a consideration of the entire opinion, that it was the intention of the court to announce a rule different from the one stated by us. \* \* \* The holding by the court that the company owed the plaintiff 'ordinary care' clearly shows that its duty to him was not that of a carrier to a passenger, to whom a higher degree of care is due in leaving a train. We conclude, therefore, that the court erred in giving the portion of the charge referred to." *International, etc., R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102, 38 S. W. 401, affirmed (see 93 Tex. 711, no op.).

**Duty of Carrier Having Notice of Intention.**—A railway company permitting a person to board a train to assist a passenger is bound to so regulate the movement of the train as to admit of his getting off without injury. *Missouri, K. & T. Ry. Co. v. Miller*, 15 Tex. Civ. App. 428, 39 S. W. 583.

The absence of any rule prohibiting it, and of objection on the part of those in charge, operates as a consent on the part of a railroad company that a person, not a passenger, may enter one of its cars for the purpose of assisting a passenger to a seat. *Missouri, K. & T. Ry. Co. v. Miller*, 15 Tex. Civ. App. 428, 39 S. W. 583.

In *St. Louis, etc., R. Co. v. Cunningham*, 48 Tex. Civ. App. 1, 106 S. W. 407, affirmed, no op., it was held

that an instruction was not erroneous which placed upon appellant the duty to hold its train for a time reasonably sufficient to enable appellee to assist his wife upon the car, procure for her a seat thereon, and then alight therefrom in safety. "The law placed upon the appellant identically the same duty." Citing *Missouri, etc., R. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905; *International, etc., R. Co. v. Satterwhite*, 19 Tex. Civ. App. 170, 47 S. W. 41, affirmed in 93 Tex. 643, no op.; *Missouri, etc., R. Co. v. McElree*, 16 Tex. Civ. App. 182, 41 S. W. 843, affirmed in 93 Tex. 735, no op.; *Ft. Worth, etc., R. Co. v. Viney* (Civ. App.), 30 S. W. 252, 253.

**Right to Rely on Information by Employee as to Time of Stop.**—Where a railroad company makes no provision for assisting passengers to seats when necessary, a person accompanying a passenger needing such assistance may enter the train for that purpose, and may rely upon information furnished by a brakeman stationed at the steps to assist passengers getting on and off the train as to the time the train will remain at the station. *St. Louis Southwestern Ry. Co. of Texas v. Cunningham*, 48 Tex. Civ. App. 1, 106 S. W. 407.

The practice of passengers and licensees accompanying them of seeking information from the employee placed at the car steps to assist passengers off and on as to the length of the train's stop, which practice is well known to the public and acquiesced in by the carrier, renders the carrier responsible for the information imparted. Hence, where plaintiff, accompanying his wife, who was a passenger, was assured by the brakeman at the car steps that the train would remain for three or four minutes, and was invited to enter the car with his wife, it was the carrier's duty to hold the train for a time reasonably sufficient to enable him to enter the car,

procure a seat for his wife, and alight in safety. *St. Louis Southwestern Ry. Co. of Texas v. Cunningham*, 106 S. W. 407, 48 Tex. Civ. App. 1.

**Sufficiency of Notification to Any of Carrier's Employees.**—Plaintiff boarded defendant's train in order to show his wife a seat, but before he succeeded the train started, and he was injured while trying to get off. The evidence showed that when plaintiff got on the train he notified a white man, either the conductor or a brakeman, of his intention merely to show his wife a seat, and also that there were negro porters at the train steps to assist people in getting on. The court instructed that defendant would be liable if plaintiff notified any of its employees in charge of the train of his intention to get off. Held not erroneous, as authorizing a finding against defendant in the event that one of the porters only had notice of plaintiff's intention to get off. *Texas & P. Ry. Co. v. Funderburg*, 68 S. W. 1006, 30 Tex. Civ. App. 22.

**Admissibility of Evidence Showing Notice.**—Statements of a conductor of one of two trains meeting at a station, made some time after an accident to a passenger on his train, which occurred while she was leaving the other train, which she had temporarily visited, with his consent, that he informed the conductor of the other train that he had a passenger on the train, to hold it for a minute, are inadmissible to prove notice to such conductor of the passenger's presence. *Bullock v. Houston, E. & W. T. Ry. Co.* (Civ. App.), 55 S. W. 184.

**Facts Held to Affect Employees with Notice of Intention.**—Where a man boarded a train at 4 a. m. with an aged lady, leaving another lady who had approached the train with them standing alone beside the track, such facts tend to affect trainmen who observed them together with notice that the man intended to leave the train

after assisting the lady aboard. *International & G. N. R. Co. v. Satterwhite*, 47 S. W. 41, 19 Tex. Civ. App. 170.

In an action for injuries in getting off a moving train which plaintiff had boarded to assist a passenger, where the train moved at a brakeman's signal, evidence that the brakeman ordered plaintiff to get off is admissible to show that those in control of the train knew of his intention to get off. *International & G. N. R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102, 38 S. W. 401.

Where a person entering a car with a passenger states to a porter or brakeman in attendance that he desires to get off, and the conductor, in starting the train, acts upon a statement of such porter or brakeman that it is "all right," the company is chargeable with notice that the person desired to leave the train. *Missouri, K. & T. Ry. Co. v. Miller*, 15 Tex. Civ. App. 428, 39 S. W. 583.

**Admissibility of Evidence as to Customary Conduct of Plaintiff.**—It was not error to permit a witness to testify that he had attended his mother on the train that morning, and seated her at the same time plaintiff seated his wife, and that he had done the same thing before with other passengers, to show that such conduct was customary, and notice to the trainmen of such a custom. *Texas & P. Ry. Co. v. Crockett*, 66 S. W. 114, 27 Tex. Civ. App. 463.

**Facts Held to Show That Plaintiff Was Properly on Train.**—Plaintiff boarded defendant's train in order to show his wife a seat, but before he succeeded the train started, and he was injured in getting off. The wife was accompanied by two children, one three years old and the other five, the younger of which she was carrying. She also had a hand satchel, while plaintiff was carrying her valise in one hand and a lunch basket in the other.

Plaintiff notified the conductor of his purpose in getting on the train. Held sufficient to justify a finding that plaintiff was properly on the train. *Texas & P. Ry. Co. v. Funderburk*, 68 S. W. 1006, 30 Tex. Civ. App. 22.

**Admissibility of Testimony Showing Failure to Stop for Reasonable time.**

—In an action for injuries sustained on jumping from a moving train, on which plaintiff had been to seat his family, it is proper to permit witnesses to testify that a certain person was at the station just before the train started, and that he bought a ticket for the train, but that it started and left him before he could get on, to show that the train did not stop at the station for a reasonable length of time. *Texas & P. Ry. Co. v. Crockett*, 66 S. W. 114, 27 Tex. Civ. App. 463.

**Question as to Failure to Exercise Due Care Proximately Causing Injury One for Jury.**

—In an action for injuries in getting off a moving train which plaintiff had boarded to assist a passenger, where the evidence tends to show that those in charge of the train knew of plaintiff's intention to get off, whether defendant used ordinary care in starting the train, and, if not, whether the injury was proximately caused by failure to do so, is for the jury. *International & G. N. Ry. Co. v. Satterwhite*, 15 Tex. Civ. App. 102, 38 S. W. 401.

**Instructions.**—Refusal of an instruction that the company was not negligent if the trainmen started the train before they knew of plaintiff's desire to get off, and that he assumed the risk of injury in attempting to alight without requesting them to stop the train, if error, is harmless, where the general charge was that plaintiff could not recover if the trainmen were ignorant of his desire to get off when they started the train. *International & G. N. Ry. Co. v. Satterwhite*, 47 S. W. 41, 19 Tex. Civ. App. 170.

In an action against a railroad com-

pany by one who had accompanied a passenger onto a train at the company's invitation for injuries received in alighting from the moving train, the refusal of a charge that if, when plaintiff came out of the car to get off, the train was standing still or moving slowly, and he could have alighted safely, but failed to get off then, and if he was negligent in not getting off at that time, which negligence contributed to the injury, defendant should recover, etc., was not error, since if plaintiff had an opportunity to alight in safety, it was because defendant had discharged its duty to hold the train long enough to enable him to do so, and was therefore not negligent nor liable for plaintiff's injuries, irrespective of whether plaintiff was negligent. *St. Louis Southwestern R. Co. of Texas v. Cunningham*, 106 S. W. 407, 48 Tex. Civ. App. 1.

A charge that, where defendant railroad company invited plaintiff to accompany his wife, who was a passenger, onto the train, it was its duty to stop the train a reasonably sufficient time to allow plaintiff to assist his wife to a seat and alight in safety, is not misleading as authorizing a recovery against the railroad company without regard to plaintiff's diligence, or the time consumed by him in seating his wife and alighting, especially where the court charged that it was plaintiff's duty to use such dispatch in assisting his wife to a seat and alighting from the train as an ordinarily careful person would have used under the same circumstances. *St. Louis Southwestern R. Co. of Texas v. Cunningham*, 106 S. W. 407, 48 Tex. Civ. App. 1.

#### 15. Rights, Duties and Liabilities as to Ejection of Persons from Conveyance of Carrier.

##### a. Grounds for Ejection.

##### (1) Disorderly Conduct.

In General.—A carrier of passengers

is given power to repress and prohibit all disorderly conduct on its means of transportation and to expel or exclude therefrom any person whose conduct or condition is such as to render acts of impropriety, rudeness, indecency or disturbance either inevitable or reasonably probable. *Galveston, etc., R. Co. v. Long*, 13 Tex. Civ. App. 664, 36 S. W. 485.

This power is given to the carrier as incidental to its duty to exercise a high degree of care in providing for the comfort and convenience of its passengers. *Galveston, etc., R. Co. v. Long*, 13 Tex. Civ. App. 664, 36 S. W. 485.

"As long as passengers have redress against railway companies for wrongs and injuries done them on trains by disorderly and vicious persons, such companies can not be denied the right to eject such disorderly and vicious persons from their trains." *Atchison, etc., R. Co. v. Wood* (Civ. App.), 77 S. W. 964.

Generally, as to the duty of a carrier of passengers to exercise the highest degree of care for their safety, see ante, "Care Required of Carrier," IV.

**Instances of Disorderly Conduct Justifying Ejection.**—A passenger, occupying more than one seat in a railroad train, contrary to the rules of the company, and who resists any attempt of the trainmen to confine him to a single seat by displaying a pistol, may be removed from the train, whether other passengers were inconvenienced or not. *Gulf, C. & S. F. Ry. Co. v. Moody*, 3 Tex. Civ. App. 622, 22 S. W. 1009.

A conductor of a railroad train has a right to eject a passenger who enters the cars intoxicated, and armed with a pistol, and whose language and conduct are disorderly and threatening. *Gulf, C. & S. F. Ry. Co. v. Adams*, 3 Willson, Civ. Cas. Ct. App. §§ 422, 423.

**Language and Conduct Held Not to Warrant Ejection.**—Plaintiff, a passenger on a street car, on being asked for his fare, handed the conductor a transfer folded. The conductor returned it with a demand that plaintiff unfold it, which plaintiff refused to do. Thereupon the conductor demanded a nickel, and the second time demanded that plaintiff unfold the transfer, when plaintiff replied, "Damned if I am going to unfold it; unfold it yourself," whereupon the conductor seized plaintiff, threw him on the floor against a seat, and ejected him from the car. Held, that plaintiff's language was neither profane nor obscene, and that his conduct was no justification for his ejection. *El Paso Electric Ry. Co. v. Alderete*, 81 S. W. 1246, 36 Tex. Civ. App. 142.

**Intoxication without Disorderly Conduct No Grounds for Expulsion.**—The mere fact that an individual may have drunk to excess will not justify his expulsion from a public conveyance, if he appears to be peaceably inclined, and is not interfering with any one. *Galveston, etc., R. Co. v. Long*, 13 Tex. Civ. App. 664, 36 S. W. 485.

**(3) Violation of Rules of Carrier.**

**In General.**—If a passenger persists in violating any reasonable rule of a railway company, it is the right and duty of the conductor to enforce the rule, and if necessary, to eject the passenger from the train, using only such force as may be necessary. *Gulf, etc., R. Co. v. Moody*, 3 Tex. Civ. App. 622, 22 S. W. 1009; *Texas, etc., R. Co. v. Pearl*, 3 App. Civ. Cases, § 4.

Upon refusal to obey the reasonable regulation of the carrier, a passenger forfeits his right to be carried, and immediately puts himself in the condition of an intruder, liable to ejection at any point upon the route of the carrier at which the latter may see fit to eject him. *Texas, etc., R. Co. v. Pearl*, 3 App. Civ. Cases, § 4, quoting Thompson on Carriers of Passengers, p. 350, § 8.

**Violation of Rule Requiring Ticket or Pass before Entering Train.**

Where a passenger, having knowledge of a regulation of a railroad company forbidding passengers to get aboard without a ticket or pass, refused to observe it, and was ejected by the use of such force as was reasonably necessary for that purpose, he is not entitled to recover for injuries sustained as a result of the ejection. *International & G. N. R. Co. v. Goldstein*, 2 Willson, Civ. Cas. Ct. App. § 275.

**(3) Want of Ticket, Pass, or Permit, and Nonpayment of Fare.**

**(a) General Rule Stated, Construed and Applied.**

**Rule Stated.**—Railway companies may eject from their cars, at a regular stopping place, without the use of unnecessary force, persons failing to pay fare or presenting, when demanded, a ticket or other evidence of their right to a seat thereon. *Breen v. Texas, etc., R. Co.*, 50 Tex. 43; *Texas, etc., R. Co. v. Casey*, 52 Tex. 112; *Texas, etc., R. Co. v. Bond*, 62 Tex. 442; *Texas Pac. R. Co. v. James*, 82 Tex. 306, 18 S. W. 586; *Texas, etc., R. Co. v. Smith*, 38 Tex. Civ. App. 4, 84 S. W. 852; *Gulf, etc., R. Co. v. Bunn*, 41 Tex. Civ. App. 503, 95 S. W. 640; *Gulf, etc., R. Co. v. McCormick*, 45 Tex. Civ. App. 425, 100 S. W. 202; *Ft. Worth, etc., R. Co. v. Gribble*, 46 Tex. Civ. App. 78, 102 S. W. 157; *Easton v. Waters*, 4 App. Civ. Cases, § 71, 16 S. W. 540; *Galveston, etc., R. Co. v. Turner* (Civ. App.), 23 S. W. 83; *Houston, etc., R. Co. v. Faulkner* (Civ. App.), 56 S. W. 253; *St. Louis, etc., R. Co. v. Fussell* (Civ. App.), 97 S. W. 332; *Texas, etc., R. Co. v. McDonald*, 2 App. Civ. Cases, §§ 163, 164; *International, etc., R. Co. v. Goldstein*, 2 App. Civ. Cases, §§ 274, 275; *Eddy v. Elliott*, 4 App. Civ. Cases, § 173, 15 S. W. 41; *Gulf, etc., R. Co. v. Kuenhle*, 4 App. Civ. Cases, § 249, 16 S. W. 177.

A person who has no valid ticket, and who fails to pay his fare, is a

trespasser, and may be ejected in a proper manner. *Texas, etc., R. Co. v. McDonald*, 2 App. Civ. Cases, §§ 163, 164; *St. Louis, etc., R. Co. v. Fussell* (Civ. App.), 97 S. W. 332; *Texas, etc., R. Co. v. Casey*, 52 Tex. 112; *Gulf, etc., R. Co. v. Bunn*, 41 Tex. Civ. App. 503, 95 S. W. 640.

The act of a person in permitting his wife to take passage on a train without a ticket and without money to pay her fare, knowing that her attempt to so ride would result in her ejection, is such contributory negligence on his part as to preclude him from recovering damages caused by the ejection, irrespective of whether he, who accompanied her, had the money to pay her fare, when the same was demanded by the conductor, or not. *Galveston, H. & H. R. Co. v. Scott*, 79 S. W. 642, 34 Tex. Civ. App. 501.

**Statutory Provision as to Ejection for Refusal to Pay Fare.**—Article 4892, Paschal's Dig., provides that "if any passenger shall refuse to pay his fare or toll, it shall be lawful for the conductor of the train and the servants of the corporation to put him out of the cars at any usual stopping place which the conductor may select." *Texas, etc., R. Co. v. Casey*, 52 Tex. 112.

**Application of Rule Confined to Willful Refusal to Pay Proper Fare.**—Rule authorizing railway conductor to eject passenger refusing to pay fare is confined to willful violators of the contract upon proper demand, and does not apply where a passenger boards a train under the honest belief that he can obtain passage for a certain less sum and tenders the amount demanded while being ejected. *Texas, etc., R. Co. v. Bond*, 62 Tex. 442.

To justify ejection from a train there must be a willful refusal to pay the proper fare, or boarding or remaining upon train with the intention of defrauding the company or resisting demands for payment of fare. *Texas,*

*etc., R. Co. v. Bond*, 62 Tex. 442, 444.

A passenger on a railway train gave to the conductor the fare which he had been accustomed to pay, and the conductor demanded a further sum as due because the passenger had no ticket. This was refused, and the conductor stopped the train. Then the passenger tendered the additional sum, but the conductor refused it, and ejected him. Held an unlawful ejection, unless the passenger's conduct was willful. *Texas & P. Ry. Co. v. Bond*, 62 Tex. 442, 50 Am. Rep. 532.

**Good Faith of Plaintiff in Refusal to Pay Fare Demanded Question for Jury.**—Where defendant railroad by mistake advertised that round-trip tickets would be for sale at a reduced rate at a station upon its line which in fact was merely a flag station, and there was evidence that plaintiff knew these facts, and on boarding a train, refused to pay the fare to the next station at which a regular ticket could be procured, tendering to the conductor the round-trip rate advertised, it was proper, in an action by plaintiff to recover for being ejected from the train, to submit to the jury the issue of plaintiff's good faith. *Cluck v. Houston & T. C. R. Co.*, 101 S. W. 1021, 46 Tex. Civ. App. 112.

The court also properly submitted to the jury the question of defendant's mistake in advertising tickets for sale and whether or not plaintiff had notice thereof. *Cluck v. Houston & T. C. R. Co.*, 101 S. W. 1021, 46 Tex. Civ. App. 112.

In an action by a passenger for unlawful ejection from a train, the refusal of an instruction that plaintiff could not recover for damages caused by his acts, intentionally done for the purpose of enhancing them, was error, when there was evidence that might have justified the jury in finding that, though he could have paid the fare, he refused to pay it at first in order to enhance his damages. *South-*

ern Pac. Co. v. Patterson, 7 Tex. Civ. App. 451, 27 S. W. 194.

**Applications of Rule to Particular Instances.**—Where plaintiff refused to pay fare for her son, nine years of age, though he was of such age as to require payment of fare, the conductor was authorized to require plaintiff and the child to leave the train. *Ft. Worth & D. C. Ry. Co. v. Gribble*, 102 S. W. 157, 46 Tex. Civ. App. 78.

Plaintiff purchased a ticket of defendant's agent, who gave plaintiff an envelope, on which was written the number of the ticket and the number of plaintiff's credential book. Plaintiff put the envelope in his pocket, and after going on the train discovered that there was no ticket in the envelope. He immediately informed the agent, but no other ticket was given him and he returned to the train, and, on refusing to pay his fare, was ejected from the car. He knew it was the duty of the conductor to eject persons without tickets who refused to pay fare, and he was ejected without unnecessary force. Held, that, if the agent did not give plaintiff a ticket, defendant was liable only for the amount of the fare, but, if plaintiff lost the ticket, defendant was not liable in any amount. *Gulf, C. & S. F. Ry. Co. v. McCormick*, 100 S. W. 202, 43 Tex. Civ. App. 425.

Where a passenger falls asleep, and is carried past his destination, it is not the duty of the company to carry him to the next station unless he pays his fare thereto. *Texas Pac. Ry. Co. v. James*, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347.

Where a passenger on a railroad train fell asleep at night, and was carried past his destination, it was not the duty of the company to carry him to the next station, unless he paid or offered to pay his fare to such station; and, if the conductor had no reason to believe that injury would result therefrom, he had a right to put the

passenger off. *Texas Pac. Ry. Co. v. James*, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347.

Where a passenger boarded a train at X., with a ticket for Z., which had expired, and on refusing to pay the required fare was ejected by the conductor at Y., he could not, immediately after his ejection, board the train again at Y., and obtain passage to Z. on the payment of fare from Y. to Z., but the conductor was authorized, on his refusal to pay the full fare from X. to Z., to eject him a second time. *Gulf, C. & S. F. Ry. Co. v. Riney*, 41 Tex. Civ. App. 398, 92 S. W. 54.

Where a passenger concludes to go to a station beyond the one to which he has a ticket, he can not demand that the train be stopped long enough for him to buy a ticket, and the company is justified in ejecting him on his refusal to pay the train fare. *Easton v. Waters*, 4 Willson, Civ. Cas. Ct. App. § 71, 16 S. W. 540.

Where plaintiff was traveling with his adult sister, having the money and tickets of both, and, on its transpiring that one of the tickets was lost, tendered the other for himself, and offered to pay three cents per mile for the sister, but refused to pay the extra cent per mile which the railroad was authorized by law to collect when cash fares were offered, such refusal was sufficient to justify the conductor in ejecting him from the train. *Houston & T. C. R. Co. v. Faulkner* (Civ. App.), 63 S. W. 253.

Two passengers got on a train without tickets, knowing that they would have to pay fare at the rate of 4 cents a mile. One of them gave the conductor \$1 to pay both fares. The latter understood him to say that he wanted to pay three fares, and told them that three fares came to \$1.65. They did not try to correct his mistake, and did not tender \$1.10, which was the fare for the two at 4 cents a



mile. He told them they must pay, or get off, and they said they would get off. He stopped the train, and they walked back a half mile to the depot from which they had started. Held, that a judgment against the company was wholly without evidence to support it. *Eddy v. Elliott*, 4 Willson, Civ. Cas. Ct. App. § 173, 15 S. W. 41; *Same v. Mathews*, Id.

Plaintiff, who was traveling with his sister, presented a ticket for one fare, and a sum of money, less than the legal rate, for the other, and was ejected by the conductor for refusal to pay the full fare. At the trial of an action therefor, plaintiff's contention was that the ticket was given to cover his fare, and the cash to cover his sister's fare, and that his sister was responsible for the extra amount demanded. The evidence did not show that the conductor had reason to so understand the matter, and it appeared that plaintiff's sister had offered to pay the additional amount, but plaintiff refused to allow her to do so, and, on being ejected, exclaimed that he would "get \$10,000 for this." Held, that a verdict for plaintiff could not be sustained. *Houston & T. C. Ry. Co. v. Faulkner* (Civ. App.), 56 S. W. 253.

**Ejection for Want of Permit.**—Where a railroad has a rule forbidding the issuance of permits by conductors, and a passenger is ejected for want of a permit, the company is not liable because its conductor has violated such rule, unless it has been so frequently violated as to warrant the conclusion that it is not enforced. *Houston, etc., R. Co. v. Jackson* (Civ. App.), 61 S. W. 440.

Where a person in good faith enters a freight train as a passenger, and in possession of a ticket good on the train when accompanied by a permit, the fact that he is informed by the brakeman prior to demand by the conductor for his ticket and permit that the rules require a permit in connec-

tion with the ticket does not make it the duty of the passenger to leave the train at a station at which a stop was made after receiving the information, and before the conductor's demand. *Houston & T. C. R. Co. v. Berry* (Civ. App.), 84 S. W. 258, affirmed in 101 Tex. 641, no op.

In an action against a carrier for injuries sustained by being ejected from a freight train, where it appeared that the agent of the carrier sold the plaintiff a ticket good on the train, and promised him a permit required by the rules of the carrier, testimony of the plaintiff was admissible to show that he did not know what a permit was, and did not understand that he would be given any evidence of it, other than the ticket, and that he did not know prior to entering the train that he was required to sign and procure a freight-train permit. *Houston & T. C. R. Co. v. Berry* (Civ. App.), 84 S. W. 258, affirmed in 101 Tex. 641, no op.

Where proof that railroad agent had no authority to issue the permit in question in an action against a railroad for ejection from a train was conclusive, error in submitting as an issuable fact, the question whether or not the agent had such authority is not cured by a charge that the jury should find for the defendant if agent's authority to issue permit had been revoked. *Ft. Worth, etc., R. Co. v. Peterson*, 24 Tex. Civ. App. 548, 549, 60 S. W. 275.

**Previous Wrongful Prevention from Completing Trip as Exempting from Payment of Fare.**—In *Breen v. Texas, etc., R. Co.*, 50 Tex. 43, it was held that if appellant was wrongfully prevented from completing his trip, after entering appellee's cars, on May 6th, 1874, he was entitled to recover the damage he thereby sustained; but that fact did not relieve him from the necessity of paying fare to the conductor of the train on which he got the next day, or presenting satisfactory evidence of his right to ride thereon.

**Conductor Not Required to Accept Articles as Pledges for Fare.**—A railroad conductor was not required to accept a passenger's jewelry as a pledge for her fare, a rule of the road requiring a ticket or fare in money. *Texas & P. Ry. Co. v. Smith*, 38 Tex. Civ. App. 4, 84 S. W. 852.

**Evidence as to Checking of Baggage Not Conclusive as to Existence of Ticket.**—Where a passenger having a ticket from G. to D. lost her ticket at F., an intermediate point, the fact that her trunk had been checked at G. to D. was not such evidence to the conductor of the train from F. to D. that she had had a ticket as to render it unlawful for him to put her off for failure to produce her ticket or fare. *Texas & P. Ry. Co. v. Smith*, 84 S. W. 852, 38 Tex. Civ. App. 4.

**Memorandum Check of Another Conductor as Exempting from Payment of Fare.**—The right of companies to eject passengers refusing to pay fare applied to a case where the passenger tendered a check given him by the conductor of another train, by which he had been accidentally left behind at a stopping place, said check being intended only as a memorandum for the individual use of the conductor of the first train. *Breen v. Texas & P. R. Co.*, 50 Tex. 43.

**(b) Allowance of Reasonable Time for Compliance with Demand.**

Passengers are entitled to a reasonable time before ejection within which to produce a ticket or to comply with the conductor's demands for fare, and the latter has no right to conclude that any apparent unwillingness is an absolute and willful refusal to accede to them. *Texas, etc., R. Co. v. Bond*, 62 Tex. 442, 446; *St. Louis, etc., R. Co. v. Fussell* (Civ. App.), 97 S. W. 332; *Gulf, etc., R. Co. v. Bunn*, 41 Tex. Civ. App. 503, 95 S. W. 640; *International, etc., R. Co. v. Wilkes*, 68 Tex. 617, 5 S. W. 491.

The person from whom fare is de-

manded is entitled to a reasonable time to get the money with which to pay, and if his intention be to pay his fare and he has the ability to do so he can not be treated as a trespasser. *St. Louis, etc., R. Co. v. Fussell* (Civ. App.), 97 S. W. 322.

A reasonable time should be given a passenger to obtain money with which to pay the fare from some other person on the train, even in another car. *Gulf, etc., R. Co. v. Bunn*, 41 Tex. Civ. App. 503, 95 S. W. 640.

When a person, having bought and put in his pocket a proper railroad ticket, takes a seat on the proper train, and, on the conductor's demand for his ticket, searches for and fails to find it, but informs the conductor that he has one, and asks the conductor to wait for him to find it, the conductor is bound to wait a reasonable time for him to produce his ticket; and the question what is a reasonable time is one of fact to be found by the jury. *International & G. N. R. Co. v. Wilkes*, 68 Tex. 617, 5 S. W. 491.

Where a passenger was told by the conductor that his ticket was not good and that he would have to pay his fare or get off, and he got off the train at its regular stopping place without making an effort to get the money or pay his fare, but before the train started told the conductor he could get the money if he would allow him to get back on the train, but the conductor refused to allow him to re-enter the train, he is entitled to damages for the ejection. *Gulf, C. & S. F. Ry. Co. v. Bunn*, 95 S. W. 640, 41 Tex. Civ. App. 503.

An instruction in an action for ejection from a train that if the passenger, after he left the train, told the conductor he could get the money if he would allow him to get back on the train, but the conductor refused to allow him to re-enter the train and pay his fare, the passenger might recover damages, was not erroneous, when

construed in connection with a charge that if the passenger, when told that his ticket was not valid, made no offer to pay his fare or request for time to get the money with which to pay it, he became a trespasser, and defendant had a right to eject him from the train. *Gulf, C. & S. F. Ry. Co. v. Bunn*, 95 S. W. 640, 41 Tex. Civ. App. 503.

In an action against a railroad, the complaint alleged that plaintiff, having purchased a ticket, entered a train, and was forcibly ejected by defendant's servants, who would not give him an opportunity to exhibit his ticket. The answer alleged that plaintiff attempted to board the train after it was in motion, and fell by his own negligence. Plaintiff testified that he succeeded in boarding the train, and was starting into a coach, when he was thrown off by the conductor, who gave him no time to exhibit a ticket, and did not ask for one. The court charged that if plaintiff, having a ticket, boarded the train, and was pushed off by the conductor, he was entitled to recover. Held, that the instruction was not open to the criticism that it was erroneous because the evidence showed that plaintiff never entered the car, but remained on the platform until ejected about 600 yards from the depot, and because he failed to state that he had a ticket, and because it failed to state that plaintiff must have been in the exercise of ordinary care to protect himself, and must have been in his proper place. *Texas & P. Ry. Co. v. Tems* (Civ. App.), 77 S. W. 230, affirmed in 97 Tex. 649, no op.

#### (c) Necessity for Tender of Fare.

**In General.**—A mere willingness on the part of a passenger to pay the fare, unaccompanied by a move or act calculated to suggest such willingness to the conductor, was not sufficient to place the conductor in the wrong in ejecting the passenger. *Texas Pac. Ry. Co. v. James*, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347.

#### When Tender of Fare Unnecessary.

—It is railway company's duty to demand proper fare, but tender is unnecessary where it is evident that it would not have been accepted. *Southern Pac. Co. v. Patterson*, 7 Tex. Civ. App. 451, 459, 27 S. W. 191.

#### Evidence Held to Justify Submission to Jury of Issue as to Tender.

In an action for ejection of a passenger, evidence held to justify the submission to the jury of the question whether the passenger offered to pay the necessary cash fare on being notified that his ticket was not good, and whether the conductor refused to accept it. *Gulf, C. & S. F. Ry. Co. v. Bunn*, 41 Tex. Civ. App. 503, 95 S. W. 640.

#### (d) Effect of Tender of Fare after Ejection Commenced.

After a person has refused to pay fare on demand and his ejection by the conductor has begun, he acquires no right to passage by then tendering the fare demanded. *Texas, etc., R. Co. v. Bond*, 62 Tex. 442, 444; *Fordyce v. Beecher*, 2 Tex. Civ. App. 29, 21 S. W. 179; *Galveston, etc., R. Co. v. Turner* (Civ. App.), 23 S. W. 83, 85.

Where an intruder on a train of cars refuses to pay his fare on demand by the conductor, the latter is authorized to remove him; and, after such removal has been begun, an offer to pay the sum demanded may be accepted or not, at the discretion of the conductor. *Galveston, H. & S. Ry. Co. v. Turner* (Civ. App.), 23 S. W. 83.

After a person has been rightfully expelled from a car for refusal to pay his fare when demanded, he can not, at least at a place other than a station for receiving passengers, re-enter the same train, and become a passenger thereon. *Fordyce v. Beecher*, 2 Tex. Civ. App. 29, 21 S. W. 179.

#### (4) Where Ticket or Pass Invalid.

##### (a) Where Invalidity Arises from Fault of Passenger.

##### aa. Where Time Limit of Ticket Has Expired.

The expulsion of the holder of a

limited ticket, which has expired, on refusal to pay fare, gives no right of action against the company if no more force was used than was necessary. *Texas & N. O. R. Co. v. Demilley* (Civ. App.), 41 S. W. 147, affirmed in *Demilley v. Texas & N. O. Ry. Co.*, 42 S. W. 540, 91 Tex. 215.

A passenger is bound to know the contents and legal effect of the ticket or contract upon which he bases his right to ride, and if that ticket has, in fact, expired, he can not claim the rights of a passenger in good faith, but is rather an intruder, and may be ejected on his refusal to pay the regular fare. *Gulf, C. & S. F. Ry. Co. v. Riney*, 41 Tex. Civ. App. 398, 92 S. W. 54.

In an action for the alleged wrongful ejection of plaintiff from defendant's train, on his presenting an expired return part of a round-trip ticket, plaintiff can not show that defendant's agent agreed that return part of ticket would be good after expiration by its terms. *Gulf, etc., R. Co. v. Daniels* (Civ. App.), 29 S. W. 426, 427.

**bb. Where Ticket Invalid for Non-compliance with Conditions.**

**In General.**—Generally as to the power of a carrier to impose reasonable conditions upon the purchaser of a ticket, duty of the latter to comply therewith, etc., see ante, "Conditions," III, B, 4.

A conductor may lawfully eject a person who has, through his own fault, failed to comply with the conditions of his ticket, although he has paid the proper fare. *Gulf, etc., R. Co. v. Kuenhle*, 4 App. Civ. Cases, § 249, 16 S. W. 177. And see *Texas, etc., R. Co. v. Payne*, 99 Tex. 46, 87 S. W. 330.

And a passenger has no cause of action against a carrier for ejecting him, where he presents a ticket, the conditions of which have not been complied with. *Reed v. Texas, etc., R. Co.* (Civ. App.), 50 S. W. 432.

Where a passenger refused to com-

ply with the conditions of his ticket, he forfeited his rights in it, and could be ejected from the train without being refunded the money he paid for the ticket. *Ketcheson v. Southern Pac. Co.*, 19 Tex. Civ. App. 288, 291, 46 S. W. 907, affirmed in 93 Tex. 712, no op.

**Illustrations.**—A passenger may lawfully be ejected from a train for failure to comply with the conditions of his ticket as to signature, identification, stamping, etc., as essential to its validity for a return trip. *Gulf, etc., R. Co. v. Kuenhle*, 4 App. Civ. Cases, § 249, 16 S. W. 177; *Abram v. Gulf, etc., R. Co.*, 83 Tex. 61, 18 S. W. 321; *Houston, etc., R. Co. v. Arey*, 18 Tex. Civ. App. 457, 44 S. W. 894; *Russell v. Missouri, etc., R. Co.*, 12 Tex. Civ. App. 627, 630, 35 S. W. 724, affirmed in 93 Tex. 737, no op.

Where no fraud or unfair means of deception have been resorted to by a carrier in selling a round-trip ticket containing a condition that it shall not be good for a return passage unless the ticket holder shall identify himself as the original purchaser to the satisfaction of the carrier's agent at the point of destination, and unless the ticket is signed and stamped by said agent, the assent of the ticket holder to the condition will be conclusively presumed, although he may not have signed the ticket; and the ticket holder may be ejected from a train for failure to comply with such a condition, though he may offer proof of identification to the conductor. *Abram v. Gulf, C. & S. F. Ry. Co.*, 83 Tex. 61, 18 S. W. 321.

Plaintiff purchased a ticket over defendant's and a connecting road and return. On presenting the ticket to be stamped for the return trip, the agent of the second line refused to stamp because the selling agent had not done so. Plaintiff boarded the train, tendered the ticket, and, on refusal to pay, was ejected. Held that, as plaintiff attempted to ride on a ticket which

he was informed and knew to be worthless, he could recover only the damages sustained by reason of the delay and the purchase of another ticket, and not for being ejected from the train. *Russell v. Missouri, K. & T. Ry. Co. of Texas*, 12 Tex. Civ. App. 627, 35 S. W. 724.

In *Houston, etc., R. Co. v. Arey*, 18 Tex. Civ. App. 457, 44 S. W. 894, it was held that, it being clear that plaintiff had no right to return passage upon his unstamped ticket, a peremptory instruction for defendant was called for; and a judgment in plaintiff's favor for damages for refusing his ticket and ejecting him from the train should be reversed on appeal and rendered for defendant.

#### cc. Tickets Good Only on Particular Train.

Where a passenger held an excursion ticket, sold at a reduced rate, which recited that it was not good on a particular train, and, though he did not read the ticket before boarding such train, he was apprised that it did not entitle him to travel thereon, he was not entitled to recover damages for his ejection, accompanied by no unnecessary force. *England v. International & G. N. R. Co.*, 73 S. W. 24, 32 Tex. Civ. App. 86.

#### (b) Where Invalidity Due to Wrong, Mistake, or Neglect of Carrier's Agent.

##### aa. General Rule.

The wrong, mistake, or negligence of the ticket agent of a railroad company will not affect the passenger's right to transportation, and he can rely upon the real contract as made, and the failure of duty upon the part of the ticket agent in furnishing him the evidence of his right to transportation will not authorize the conductor, after receiving information of that fact, to expel him from the train. *Houston, etc., R. Co. v. Arey*, 18 Tex. Civ. App. 457, 44 S. W. 894; *Missouri Pac. R. Co. v. Martino*, 2 Tex. Civ. App. 634,

642, 16 S. W. 1066, 21 S. W. 781; *Missouri, etc., R. Co. v. Mitchell*, 47 Tex. Civ. App. 307, 105 S. W. 827; *Missouri, etc., Railway v. Lightfoot*, 48 Tex. Civ. App. 120, 106 S. W. 395, affirmed, no op.; *Pullman, etc., Co. v. McDonald*, 2 Tex. Civ. App. 322, 324, 21 S. W. 945; *Gulf, etc., R. Co. v. St. John*, 13 Tex. Civ. App. 257, 264, 35 S. W. 501, affirmed in 93 Tex. 662, no op.

Where a person is upon a train by mistake arising from the fault of the servants of the carrier, or if there is a mistake in the ticket calling for a different route than that contracted for, such person is not a trespasser, and it is the duty of the carrier to treat and deal with him as a passenger and afford a reasonable opportunity to correct the mistake if he so desires, and not prevent him from doing so, as, for instance, by refusing him a reasonable time to purchase other tickets. *Gulf, etc., R. Co. v. Rather*, 3 Tex. Civ. App. 72, 21 S. W. 951, affirmed in 93 Tex. 685, no op., in which case the appellee was endeavoring to purchase other tickets when he was left at the station by the conduct of the conductor.

In a suit against a carrier for unlawfully expelling a passenger, refusal to charge that the conductor could in all cases look to the ticket alone in dealing with a passenger was proper. *Texas, etc., R. Co. v. Dennis*, 4 Tex. Civ. App. 90, 96, 23 S. W. 400, affirmed in 93 Tex. 674, no op.

Generally, as to the conclusiveness of a ticket as to actual contract, see ante, "Conclusiveness of Ticket or Pass as to Actual Contract," III, B, 3, a, (4).

As to right of passenger to rely on contract with agent, see ante, "Right of Purchaser of Ticket to Rely on Contract with Carrier's Agent," III, B, 5.

##### bb. Applications of Rule.

Where a carrier's ticket agent by mistake punched plaintiff's return ticket so that it expired on November 10th,

the date of sale, instead of November 20th, as intended, and the ticket was refused for the return passage on November 12th because it was alleged to have expired, and plaintiff was ejected, the carrier was liable. *Missouri, K. & T. Ry. Co. of Texas v. Mitchell*, 103 S. W. 827, 47 Tex. Civ. App. 307.

Where a railroad's agent wrongfully refused to indorse a return trip ticket, and the passenger in consequence was ejected from a train, he was entitled to recover for his expulsion, it not having been incumbent on him to purchase a ticket or to pay his fare. *Texas & P. Ry. Co. v. Payne*, 87 S. W. 330, 70 L. R. A. 946, 99 Tex. 46.

Where a ticket agent wrongfully refuses to stamp the return coupon of a round-trip ticket, the railroad company is liable for the ejection of the passenger by the conductor, who, in obedience to the company's rules, refuses to accept the unstamped ticket. *Missouri Pac. Ry. Co. v. Martino*, 2 Tex. Civ. App. 634, 21 S. W. 781, following *Id.* (1892) 2 Tex. Civ. App. 634, 18 S. W. 1066.

Though the carrier's agent at the point of destination named in a round-trip ticket refuses to stamp and sign the ticket as required thereby, the passenger has a right to ride thereon. *Ft. Worth & R. G. Ry. Co. v. Jones*, 85 S. W. 37, 38 Tex. Civ. App. 129.

Where a railroad company sold a return ticket to a point on a connecting line, under conditions printed thereon providing that the company acted only as agent of the connecting carrier, and was not liable beyond its own line; that no agent of any line could modify its conditions; that the ticket was good for return only after the holder had been identified by the agent of the connecting line at the destination point, and the ticket officially executed by such agent in the manner provided therein,—the company issuing the ticket was liable for the expulsion of the purchaser from one of its trains

on his return trip because the ticket had not been duly executed by the connecting line at the destination point, where the passenger presented the ticket to such agent, and he returned it without stamping it, telling the purchaser that it was all right. *Gulf, C. & S. F. Ry. Co. v. St. John*, 13 Tex. Civ. App. 257, 35 S. W. 501.

Plaintiff purchased a ticket from defendant's agent at D., for transportation over defendant's and connecting lines to S., and return, which the agent neglected to stamp as required by regulations. Plaintiff traveled to S. on the ticket, but on presenting it to the agent of the connecting line at S., to be stamped for the return trip, as required by the terms thereof, the agent refused to do so, because of the absence of the stamp of the selling office. Plaintiff boarded the train, tendered the ticket, which was refused, and, declining to pay his fare, he was ejected. Held, that plaintiff was entitled to recover the actual damages sustained by reason of the failure of defendant's agent to properly stamp the ticket, even though it was stipulated that, in selling the ticket, defendant acted only as agent for the connecting line, and should not be responsible beyond its own line. *Russell v. Missouri, K. & T. Ry. Co. of Texas*, 12 Tex. Civ. App. 627, 35 S. W. 724.

In an action against a railroad company for ill treatment of plaintiff's wife, it appeared that plaintiff purchased for her of defendant a first-class round-trip ticket from D. to S., which contained a condition that, before returning, the ticket should be signed by the holder, and stamped by defendant's agent at S. The evidence showed that the agent at S. refused to stamp the ticket, and by reason thereof plaintiff's wife was by defendant's conductor threatened to be removed from the train, and was compelled to give her watch and chain as

security for her return fare. The court instructed the jury that, if plaintiff's wife went to the authorized agent of defendant at S., to identify herself, and requested the agent to sign and stamp the ticket, and he refused, and as a result of such refusal the conductor in charge of defendant's train refused to receive the ticket, and threatened to put her off the train, and acted in an oppressive manner towards her, then plaintiff is entitled to recover the actual damage occasioned thereby. Held, that the instruction was proper. *Missouri Pac. Ry. Co. v. Martino*, 2 Tex. Civ. App. 634, 18 S. W. 1066, 21 S. W. 781.

Rev. St. 1895, art. 331a, provides that connecting lines shall be deemed the agents of each other as to through contracts of shipment acquiesced in by such connecting lines. Plaintiff made a through shipment of cattle over the lines of two carriers, and the contract issued by the initial carrier entitled him to return transportation upon presentation of a "return transportation request" issued with the contract. The shipment was carried over the lines of the terminal carrier under the contract, and on presentation of the contract to its agent he stamped it, and returned it to plaintiff, stating that it was "all right," but subsequently plaintiff was ejected from the train of the terminal carrier by the conductor because plaintiff's transportation was not made out as required by the rules of such carrier, whereby a shipper must sign the "drover's pass." Held that, though the conductor acted in good faith, the ejection was wrongful. *Texas & P. Ry. Co. v. Lynch*, 43 Tex. Civ. App. 121, 94 S. W. 1093.

Plaintiff shipped horses over connecting railroad lines, of which defendant was one, and was to receive return transportation for himself on condition that he present to defendant's agent the transportation request

issued with the contract for a return pass. Held, that the fact that plaintiff did not present the form of request furnished was immaterial where he did present the contract itself, and his identity was unquestioned, and no objection to the form of the request was made, and in answer thereto the agent received the contract, stamped it, and returned it to plaintiff with the statement that it would be "all right;" and plaintiff would not be precluded from recovering damages for being ejected from a train for failure to present the return pass or pay his fare. *Texas & P. Ry. Co. v. Lynch* (Civ. App.), 73 S. W. 65.

A drover's pass was made out for two persons, the maximum number allowed to ride on such a pass; but the agent of the company, at the request of the parties, inserted the name of a third person, informing them the pass would be good for all three. The conductor of the train on which the parties sought to ride refused to allow all three to ride on the pass, and was informed by them which two persons were in charge of the stock. One of these two drew straws with the third person to determine which should get off the train, and, on losing, he was ordered off. Held, that he did not forfeit his right by the drawing, and the company was liable for his ejection. *San Antonio & A. P. Ry. Co. v. Newman*, 43 S. W. 915, 17 Tex. Civ. App. 606.

A carrier is bound to accept a ticket providing that it must be signed by the person using it, though tendered by a wife whose husband signed it in his own name, where the company's agent told the husband that he could sign it. *Mexican Cent. Ry. Co. v. Goodman* (Civ. App.), 43 S. W. 580.

**(c) Right of Passenger to Receipt for Invalid Ticket as Condition Precedent to Payment of Fare.**

Where plaintiff presented to the conductor of defendant's train a ticket

which was issued to another by name, and by its terms was not transferable, and provided that, if presented by a person other than the original purchaser, it should be void, and the conductor might cancel it, and collect fare, it was error to charge that if plaintiff intended to test the question whether the ticket would be honored, and to pay his fare if required, he had a right to demand a receipt for the ticket, as a condition precedent to paying fare; that question being for the jury. *Houston & T. C. R. Co. v. Ritter* (Tex. Civ. App.), 41 S. W. 753, 16 Tex. Civ. App. 482.

**(d) Duty of Conductor to Receive Valid Though Mutilated Tickets.**

A valid ticket, though mutilated, must be received by the conductor unless its condition is due to fault of the passenger, and the conductor is reasonably satisfied that it is invalid. *Houston & T. C. R. Co. v. Crone* (Tex. Civ. App.) 37 S. W. 1074.

**(e) Estoppel of Carrier to Deny Validity of Pass after Journey Commenced.**

A railroad company, giving a free pass to a laborer agreeing to work for it at the end of his journey, is estopped to deny the validity of the pass after the laborer has entered the train to go on the journey, without any knowledge that the pass has been revoked; and hence, when he presents such a pass under such circumstances, the company has no right to expel him. *St. Louis, A. & T. Ry. Co. v. Tucker*, 3 Willson, Civ. Cas. Ct. App. § 322.

**(5) Ejection of Persons Having Notice That Train Does Not Stop at Place Designated by Ticket.**

Plaintiff bought a ticket to E., and entered a train pointed out to him by the ticket seller. The conductor accepted the ticket, but immediately notified him that the train did not stop at E., and that he could get off at P.

and there resume his journey for E. He refused to get off, and was ejected. Held proper. *International & G. N. Ry. Co. v. Hassell*, 62 Tex. 256, 50 Am. Rep. 525.

**b. Who May Eject.**

**Conductor.**—Generally, as to the right and duty of a conductor to eject passengers for proper cause therefor, see cases cited ante, under "Grounds for Ejection," V, D, 15, a.

The duty of a conductor to eject from the train persons without tickets or who refuse to pay fare is a matter of such common knowledge that a passenger would be presumed to expect its performance. *Galveston, etc., R. Co. v. Scott*, 34 Tex. Civ. App. 501, 79 S. W. 642, affirmed in (see 98 Tex. 617, no op.).

"We know that as a general rule the conductor of a railway train has the general control and management of his train. His position has been likened to that of the master of a ship. It is necessary, as well for the protection of the interests of the company as for the security of the persons and property intrusted to his care that he should have authority to eject trespassers from the cars under his control. Therefore it has been held in numerous cases that he has an implied authority to do this." *International, etc., R. Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039.

While the conductor of a Pullman car, forming part of a railroad company's train, is, in his dealings with its passengers, to be regarded as its servant, making it responsible for his acts as if he were directly employed by it, this is not so as respects his dealings with a trespasser on the train and car. *Blake v. Kansas City Southern Ry. Co.*, 38 Tex. Civ. App. 337, 85 S. W. 430, affirmed in 101 Tex. 553, no op.

**Admissibility of Evidence as to Porter's Authority to Eject Trespassers.**

—In action by a passenger for alleged



wrongful ejection from defendant's train, evidence of porter's general authority to eject trespassers was properly admitted. *St. Louis, etc., R. Co. v. Huffman* (Civ. App.), 32 S. W. 30, affirmed in 93 Tex. 738, no op.

**Authority of Brakeman to Eject Passengers.**—A boy 13 years old boarded a freight train, and paid his fare to a brakeman. Shortly before reaching his destination, he was ordered off by the brakeman, and on his refusal to get off the brakeman knocked him off with a piece of coal. Held, in an action for the resulting injuries, that, it being an issue of fact whether it was within the scope of the brakeman's employment to eject passengers, and the court having charged that the burden of proof was on plaintiff, a special instruction that the brakeman had no implied authority to eject passengers was properly refused. *Texas & P. Ry. Co. v. Hayden*, 6 Tex. Civ. App. 745, 26 S. W. 331.

In an action against a railroad company for the ejection of a passenger from its train by a brakeman, the court instructed the jury that "a railroad company is not responsible for the willful trespass or unlawful acts of its agents done clearly outside of the scope of that employment, but when a brakeman on a train undertakes to keep persons from getting on his train or to expel them, in the absence of proof to show that this was outside of the scope of his duties there would be no presumption that such was the fact." Held error, since a brakeman has no implied authority to eject passengers, and the burden was upon plaintiff to prove the facts which would entitle him to recover. *International & G. N. R. Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039.

**Burden of Proof as to Authority of Ejector.**—In an action for injuries to a person by being compelled to jump from a moving train by the act of the brakeman, the burden of proving

that the brakeman was acting within the scope of his authority is on plaintiff. *Houston & T. C. Ry. Co. v. Grigsby*, 13 Tex. Civ. App. 639, 35 S. W. 815, 36 S. W. 496.

If one wrongfully on a train is injured by being improperly expelled from the cars by a brakeman and seeks to hold the company liable therefor, it devolves on him to show that the acts of the brakeman were within the scope of the authority in fact conferred on him. *Texas & P. Ry. Co. v. Mother*, 5 Tex. Civ. App. 87, 24 S. W. 79.

### c. Place of Ejection.

**In General.**—In ejecting a passenger, even though on proper grounds, at least ordinary or reasonable care must be used in selecting the place for such ejection, and negligence in this respect will render the carrier liable for damages. *Texas, etc., R. Co. v. McDonald*, 2 App. Civ. Cases, § 163.

If a passenger, through the fault of servants of a railway company, takes the wrong train, it is the duty of the company to return him in safety to the place where the mistake was made, or leave him at a convenient place until a return train arrives; if the passenger is ejected at an uncomfortable and an unsafe place, the company is liable in damages for the bodily and mental suffering caused thereby, as well as for the injuries resulting from the effort to reach a place of comfort and safety. *International & G. N. Ry. Co. v. Gilbert*, 64 Tex. 336.

A passenger on a railroad train, having failed to pay his fare, was told by the conductor that he must get off at the next station. Not being notified when the train reached such station, he did not get off. A short distance beyond he was put off the train, the time being midnight, the weather very cold, and the passenger a cripple and thinly clad. Held to warrant a verdict for the plaintiff. *Texas & P. Ry. Co.*

*v. McDonald*, 2 Willson, Civ. Cas. Ct. App. § 163.

Where plaintiff, misinformed by brakeman, entered the wrong train, and conductor, on examining his ticket, stopped the train, and put him off near a trestle, on a dark night, and plaintiff, returning to station, fell into a ravine and was injured, it is not error to charge, in an action for damages against the company, that the conductor was justified in putting him off, but was required to do so at a safe place. *Houston, etc., R. Co. v. Devainy*, 63 Tex. 172, 174.

A railroad company, defendant in an action for damages for putting plaintiff off a train, is not entitled to have the judge charge that, if plaintiff was a trespasser, and refused to pay fare, she could be put off at any station, if plaintiff's uncontradicted testimony shows that she was on the train by an innocent and natural mistake. *International & G. N. R. R. v. Smith* (Sup.), 1 S. W. 565.

Passenger who refuses to obey reasonable regulation of carrier forfeits his rights to be carried and at once puts himself in condition of intruder, and may be ejected at any point upon carrier's route at which he may choose to put him off, but no more force than necessary can be used in putting him off. *Texas, etc., R. Co. v. Pearl*, 3 App. Civ. Cases, § 4.

Plaintiff boarded the wrong train, without being misled by an employee of defendant, and the mistake was not discovered till the conductor took up tickets, when plaintiff refused to pay his fare to the next station; but he obeyed the conductor in getting off when the train stopped for him. Held, that it was not the conductor's duty to carry plaintiff to the next station, or to a place where he could rest in comfort, so that he might return on the next train. *Missouri K. & T. Ry. Co. v. Dawson*, 10 Tex. Civ. App. 19, 29 S. W. 1106.

A passenger on a railway train has no right to demand that he be put off at a point where there is no regular station, unless he has contracted for that privilege with some agent of the company having the real or apparent power to make such a contract. *Hull v. East Line & Red River R. Co.*, 66 Tex. 619, 2 S. W. 831.

**Statutory Provision as to Place of Ejection.**—The words "any usual stopping place" in Paschal's Dig. art. 4892, providing that where any passenger shall refuse to pay his fare it shall be lawful for the conductor to put him out of the cars at "any usual stopping place" which the conductor may select, mean either a regular station, or any other place which the company expressly, by public notice or otherwise, or impliedly by user for such purpose, has designated as a proper place for passengers to board or alight from trains, and where they will, in consequence thereof, have the right to demand the exercise of such privilege. *Texas & P. R. Co. v. Casey*, 52 Tex. 112.

A place at which a train is stopped for wood or water only is not "a usual stopping place," within Paschal's Dig. art. 4892, allowing a conductor to put a passenger off for refusal to pay the fare. *Texas & P. R. Co. v. Casey*, 52 Tex. 112.

#### d. Manner of Ejection.

##### (1) In General.

##### **Liability for Use of Undue Force.**—

The ejection of a passenger, even on proper ground, must be done in a decent and proper manner. The carrier must use only so much force as may be necessary, and if the expulsion is made with undue force or under circumstances which show brutality, it can not be justified, and will render the carrier liable for damages. *Breen v. Texas, etc., R. Co.*, 50 Tex. 43; *International, etc., R. Co. v. Hassell*, 62 Tex. 256; *International, etc., R. Co. v. Leak*, 64 Tex. 634; *Texas Pac. R. Co.*

*v. James*, 82 Tex. 306, 307, 18 S. W. 589; *Gulf, etc., R. Co. v. Moody*, 3 Tex. Civ. App. 622, 22 S. W. 1009; *Texas, etc., R. Co. v. Mother*, 5 Tex. Civ. App. 87, 24 S. W. 79, affirmed in 93 Tex. 674, no op.; *Galveston, etc., R. Co. v. Kinnebrew*, 7 Tex. Civ. App. 549, 27 S. W. 631; *International, etc., R. Co. v. Miller*, 9 Tex. Civ. App. 104, 28 S. W. 233, affirmed in 87 Tex. 430; *Southern Pac. R. Co. v. Kennedy*, 9 Tex. Civ. App. 232, 238, 29 S. W. 394; *Wilcox v. San Antonio, etc., R. Co.*, 11 Tex. Civ. App. 487, 33 S. W. 379, affirmed in 93 Tex. 653, no op.; *Texas, etc., R. Co. v. Humphries*, 20 Tex. Civ. App. 28, 30, 48 S. W. 201, affirmed in 93 Tex. 674, no op.; *Southern Pac. Co. v. Bender*, 24 Tex. Civ. App. 133, 57 S. W. 574, affirmed in 94 Tex. 707, no op.; *Denison, etc., R. Co. v. Randell*, 29 Tex. Civ. App. 460, 69 S. W. 1013; *Ft. Worth, etc., R. Co. v. Gribble*, 46 Tex. Civ. App. 78, 102 S. W. 157; *St. Louis, etc., R. Co. v. Huffman* (Civ. App.), 32 S. W. 30, affirmed in 93 Tex. 738, no op.; *International, etc., R. Co. v. Bohannon* (Civ. App.), 71 S. W. 776; *Texas, etc., R. Co. v. Pearl*, 3 App. Civ. Cases, § 4; *Gulf, etc., R. Co. v. Kuenhle*, 4 App. Civ. Cases, § 249, 16 S. W. 177.

Disobedience by the passenger to the rules of the carrier will constitute no defense to an action for damages where unnecessary violence is used in the ejectment of passengers. *Texas, etc., R. Co. v. Pearl*, 3 App. Civ. Cases, § 4.

If a passenger aided and abetted by the conductor, uses excessive force in removing another passenger from the train, the company is liable for the resulting injuries. *International & G. N. Ry. Co. v. Miller*, 9 Tex. Civ. App. 104, 28 S. W. 233.

A railroad company is liable in damages to a trespasser who was ejected from a moving train by the porter, and seriously injured, when greater force than necessary was used. *St.*

*Louis S. W. Ry. Co. v. Huffman* (Civ. App.) 32 S. W. 30.

An excursion ticket issued to the plaintiff, required her to sign it, and have it stamped at the company's office at D., before it would be good for the return trip. She did not comply with this provision. On her return trip the first conductor honored the ticket, but the second one refused to do so, and put her off. She testified: "In putting me off the train the conductor talked loud and ungentlemanly. He acted every way but manly. The car was crowded, and everybody in the car could hear what he said." This was denied by the conductor, and no force was used. The court charged the jury to find for the plaintiff if the conductor used unnecessary force or violence, or in any way ill-treated the plaintiff. Held, that there was no error in the charge, and a verdict for the plaintiff should not be disturbed. *Gulf, C. & S. F. Ry. Co. v. Kuenhle*, 4 Willson, Civ. Cas. Ct. App. § 249, 16 S. W. 177.

Plaintiff, suing a railroad, alleged that the conductor negligently and maliciously assaulted him and pushed him from the train, and testified that as he was coming down the steps the conductor crowded behind him with one hand on his shoulder, pushed his knees in his back, and shoved him off the steps. An eyewitness testified that the conductor was right behind plaintiff, with one hand on his shoulder; plaintiff apparently pushing back, and then falling off. The conductor testified that he did not use violence, nor kick or knock him off the train, and had had no trouble with him. Held to justify a charge that if the conductor willfully and purposely, or carelessly and negligently, shoved, pushed, or kicked plaintiff, causing him to fall from the train and be injured, he could recover. *Texas & P. Ry. Co. v. Humphries*, 48 S. W. 201, 20 Tex. Civ. App. 28.

**Rule Applicable Whether Person Rightfully on Train or Not.**—The law as to unnecessary violence in expulsion of persons from trains is the same whether such persons were rightfully or wrongfully on board. *Southern Pac. R. Co. v. Kennedy*, 9 Tex. Civ. App. 232, 238, 29 S. W. 394. And see *Galveston, etc., R. Co. v. Kinnebrew*, 7 Tex. Civ. App. 549, 27 S. W. 631.

"In cases where a trespasser is found on the train and expelled with the use of unnecessary violence, or by the manner of the expulsion is exposed to unnecessary danger, his wrongful act in getting on the train does not contribute to the excessive force or to the superadded danger, but it is a distinct wrong." *Wilcox v. San Antonio, etc., R. Co.*, 11 Tex. Civ. App. 487, 33 S. W. 379, affirmed in 93 Tex. 653, no op.

A railway company is liable if it uses unnecessary violence in expelling a trespasser from its cars, or compels him to leave while the train is in motion, by reason of which he is injured. *Texas, etc., R. Co. v. Mother*, 5 Tex. Civ. App. 87, 24 S. W. 79, affirmed in 93 Tex. 674, no op.

Where a trespasser riding on top of a freight car was assaulted by the conductor while attempting to get off in obedience to the conductor's order, and there was no evidence showing that he was trying to break into the car, it was not error of which defendant could complain to instruct that though plaintiff was on the car without right and attempting to break into it, yet if the conductor used more force than was necessary to eject him and keep him from breaking into the car, the defendant company would be responsible for the damages resulting to plaintiff from the assault. *Southern Pac. Co. v. Bender*, 24 Tex. Civ. App. 133, 57 S. W. 574, affirmed in 94 Tex. 707, no op.

Special instructions that if plaintiff paid to be carried, knowing it was

against the rules for the freight train on which he was riding to carry persons situated as he was, then defendant was not liable for any willful assault made by the brakeman, were properly refused, as they placed plaintiff beyond the protection of the law, regardless of whether the brakeman was acting in the master's interests or in the scope of his duties, and they also assumed fraud and collusion between plaintiff and the brakeman to defraud defendant. *Texas & P. Ry. Co. v. Black*, 57 S. W. 330, 23 Tex. Civ. App. 119.

Plaintiff was sitting on a box car, which was standing in defendant's yard. An engine was attached to the car without his observing it, and the train was moved away. A person came to plaintiff, and ordered him to leave the train, using violent and threatening language, in consequence of which plaintiff leaped from the car while it was in rapid motion, and was injured. Held, that it was proper to charge that if defendant's servant, within the scope of his employment, by peremptory order and threats, caused plaintiff to get off the car when it was dangerous to do so, defendant was liable. *Gulf, C. & S. F. R. Co. v. Kirkbride*, 79 Tex. 457, 15 S. W. 495.

**Right to Use Such Force as Is Necessary.**—The conductor and servants of a railway company have the right to use all the force necessary to remove from the train a passenger who has forfeited his right to remain there. *Gulf, etc., R. Co. v. Kuenhle*, 4 App. Civ. Cases, § 249, 16 S. W. 177; *Kaase v. Gulf, etc., R. Co.*, 41 Tex. Civ. App. 370, 92 S. W. 444; *Southern Pac. Co. v. Bender*, 24 Tex. Civ. App. 133, 57 S. W. 574, affirmed in 94 Tex. 707, no op.; *Galveston, etc., R. Co. v. Zantinger*, 92 Tex. 365, 48 S. W. 563; *Houston, etc., R. Co. v. Ritter*, 16 Tex. Civ. App. 482, 41 S. W. 753; *International, etc., R. Co. v. Leak*, 64 Tex. 654; *International, etc., R. Co. v. Gold-*

stein, 2 App. Civ. Cases, § 274; Gulf, etc., R. Co. v. St. John, 13 Tex. Civ. App. 257, 35 S. W. 501, affirmed in 93 Tex. 662, no op.

Where a railway passenger failed to produce evidence of his right to ride on a train or to pay his fare it was not unlawful for the conductor and brakeman to loosen his hands from the seat on which he was sitting and to raise him to his feet for the purpose of ejecting him from the train. *Breen v. Texas & P. R. Co.*, 50 Tex. 43.

Evidence held to justify a jury in finding that a carrier's employees resorted to no means that were unreasonable or unnecessary in awakening the passenger and getting him off the train after arrival at his destination. *Kaase v. Gulf, C. & S. F. Ry. Co.*, 92 S. W. 444, 41 Tex. Civ. App. 370.

Where a passenger remained on a car, sleeping, after arrival at his destination, the terminus of the road, the carrier's employees had the right to resort to whatever means were reasonably necessary to awaken him and get him off the train, and were not guilty of unlawful assault in using such means. *Kaase v. Gulf, C. & S. F. Ry. Co.*, 92 S. W. 444, 41 Tex. Civ. App. 370.

In an action for personal injuries to a wife, defendant was entitled to an instruction, there being evidence justifying same, that if the conductor of defendant's train requested plaintiff to pay his fare or leave the train, and he refused, the conductor had the right to call to his aid in ejecting him a police officer, who was justified in using whatsoever force was necessary thereto; and that if plaintiff's wife interfered, and assaulted him without provocation, he had the right to use such force as was reasonably necessary to prevent further violence on her part, and that defendant was not liable for resulting damages. *Houston & T. C. R. Co. v. Ritter*, 41 S. W. 753, 16 Tex. Civ. App. 482.

## (2) Degree of Care Required in Ejection.

. In ejecting from its train a person who has forfeited the right to remain thereon, the carrier only owes such person the duty of reasonable or ordinary care. *Ft. Worth, etc., R. Co. v. Gribble*, 46 Tex. Civ. App. 78, 102 S. W. 157; *International, etc., R. Co. v. Bohannon* (Civ. App.), 71 S. W. 776; *Texas, etc., R. Co. v. Lyons* (Civ. App.), 50 S. W. 161, affirmed in 93 Tex. 741, no op.

The degree of care required of a railway company in ejecting a trespasser from its train is such as considerations of humanity would demand, and the authorities do not place the degree of care upon a lower plane than that of reasonable and ordinary care. *Houston, etc., R. Co. v. Grigsby*, 13 Tex. Civ. App. 639, 35 S. W. 815, 36 S. W. 496, affirmed in 93 Tex. 710, no op.

In an action for unlawful ejection from a train, the word "humane," in an instruction that it was the duty of the conductor to "exercise such care to avoid unnecessary injuries to plaintiff's feelings and person" as a "humane person of ordinary prudence would use," etc., should have been excluded as unnecessary, and suggestive of a somewhat new, and probably higher, standard of liability than that recognized by law. *Ft. Worth & D. C. R. Co. v. Peterson*, 60 S. W. 275, 24 Tex. Civ. App. 548.

## (3) Propriety of Manner of Ejection a Question for Jury.

Whether the circumstances attending the expulsion of a passenger from a train by conductor were proper or improper is a question for the jury. *Gulf, etc., R. Co. v. Kuenhle*, 4 App. Civ. Cases, § 249, 16 S. W. 177.

In suit by a passenger against a carrier for personal injuries sustained while alighting from a train, where the petition alleged that as he was leaving train, the conductor negligently

and maliciously assaulted him and kicked him off the train, and evidence showed conductor did crowd and push him as he got off, a charge submitting to the jury the question of careless and negligent ejection from the train was justified. *Texas, etc., R. Co. v. Humphries*, 20 Tex. Civ. App. 28, 30, 48 S. W. 201, affirmed in 93 Tex. 674, no op.

In an action against a railroad for injuries alleged to have been sustained by plaintiff by being thrown from one of defendant's trains by the conductor, without opportunity to exhibit his ticket, the evidence showed that the train was the last one running between the point at which he boarded it and his alleged destination on the day of the injury. When found where he said he fell from the train, he had in his pocket a ticket from the place where he boarded the train to his alleged destination, stamped as of the day of the injury, which stamp was placed there by the selling agent. Physicians testified that his injuries were such as could follow from a fall at the place where he said he fell. Plaintiff, being confronted with the conductor, testified that he thought he saw him on the train, but that, at any rate, the man who threw him off was of about the same appearance. The conductor testified that he did not see plaintiff on the night of the alleged injury, and that he had no trouble with any one. Two porters testified that they were in a position to have seen if there was any trouble as claimed, and that there was none. Held, that the question whether plaintiff was ejected from the train as claimed was for the jury. *Texas & P. Ry. Co. v. Tams* (Civ. App.), 77 S. W. 230, affirmed in 97 Tex. 649, no op.

**e. Right of Passenger to Resist Ejection.**

It has been held that when a passenger is rightfully on the train he is entitled to assert the right to remain

thereon until he is carried to his destination, and is justified in refusing to leave the train and may resist expulsion, without using violence, but in such a manner as to reasonably show that he is being removed against his will, and may then recover damages for any increased injuries inflicted on him on account of his rightful refusal to leave the train and through or by his consequent expulsion. *Gulf, etc., R. Co. v. Dyer*, 43 Tex. Civ. App. 93, 95 S. W. 12, affirmed in 101 Tex. 639, no op.

**f. Duties and Liabilities of Carrier as to Baggage of Ejected Passenger.**

In ejecting a passenger from a railway train, employees of the company have no right to place the baggage of the passenger in a place where it will be injured. *Gulf, C. & S. F. Ry. Co. v. Moody* (Civ. App.) 30 S. W. 574.

A passenger being ejected from a railway train has the right to use such force as is necessary to prevent his baggage from being injured. *Gulf, C. & S. F. Ry. Co. v. Moody* (Civ. App.) 30 S. W. 574.

**g. Recovery of Damages for Wrongful Ejection.**

**(1) Right to Recovery.**

**aa. In General.**

The company is liable for actual damages where the conductor wrongfully ejects a person from the cars or prevents him from going to his destination, or causes his arrest. *Galveston, etc., R. Co. v. Donahoe*, 56 Tex. 162, 166.

If the ejection of a passenger was by the use of unnecessary force, or he was injured in getting off by the carelessness of the conductor, without any fault of his own, he is entitled to such damages as will compensate the injuries he received in getting off or being forced off. *International, etc., R. Co. v. Hassell*, 62 Tex. 256.

A railroad company is liable for ejecting a passenger who is rightfully on a train and has paid his fare, though

the ejection is the result of the honest belief of the conductor that he has not paid, and the passenger makes no effort to show that he has paid, and is immediately taken back onto the train. *Gulf, C. & S. F. Ry. Co. v. Barnett* (Civ. App.) 34 S. W. 449.

A passenger who leaves a train rather than pay fare, the conductor having dishonored his valid ticket, and required him to do one or the other, may, though no violence is used, recover for the unused portion of his ticket, inconvenience, loss of time, and necessary expenses. *Houston & T. C. R. Co. v. Crone* (Tex. Civ. App.) 37 S. W. 1074.

**bb. Right to Recover as Affected by Refusal to Pay Fare Wrongfully Demanded.**

A passenger wrongfully threatened with ejection from train need not pay conductor a sum in excess of agreed price of transportation. *Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463, 469, 21 S. W. 399; *Texas, etc., R. Co. v. Dennis*, 4 Tex. Civ. App. 90, 96, 23 S. W. 400, affirmed in 93 Tex. 674, no op.

Where a passenger tendered the conductor the lawful amount of fare, he was under no duty to pay additional fare unlawfully demanded, or to get off the train at an intermediate station and buy a ticket in order to reduce the damages that might result from his ejection from the train. *Gulf, C. & S. F. Ry. Co. v. Dyer*, 95 S. W. 12, 43 Tex. Civ. App. 93.

A passenger whose ticket has been wrongfully refused by the conductor is not bound to lessen his damages by paying his fare, so as to avoid ejection. (Tex. Civ. App. 1897) *Gulf, C. & S. F. Ry. Co. v. Copeland*, 42 S. W. 239, 17 Tex. Civ. App. 55.

The passenger was under no obligation to avoid expulsion from the train, to pay the extra fare demanded, and then sue to recover it back. *Texas*

*& P. Ry. Co. v. Dennis*, 4 Tex. Civ. App. 90, 23 S. W. 400.

Where, owing to agent's refusal to sign the ticket, the conductor treated a passenger abusively and exacted security, railway was liable. Passenger need not pay additional fare. *Missouri Pac. R. Co. v. Martino*, 2 Tex. Civ. App. 634, 642, 18 S. W. 1066, 21 S. W. 781.

Plaintiff was wrongfully ejected from defendant's train, in breach of its contract to furnish him return passage, which contract he showed to the conductor. Held, that it was not necessary for him to pay his fare to entitle him to recover for breach of the contract. *Texas & P. Ry. Co. v. Lynch* (Civ. App.), 73 S. W. 65, reversed on another point in 97 Tex. 25.

A lady passenger who is on a wrong train by the fault of defendant's agent, and who is put off at night at a lonely place, from where she walks back to the next station, being afraid to remain there, is not precluded from recovering damages for injuries received and fright suffered in walking back to the station by the fact that she was unwilling either to pay fare for being carried further on the train, or to remain at the place where she was put off until the arrival of a return train. *International & G. N. R. R. v. Smith* (Sup.) 1 S. W. 565.

**cc. Right to Recover as Affected by Contributory Negligence of Passenger.**

See post, "Liability of Carrier as Affected by Contributory Negligence of Passenger," V, L.

**dd. Duty of Person Ejected to Use Ordinary Care to Minimize Damages.**

When a railway passenger is wrongfully ejected, he must exercise ordinary care and prudence to minimize damages; otherwise, the measure of damages will be such an amount as will compensate him for the injury he must have suffered, had he acted as

an ordinarily prudent man. *Galveston, etc., R. Co. v. Turner* (Civ. App.), 23 S. W. 83, 85.

In an action against a railroad company for the wrongful ejection of plaintiff from a train several miles from his place of destination, when he was ill, it is error to refuse to charge that if he was wrongfully ejected, and he walked to such place through rain and darkness, and sustained greater injury than he would if he had sought shelter nearer where he was ejected, as a reasonably prudent person would have done, then his injuries occasioned by his walk are the proximate result of his own negligence, for which he can not recover, and he can recover only such sum as will compensate him for the actual injury which he must have sustained had he acted as an ordinarily prudent person would have done. *Galveston, H. & S. A. Ry. Co. v. Turner* (Civ. App.), 23 S. W. 83.

**(2) Joint Liability of Roads Employing Same Agents, Using Same Tracks, and Accepting Each Other's Tickets.**

Where two railroad companies employ the same ticket agent and use the same track, and it was the custom for each company to accept the tickets of the other on its trains, and the agent, after selling a passenger a ticket of one company, directs him to get on a train of the other, and the conductor refuses the ticket and ejects the passenger, both companies are liable. *Texas & P. Ry. Co. v. Dye* (Civ. App.) 33 S. W. 551.

**(3) Actions to Recover Damages.**

As to actions to recover damages for wrongful ejection, form of action, limitation of action, and pleadings in such action, see post, "Actions against Carriers," VII.

**(4) Measure and Elements of Damages.**

**(a) Compensatory Damages.**

Generally, as to the recovery of

compensatory damages, see the title DAMAGES.

**Effect of Stipulations in Ticket as to Measure of Recovery.**—A stipulation on a railroad ticket that the measure of damages in case of a breach of the contract of carriage shall be the amount of fare demanded by the conductor does not preclude a recovery for full damages for the wrongful ejection of the passenger from the train. *Galveston, H. & S. A. Ry. Co. v. Kinnebrew*, 7 Tex. Civ. App. 549, 27 S. W. 631.

**(b) Punitive or Exemplary Damages.**

See, generally, the title EXEMPLARY DAMAGES.

Generally, as to right to recover punitive or exemplary damages, see the title EXEMPLARY DAMAGES.

Where a railroad company ratifies the malicious act of its conductor in removing a passenger from a train with unnecessary force, it is liable for exemplary damages. *International & G. N. Ry. Co. v. Miller*, 9 Tex. Civ. App. 104, 28 S. W. 233.

In an action for malicious assault in ejecting a passenger from a street car, evidence held to warrant the submission of the plaintiff's right to recover exemplary damages to the jury. *Denson, etc., R. Co. v. Randell*, 29 Tex. Civ. App. 460, 69 S. W. 1013.

**(c) Excessive or Inadequate Damages.**

See the title NEW TRIALS.

**(5) Evidence.**

**Evidence Held Admissible.**—Where, in an action against a railroad for damages to plaintiff through ill treatment at the hands of defendant's train employees in threatening to eject her from the train because of an alleged irregularity in her ticket, the petition did not allege plaintiff's pecuniary condition, but plaintiff testified that at the time of the threatened ejection, she told defendant's inspector that she could not leave the train at that point as she had not sufficient money to



enable her to reach home from there, such evidence could be considered by the jury in passing on the question of the extent of plaintiff's anxiety. *Southern Pac. Co. v. Bailey* (Civ. App.), 91 S. W. 820, affirmed in 101 Tex. 659, no op.

Where one sues for a wrongful expulsion from a train while he held a ticket, and proves sickness resulting therefrom, evidence that he was sick before he entered the train, and that he started on his journey against the advice of his physician, is admissible under a general denial. *Mexican Cent. R. Co. v. Goodman* (Civ. App.), 43 S. W. 580.

In an action against a carrier for compelling a passenger, on the wrong train by mistake, to get off at a place where she was subjected to inconvenience, delay, and suffering, testimony that plaintiff told the conductor that she had relatives at a point some miles beyond, and that they would take her to her destination, and that she had no money, and asked the conductor to carry her to that point, was competent to show that the conductor was informed of the facts, and probable result which might follow in compelling plaintiff to get off at the place where he did compel her to get off, and there remain for the next returning train. (Civ. App.) *St. Louis Southwestern Ry. Co. v. Pruitt*, 79 S. W. 598, writ of error denied (Sup.), 80 S. W. 72, 97 Tex. 487.

In an action by a passenger for wrongful ejection from a train, evidence that plaintiff was unaccustomed to traveling on a train, and that, up to the time she was put off at the station in question, she had not been at the station before, was admissible, as tending to show her mental distress in being put off, and the causes which led to such distress, and to contradict the testimony of defendant's auditor that she left the train voluntarily. *St. Louis & S. F. R. Co. v. McAnellia* (Civ. App.), 110 S. W. 936.

In an action against a railroad for damages alleged to have been sustained by plaintiff from ill treatment by defendant's inspector, evidence that when the inspector ordered plaintiff off the train he was gruff and insulting, and said to a gentleman passenger interfering by reason thereof: "It is none of your business. I will not give you my name. I don't have to. I don't care if I do lose my job. I was going to quit anyhow"—was admissible as tending to characterize the conduct of the inspector, and to show that the language used to plaintiff was in the hearing of the other passengers. *Southern Pac. Co. v. Bailey* (Civ. App.), 91 S. W. 820, affirmed in 101 Tex. 659, no op.

Testimony of the plaintiff was admissible that he sustained an injury by falling through a cattle guard after he was ejected from the train in the night time at a place where there was no station or houses, and with which he was not familiar. *Houston & T. C. R. Co. v. Berry* (Civ. App.), 84 S. W. 258, affirmed in 101 Tex. 641, no op.

The declarations of a brakeman when ejecting a person from a train are inadmissible to prove that he acted under orders from the conductor. *Lyons v. Texas & P. Ry. Co.* (Civ. App.), 36 S. W. 1007.

Where, in an action for the wrongful ejection of a passenger, plaintiff alleged that he was wrongfully, etc., ejected from a train at a strange place on a dark night, and by reason thereof suffered great mental distress, evidence that plaintiff was frightened as a result of the ejection was admissible. *Missouri, K. & T. Ry. Co. of Texas v. Lightfoot*, 106 S. W. 395, 48 Tex. Civ. App. 120.

In an action for the ejection of a passenger, proof that he had no money with which to pay fare was competent. *Atchison, T. & S. F. Ry. Co. v. Cuniffe* (Civ. App.), 57 S. W. 692.

Though a passenger was entitled to transportation without further pay-

ment, it may be shown on the question of damages for ejection for refusing to make further payment that he had sufficient money with him to do so. *Texas & P. Ry. Co. v. Lynch*, 87 S. W. 884, 39 Tex. Civ. App. 96.

Plaintiff was wrongfully ejected from defendant's train at night, and stayed at a hotel until the afternoon of the next day. Her son testified that he "paid \$1.75 for his mother for her hotel bill." Held, sufficient to show that the bill was reasonable, and that it was paid with plaintiff's money. *St. Louis & S. F. R. Co. v. McAnellia* (Civ. App.), 110 S. W. 936.

**Evidence Held Inadmissible.**—Proof of general knowledge of a custom of railway trains not to stop at a certain station is inadmissible as against a passenger who did not live in that vicinity, and had no means of acquiring knowledge of such custom. *International & G. N. Ry. Co. v. Hassell*, 62 Tex. 256, 50 Am. Rep. 525.

In an action against a carrier by an ejected passenger, it was improper to admit evidence of a custom among defendant's conductors to permit old trackmen to ride free on its trains. *Missouri, K. & T. Ry. Co. of Texas v. Tarwater*, 75 S. W. 937, 33 Tex. Civ. App. 116.

In suit for damages for ejection from a train while riding on pass given for land conveyed to the railway for depot purposes, evidence that plaintiff's land contiguous to the depot became more valuable by reason of the erection of the depot is properly excluded. *Kansas, etc., R. Co. v. Scott*, 1 Tex. Civ. App. 1, 4, 20 S. W. 725.

Where the value of a twenty-five year railway pass was in issue, it is error to allow the owner of the pass to state how many trips he would have probably made over the road had the pass not been revoked. *Kansas, etc., R. Co. v. Scott*, 1 Tex. Civ. App. 1, 4, 20 S. W. 725.

In suit by passenger against a car-

rier for damages resulting from his humiliation in being wrongfully put off train, evidence that, since then, plaintiff had been "guyed" about it was improperly admitted. *Gulf, etc., R. Co. v. Copeland*, 17 Tex. Civ. App. 55, 57, 42 S. W. 239.

In an action for unlawful ejection from a train, evidence of result of a criminal prosecution against plaintiff after his removal from train is inadmissible. *Gulf, etc., R. Co. v. Moody* (Civ. App.), 30 S. W. 574, 575.

**Evidence Held Immaterial.**—Under a petition seeking to recover damages for wrongful ejection of plaintiff from a train on which he was passenger, by orders of the conductor, proof of a general practice of brakemen on defendant's road to eject trespassers was immaterial. *Lyons v. Texas & P. Ry. Co.* (Civ. App.) 36 S. W. 1007.

**Weight and Sufficiency of Evidence.**—In an action by a passenger for wrongful ejection evidence held sufficient to support a verdict for plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. Sanders*, 12 Tex. Civ. App. 5, 33 S. W. 245.

Where, at the time a passenger reached his destination, he was asleep, and so continued until the train had left the station, when the conductor discovered him and his companion, and, while the train was in motion, ejected them, and a passenger on the train testified that the conductor and porter put plaintiff and his companion off the train, and came back laughing, and stated that the last they saw of them they were turning somersaults along the track, a verdict in favor of plaintiff was supported by the evidence. *International & G. N. R. Co. v. Bohannon* (Civ. App.), 71 S. W. 776.

Where the evidence showed that plaintiff's wife and children had a first-class full-fare ticket on defendant's road, entitling them to ride on a regular train, but the conductor thereon,

without looking at the ticket, ejected them in a rough and humiliating manner, saying all who had excursion tickets would have to leave and take the next train, on which plaintiff's wife was compelled to stand, holding one of her children, and delaying her arrival, it was held to show right of recovery and should have been submitted to the jury. *Alley v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 35 S. W. 735.

#### (6) Instructions.

Instance of proper instructions to be given to jury in an action to recover damages for alleged wrongful ejection from railway passenger train. *Galveston, etc., R. Co. v. Kinnebrew*, 7 Tex. Civ. App. 549, 552, 553, 27 S. W. 631.

Where, in an action for the ejection of a passenger, one of the court's instructions was prefaced by the clause that, if the jury believed from the preponderance of the evidence that the conductor politely requested defendant to pay his fare, etc., the refusal of the court to charge that if the jury believed from the evidence that plaintiff's misconduct, if any, caused or proximately contributed to cause his injury, they should find for defendant, was not error, on the ground that such instruction would have cured the alleged error in the previous one, in that it in effect placed the burden of proof on the defendant. *El Paso Electric Ry. Co. v. Alderete*, 81 S. W. 1246, 36 Tex. Civ. App. 142.

In a suit against a carrier for ejection of passenger from the train, a charge limiting the conductor's right to eject passenger wrongfully refusing to pay his fare in case of latter's sickness, where conductor refrained from such ejection when passenger showed signs of sickness, and was not ejected, was error. *Houston, etc., R. Ry. v. Ritter*, 16 Tex. Civ. App. 482, 485, 41 S. W. 753.

In an action by a passenger against a carrier for wrongful ejection, evidence that when plaintiff offered the conductor a pass the latter said that it was bogus, and plaintiff would have to get off, that he told plaintiff he looked upon him as a gentleman, and did not want to put him off, and, on his refusing to get off, took him by the arm and led him off, does not warrant an instruction allowing a recovery of damages if the conductor used abusive language or insults to plaintiff, or offered indignities to his person or character. *Kansas & G. S. L. R. Co. v. Scott*, 1 Tex. Civ. App. 1, 20 S. W. 725.

#### E. DUTY OF CARRIER AS TO EMPLOYMENT OF PROPER SERVANTS AND LIABILITY FOR THEIR ACTS OR OMISSIONS.

##### 1. Duty to Employ Competent Persons.

The degree of care demanded of a railroad company extends to the employment of a sufficient number of good, steady, and competent agents and employees to so conduct and control the train as to insure its careful and skillful management. *International, etc., R. Co. v. Halloren*, 53 Tex. 46; *St. Louis, etc., R. Co. v. McAnellia* (Civ. App.), 110 S. W. 936.

**Duties and Liabilities of Carriers by Stage.**—It is the duty of a carrier by stage to employ a competent driver, and of the driver to use the "utmost care" for the safety of passengers; and an omission to charge, in an action for personal injuries, that the negligence of the driver is that of the carrier, can not prejudice the carrier. *Gallagher v. Bowie*, 66 Tex. 265, 17 S. W. 407.

The legal purport of a receipt for stage fare is that the carrier agrees to provide careful drivers of reasonable skill and good habits. *Sawyer v. Dulany*, 30 Tex. 479, 483.

## 2. Liability for Acts or Omissions of Employees.

### a. In General.

The carrier becomes responsible for all damages resulting from the negligent acts of such employees as were within the legal contemplation of the carrier at the time of contracting with a passenger for transportation. *St. Louis, etc., R. Co. v. McAnellia* (Civ. App.), 110 S. W. 936, citing *International, etc., R. Co. v. Halloren*, 53 Tex. 46; *International, etc., R. Co. v. Welch*, 86 Tex. 203, 206, 24 S. W. 390; *Gulf, etc., R. Co. v. Shields*, 9 Tex. Civ. App. 652, 28 S. W. 709, 29 S. W. 652, affirmed in 93 Tex. 685, no op.; *Gallagher v. Bowie*, 66 Tex. 285, 17 S. W. 407.

### b. Test as to Liability.

The test of a master's liability is whether the act was within the scope of the servant's duties under his employment, and not the spirit or motive animating the servant in his action. *Texas, etc., R. Co. v. Lyons* (Civ. App.), 50 S. W. 161, affirmed in 93 Tex. 741, no op.

The fact that an employee is angry and acts maliciously will not relieve the railroad company from the consequences of the act if it was in the line of his duty. *Texas, etc., R. Co. v. Lyons* (Civ. App.), 50 S. W. 161, affirmed in 93 Tex. 741, no op.; *Houston, etc., R. Co. v. Washington* (Civ. App.), 30 S. W. 719.

The duty of proper treatment owed by a carrier to his passenger covers the conduct of all employees placed where they come in contact with the passenger and render to him services due by the carrier, though the act complained of was not done in pursuance of the duties of the servant's employment nor for the master's service. *Texas, etc., Railroad v. Dean*, 98 Tex. 517, 85 S. W. 1135, reversing 82 S. W. 524.

"In the case of *Bryant v. Rich* (106 Mass. 188), the doctrine is thus

stated: 'As a general rule, the master is liable for what his servant does in the course of his employment, but in regard to matters wholly disconnected from the service to be rendered, the master is under no responsibility for what the servant does or neglects to do.' *Texas, etc., Railroad v. Dean*, 98 Tex. 517, 85 S. W. 1135, reversing 82 S. W. 524.

A passenger contracts, not only for transportation, but for good treatment and against personal rudeness and every wanton interference with his person either by the carrier or its agents employed in the management of the conveyance, and a passenger is under the protection of the carrier and those of its servants to whom it commits the performance of the various duties to the passenger which it assumed by the contract. *International, etc., R. Co. v. Hugen*, 45 Tex. Civ. App. 326, 100 S. W. 1000, affirmed in 102 Tex. 585, no op., citing *Texas, etc., Railroad v. Dean*, 98 Tex. 517, 85 S. W. 1135, reversing 82 S. W. 524.

"The master is liable for what his servant does in the course of his employment, if the particular act was unauthorized and unlawful." *International, etc., R. Co. v. Hugen*, 45 Tex. Civ. App. 326, 100 S. W. 1000, affirmed in 102 Tex. 585, no op., citing *Texas, etc., Railroad v. Dean*, 98 Tex. 517, 85 S. W. 1135, reversing 82 S. W. 524.

Carriers are liable for injury to passenger caused by negligence or unskillfulness of servants, unless such acts are shown to be without scope of employment or to be willful. *Houston, etc., R. Co. v. Gorbett*, 49 Tex. 573, 581.

The negligence of the agent of whatsoever grade, of a corporation pursuing the business of a common carrier, is, as to matters within the scope of the employment, with reference to passengers, the negligence of the corporation itself, and fixes a lia-

bility which the carrier can not avoid or limit by contract. *G., C. & S. F. Ry. Co. v. McGown*, 65 Tex. 640.

A carrier is liable to a passenger thereof for injury inflicted on him by its servant, in whatever capacity the servant may be employed. *St. Louis S. W. Ry. Co. of Texas v. Franklin* (Civ. App.), 44 S. W. 701.

Generally, as to the liability of a master for the acts of his servants, see the title MASTER AND SERVANT.

### c. Application of Rule in Particular Instances.

**Liability for Negligence of Ticket Agent.**—The negligence of a ticket agent of a railroad company in not selling ticket to an intending passenger and in failing to signal the train for said passenger is the negligence of the railroad company, and the latter is liable for any damages resulting, or which might reasonably be expected to result from the passenger being left under the circumstances. *Houston, etc., R. Co. v. Rand*, 1 App. Civ. Cases, § 255.

**As to liability of carrier for misrepresentations of its agents to purchasers of tickets**, see ante, "Right of Purchaser of Ticket to Rely on Contract with Carrier's Agent," III, B, 5.

**Liability for Switching Crew Equally the Servants of Two Railroads.**—Where a switching crew, employed to do yardwork for one railroad, and paid by it, performed similar services at a connecting point for defendant, who paid the other company one-half the cost, and there was no evidence of the terms of the contract between the two companies concerning their joint business at that point, the crew were equally the servants of both companies, and defendant was liable for their acts to the same extent as if it had employed them. Judgment (Civ. App. 1902) 70 S. W. 359, affirmed. *Gulf, C. & S. F. Ry. Co. v. Shelton*, 72 S. W. 165, 96 Tex. 301.

**Liability for Injuries Arising from Negligence of Driver of Horse Car or Stage.**—Where plaintiff's wife was a passenger on defendant's street car, whose driver left it standing in the street without tying the mules, who ran away, and, in attempting to get off the car, she was thrown to the ground, the defendant is liable for the damages. *Texarkana St. Ry. Co. v. Hart* (Civ. App.), 26 S. W. 435.

A stage driver who leaves his horses in the road, unfastened and unattended, is guilty of negligence, and a passenger who is injured by their running away is entitled to recover. *Gallagher v. Bowie*, 66 Tex. 265, 17 S. W. 407.

**Liability for Injuries Resulting from Negligence of Motorman.**—A street railway company was liable for the motorman's negligence resulting in injuries to a minor whom the motorman permitted to ride on the car in consideration of certain services rendered, though the motorman had no authority to make such arrangement. Judgment (Civ. App.) 79 S. W. 320, reversed. *Denison & S. Ry. Co. v. Carter*, 82 S. W. 782, 98 Tex. 196, 107 Am. St. Rep. 626.

**Discourteous Conduct of Agent Held Not to Impose Liability on Company.**—A carrier is not liable because the agent at a depot, at which a passenger was waiting for a train was cross, and refused to tell her the name of the town or where she could find a hotel, and, on her asking for water, merely pointed to a tank some distance away, or because men and boys around the station jeered and laughed at her. *Missouri, K. & T. Ry. Co. of Texas v. Kendrick* (Civ. App.), 32 S. W. 42.

**Liability for Act of Engineer and Fireman Not within Scope of Duty.**—Cooper was allowed to enter and occupy the cab in a freight train. He was not a passenger. The fireman inserted the end of a hose in Cooper's pocket, without his knowledge. The engineer, for amusement, turned hot

water into the hose, thinking it was cold water, scalding him. Held, that the acts of the engineer and the fireman were not in the real or apparent scope of their duty, and that the company was not liable for the injury to Cooper. *International, etc., R. Co. v. Cooper*, 88 Tex. 607, 32 S. W. 517, reversing 30 S. W. 470.

**As to the liability of carriers for assaults, offensive conduct, or language of employees,** see ante, "Assaults or Offensive Language of Employees," V, D, 7, b, (2).

**Powers and Duties of Conductor Generally, and Liability of Carrier for Breach of Such Duties.**—A conductor of a passenger train in the performance of these duties the railroad company owes its passenger, or those rightfully aboard the train, is the representative of the company. *Missouri, etc., R. Co. v. Hibbitts*, 49 Tex. Civ. App. 419, 109 S. W. 228, affirmed, no op.; *Galveston, etc., R. Co. v. La Prelle*, 27 Tex. Civ. App. 496, 65 S. W. 488, affirmed in 95 Tex. 678, no op.; *Gulf, etc., R. Co. v. Rather*, 3 Tex. Civ. App. 72, 21 S. W. 951, affirmed in 93 Tex. 685, no op.

In the observance of those duties he must refrain from conduct which exposes a passenger, or one rightfully aboard the train to peril. *Missouri, etc., R. Co. v. Hibbitts*, 49 Tex. Civ. App. 419, 109 S. W. 228, affirmed, no op.

It is within the scope of the authority of the conductor of a railroad train to announce to a passenger, at his request, the name of the station at which the train is then stopped, to state to him the length of time the train will remain there, and to hold the train, in accordance with the answer, for the time so designated. *Missouri, K. & T. Ry. Co. of Texas v. Price*, 106 S. W. 700, 48 Tex. Civ. App. 210.

**Power as to Enforcement of Rules of Carrier.**—Where a person on a train is violating rules of the railroad,

the conductor is justified in using only sufficient force to make him desist. *Texas, etc., R. Co. v. Pearl*, 3 App. Civ. Cases, § 4.

**As to duty of conductor to awaken sleeping passengers,** see ante, "Duty to Awaken Sleeping Passengers," V, D, 10.

**As to duty of conductor to inform passengers as to change of cars, etc.,** see ante, "Duty to Inform Passengers as to Change of Cars," V, D, 12.

**As to liability of railroad company for assault by conductor upon passenger,** see ante, "Assaults or Offensive Language of Employees," V, D, 7, b, (2).

**Liability for Breach of Agreement to Stop at Other than Regular Station.**

—Where a passenger, after getting upon a train, tells the conductor that he wishes to be put off at a point not a regular station, but where the trains, to defendant's knowledge, were in the habit of stopping and putting off passengers, and pays the fare claimed for transporting him to that place, and the conductor afterwards refuses to put him off there, and carries him to the next station, there is a violation of the contract of carriage. *Hull v. East Line & R. R. R. Co.*, 66 Tex. 619, 2 S. W. 831.

Where a conductor was in charge of a train, and had apparent authority to contract with a passenger to stop at a certain station, and he had frequently made and carried out such contracts, his agreement with the passenger to stop at such station is binding, although contrary to rules of the company, which are unknown to the passenger. *Texas & P. Ry. Co. v. Elliott*, 54 S. W. 410, 22 Tex. Civ. App. 31.

It was not error to instruct that the conductor had authority to make a contract for the train to stop at a station, or where it did. *Texas & P. Ry. Co. v. Elliott*, 61 S. W. 726, 26 Tex. Civ. App. 106.

Plaintiff boarded a regular passenger train and paid his fare to a regular station, at which the train did not stop, under the rules of the company. Plaintiff was ignorant of such rules, and the conductor agreed to stop the train at or near the station for him to get off. At a bridge near the station the train slowed up to a speed of about four miles an hour, and plaintiff and the conductor went out on the platform, where the conductor repeatedly told him to get off, which he at first declined to do, because of scantlings piled on the ground. When he finally did attempt to get off, the train gave a sudden jerk, throwing him to the ground and injuring him. Held, that defendant was guilty of negligence causing the injuries. *Texas & P. Ry. Co. v. Elliott*, 61 S. W. 726, 26 Tex. Civ. App. 106.

**Effect of Promise by Conductor to Notify Passenger of Arrival at Station.**—A railway company is not bound by promise of conductor to notify passenger of arrival at station, where customary announcement has been made. *St. Louis, etc., Ry. Co. v. McCullough*, 18 Tex. Civ. App. 534, 538, 45 S. W. 324; *Missouri, etc., R. Co. v. Kendrick* (Civ. App.), 32 S. W. 42, 44; *St. Louis, etc., R. Co. v. McCullough* (Civ. App.), 33 S. W. 285, 286.

The promise of a conductor to give special notice to a passenger, when a particular station is reached, further than the customary way of announcing the arrival of trains at stations, is without the scope of his authority, and not binding on the company. *St. Louis S. W. Ry. Co. v. McCullough*, 45 S. W. 324, 18 Tex. Civ. App. 534.

Where a station is duly called by the brakeman, and a passenger, relying on the promise of the conductor to notify her personally when the train arrived there, fails to hear it announced, and is carried past, her whole attention being occupied at the time by a

sick child, the carrier is not responsible, unless the conductor had knowledge of the child's illness, or of the necessity that might require the mother's exclusive attention to its needs, when he made the promise. *Chicago, R. I. & T. Ry. Co. v. Boyles*, 11 Tex. Civ. App. 522, 33 S. W. 247.

**Statement of Conductor as to Length of Stop as Binding Carrier.**—The statement of a train conductor, in answer to a passenger's question, that the train would stop a certain length of time at an intermediate station, creates no obligation to stop that length of time, and such question and answer have no bearing on the question of damages for an injury to the passenger who left the train at the station, and attempted to board it after it had started. *Missouri Pac. Ry. Co. v. Foreman*, 73 Tex. 311, 11 S. W. 326, 15 Am. St. Rep. 785.

**Liability for Unauthorized Promise of Conductor to Furnish Conveyance to Complete Journey.**—Since, without negligence, it is not liable for a failure to forward passengers on schedule time, a railroad company is not bound by its conductor's promise to furnish a passenger other transportation, where a train has been delayed by a washout for which the company is not to blame. *Houston, E. & W. T. Ry. Co. v. Rogers*, 40 S. W. 201, 16 Tex. Civ. App. 19.

**Liability for Conductor's Promise to Assist Passenger in Changing Cars.**—A railway company is not bound by conductor's promise to assist passenger in changing cars, where the train stopped long enough for her to alight and change. *St. Louis, etc., R. Co. v. McCullough* (Civ. App.), 33 S. W. 285, 286, 287.

**Authority of Brakeman to Make Statements as to Movements of Trains.**—Where a train is in charge of a conductor, a brakeman is not authorized to make statements to passengers as to the movements of the

train, and a passenger who is injured by relying on such statements can not recover from the company. *Receivers International & G. N. Ry. Co. v. Armstrong*, 4 Tex. Civ. App. 146, 23 S. W. 236.

**Liability for Acts of Porter or Brakeman Assisting Passengers to Alight.**—Where, in an action for injuries to a passenger, it appeared that a porter on a train was on duty and assisting in the operation of the train at the time he pushed plaintiff off the train, the company was liable for the consequences of the act. *International & G. N. R. Co. v. Hugen*, 100 S. W. 1000, 45 Tex. Civ. App. 326.

A railroad is liable for the acts of a brakeman in assisting passengers to alight from cars when within the scope of his duties but is not liable for his willful trespass or acts done clearly without the scope of his employment. *Houston & Texas C. Ry. Co. v. Gorbett*, 49 Tex. 573.

An instruction that if defendant's porter knew plaintiff's destination, and in the exercise of ordinary care he assisted her to alight at her request, the defendant would not be liable, is erroneous in requiring the exercise of such reasonable care on the part of the porter in directing her to alight, as he was only required to announce the name of the station, and was under no duty to inquire if that was where plaintiff wished to alight. *Texas Midland R. Co. v. Terry*, 65 S. W. 697, 27 Tex. Civ. App. 341.

A railroad company is liable for the negligence of a brakeman, resulting in injury to a passenger, while carrying such passenger, a physically disabled person, from a train, which he did at the request of persons having the passenger in charge, though the latter and her attendants left the train at a point short of their destination by reason of the mistaken statement of the brakeman that it was necessary for them to change cars at that point. *Internat-*

*tional & G. N. Ry. Co. v. Anderson*, 53 S. W. 606, 15 Tex. Civ. App. 180.

**Liability for Injury from Being Struck by Brakeman on Side of Freight Train.**—There is negligence of the carrier allowing recovery by plaintiff, who, while waiting at a station, at the customary place between two tracks, for a passenger expected to arrive, was struck by a brakeman on the side of a freight train, by reason of his assuming a humped position, throwing his body out from the car, just before he passed plaintiff. *Texas & P. Ry. Co. v. Russell* (Civ. App.), 74 S. W. 569.

**Liability for Threats of Employees Causing Trespasser to Jump from Train.**—In *Houston, etc., R. Co. v. Grigsby*, 13 Tex. Civ. App. 639, 35 S. W. 815, 36 S. W. 496, affirmed in 93 Tex. 710, no op., which was an action against a railway company for personal injury, the evidence showed that plaintiff was on defendant's freight train as a trespasser; that he was a man of weak mind; that defendant's brakeman ordered him to get off the train while it was moving rapidly; that plaintiff said he would if train would stop; that the brakeman told him that if he did not get off, he would get his gun and kill him, and started towards the caboose; and that plaintiff, believing he would execute his threat, jumped off the train and was injured. It was held that a requested instruction which made defendant's liability depend on a gun being in the caboose, and the ability of the brakeman to put his threat into execution at the very time plaintiff jumped from the train, was properly refused.

In the case of *Gulf, etc., R. Co. v. Kirkbride*, 79 Tex. 457, 15 S. W. 495, it was held that if the servant of the railway company, within the scope of his employment, by peremptory order and by violent and threatening language towards a trespasser, caused him to get off a car while the same



was moving at such a rate of speed as to render such getting off manifestly dangerous and the trespasser was injured thereby, the railway company would be responsible. In that case there was no assault made, but threats only, and the trespassers were not shown to have been mentally weak.

**3. Liability for Communication of Disease by Employee to Passenger.**

A carrier is liable in damages for the communication of smallpox by a ticket agent to a passenger buying tickets from him, where the agent knows he is infected. *Missouri, K. & T. Ry. Co. of Texas v. Raney*, 99 S. W. 589, 44 Tex. Civ. App. 517.

The act of a railway ticket agent infected with smallpox in exposing himself to plaintiff, who purchased tickets from him, was the proximate cause of plaintiff's wife contracting the disease, where plaintiff contracted it and communicated it to her. *Missouri, K. & T. Ry. Co. of Texas v. Raney*, 99 S. W. 589, 44 Tex. Civ. App. 517.

Evidence held sufficient to show that a passenger contracted smallpox from a railway ticket agent. *Missouri, K. & T. Ry. Co. of Texas v. Raney*, 99 S. W. 589, 44 Tex. Civ. App. 517.

In an action against a carrier for the communication of smallpox to a passenger by a ticket agent, evidence held sufficient to show that the agent had smallpox and knew it when the passenger bought tickets from him. *Missouri, K. & T. Ry. Co. of Texas v. Raney*, 99 S. W. 589, 44 Tex. Civ. App. 517.

**4. Liability for Malpractice or Neglect of Physician Employed to Attend Injured Passengers.**

Where a common carrier has furnished a competent physician to attend on injured passengers, it is not liable for his malpractice or neglect. *Galveston, H. & S. A. Ry. Co. v. Scott*, 44 S. W. 589, 18 Tex. Civ. App. 321.

**F. LIABILITY FOR INJURIES OCCASIONED BY CONCURRENT NEGLIGENCE OF CARRIER AND ANOTHER.**

If an accident occurs from two causes, both due to negligence of different persons, but together one efficient cause, then all the carriers whose acts contribute to the action are liable for an injury resulting and the negligence of one furnishes no excuse for the negligence of the other. *Missouri, etc., R. Co. v. Harrison* (Civ. App.), 77 S. W. 1036, reversed on another point in 97 Tex. 611, citing *Gulf, etc., R. Co. v. McWhirter*, 77 Tex. 356, 360, 14 S. W. 26.

If a street railway was negligent, and its negligence contributed to the injury to plaintiff, occurring from a collision at the intersection of the street railway with a steam railway, it was immaterial, as affecting the liability of the street railway company, that the steam railroad also contributed to the injury. *Gulf, C. & S. F. Ry. Co. v. Holt*, 70 S. W. 591, 30 Tex. Civ. App. 330.

The defendant company in its work left a rope suspended across Buffalo Bayou at night without a signal light showing its presence. A boat with passengers ascending the bayou collided with the rope, thereby injuring the plaintiff, who was a passenger. Held, that while the boat as a carrier owed the duty of greater care to its passengers, still the navigation company would not be relieved from responsibility for its negligence by the contributory negligence of those manning the boat. *Markham v. Houston Direct Nav. Co.*, 73 Tex. 247, 11 S. W. 131.

Where a carrier entered into a contract with a gaslight company to supply the carrier's cars with gas, and while a servant of the light company was filling a gas tank on one of the cars of a train in which plaintiff was a passenger an explosion of gas oc-

curred, by which plaintiff was injured, through the failure of the gas company's employee to shut off the gas, either through his negligence or by reason of the defective condition of the valve of the car, the gas company and the carrier were both liable for plaintiff's injuries. *Chicago, R. I. & P. Ry. Co. v. Rhodes*, 80 S. W. 869, 35 Tex. Civ. App. 432.

Where the negligence of a carrier concurred with the act of a fellow passenger in injuring plaintiff's wife, the carrier was liable, irrespective of whether or not the act of the fellow passenger was negligence. *Missouri, K. T. Ry. Co. of Texas v. Wolf*, 89 S. W. 778, 40 Tex. Civ. App. 381.

In an action by a passenger against two railroad companies for injuries caused by a collision between their trains, neither defendant is entitled to judgment over against the other in any event, since plaintiff is only entitled to judgment against either defendant by showing that its negligence contributed to the accident; and, if defendants were jointly negligent, there can be no contribution between them, each being an independent agent. *Missouri, etc., R. Co. v. Vance* (Civ. App.), 41 S. W. 167.

A passenger on the Southern Pacific Railway was injured in a collision with a car upon the track of the Gulf, Colorado and Santa Fé Railway Company, alleged to have been negligently left so as to occasion the collision. The passenger sued both companies. The Southern Pacific Railway Company alleged that the injury was caused alone by the negligence of the other railway company, and asked judgment over against it in case the plaintiff should recover. It was held to be within the power of the court to allow such relief. *Gulf, etc., R. Co. v. Hathaway*, 75 Tex. 557, 12 S. W. 999. See, generally, the title JUDGMENTS AND DECREES.

#### G. LIABILITY FOR INJURIES ON CONSOLIDATED OR CONNECTING LINES.

**Liability for Injuries in Case of Consolidation.**—The Texas and Pacific Railway Company was liable for damages caused by the Southern Pacific Railway Company prior to the 21st of March, 1872, the date when the consolidation of said companies was effected in pursuance of legislative enactments. *Texas, etc., R. Co. v. Murphy*, 46 Tex. 356.

**Liability for Injuries on Connecting Lines.**—See the title CONNECTING CARRIERS.

#### H. LIABILITY FOR INJURIES ON LINES OPERATED UNDER LEASE.

A railroad company in Texas can not lease the right to use its road so as to absolve itself from its duties to the public without legislative authority. *International, etc., R. Co. v. Underwood*, 67 Tex. 589, 4 S. W. 216; *International, etc., R. Co. v. Eckford*, 71 Tex. 274, 8 S. W. 678; *East Line, etc., R. Co. v. Lee*, 71 Tex. 538, 9 S. W. 604; *Central, etc. R. Co. v. Morris*, 68 Tex. 49, 59, 3 S. W. 457; *International, etc., R. Co. v. Kuehn*, 70 Tex. 582, 8 S. W. 484.

If without such authority it surrenders the control of its road to another, it becomes liable for the torts of the company operating it which are permitted on its line. *International, etc., R. Co. v. Underwood*, 67 Tex. 589, 4 S. W. 216.

In an action against a railroad company, which had leased its road, for damages for ejection from a train run by the lessee road, a charge asked by defendant that, if plaintiff's ticket was bought from or issued by any other company than defendant, and the train was owned and operated by any other company, the jury should find for defendant, was properly refused. *East*

*Line & R. R. Co. v. Lee*, 71 Tex. 538, 9 S. W. 604.

The rule of law that a chartered railway company can not, by lease to another company, without express permission of law, absolve itself from its charter obligations, and from liability for the negligent operation of its road by the lessee, is applicable also to street railway companies. *Ft. Worth St. R. Co. v. Ferguson*, 9 Tex. Civ. App. 610, 29 S. W. 61, affirmed in 93 Tex. 660, no op.

A street railway company was granted a franchise of a certain street on condition that it operate a line thereon between the public square and a railroad depot. Thereafter it leased its line, and through the lessee's negligent operation thereof between said points a collision occurred. Held, that the street railway company was not relieved of liability for injuries resulting to a passenger of its lessee from a collision by the fact that it occurred on land owned by the railroad company, and not on said street. *Ft. Worth St. R. Co. v. Ferguson*, 9 Tex. Civ. App. 610, 29 S. W. 61.

#### **I. LIABILITY FOR INJURIES ON CHARTERED TRAINS OR CARS.**

Where a railroad company hires its trains to an association for an excursion, the association selling the tickets to the passengers, the railroad company is liable as a carrier to passengers on the train. *Collins v. Texas & P. Ry. Co.*, 39 S. W. 643, 15 Tex. Civ. App. 169.

Where a passenger is being transported by an express company on a special train, made up expressly for it, and is injured through the negligence of the railroad, he may sue either the express company or the railroad, or both. *American Exp. Co. v. Ogles*, 81 S. W. 1023, 36 Tex. Civ. App. 407.

Where an express company obtained a train of cars and an engine from a railroad for the purpose of

making a particular shipment of stock, no passengers being carried except the owners of the stock and their employees, and the shipment being accompanied by the messenger of the express company, although the train was operated by the servants of the railroad, the railroad was the mere agent of the express company for the transportation and forwarding of the stock, and the express company was liable for the railroad's negligence. *American Exp. Co. v. Ogles*, 81 S. W. 1023, 36 Tex. Civ. App. 407.

#### **J. LIABILITY FOR INJURIES WHERE RAILROAD IS IN HANDS OF RECEIVER.**

See, generally, the title RECEIVERS.

It is settled law that the receiver of a railroad company is the representative of the court, and not of the company, and that the company is not liable for his acts or those of his employees. *Kansas, etc., R. Co. v. Dorrough*, 72 Tex. 108, 10 S. W. 711.

In a suit against a railroad for personal injuries it was competent for defendant to show, under a general denial, that at the time the plaintiff received injuries the road was being operated by servants of a receiver. *Kansas, etc., R. Co. v. Dorrough*, 72 Tex. 108, 110, 10 S. W. 711.

In an action against a railroad company for injuries received while riding on its freight trains, in violation of its rule forbidding conductors to carry passengers thereon, it was error to admit testimony of the custom of carrying passengers on such trains after the road was placed in charge of a receiver, since the company could not be held responsible for what the receiver may have permitted. *San Antonio & A. P. Ry. Co. v. Lynch* (Civ. App.), 55 S. W. 517.

It is technically true that the relation of master and servant does not exist between a railway company and a receiver, when the company's prop-

erty is placed in his possession by a proper court, and he is required by its order to discharge with the property of the company the duty of a common carrier. While this is true, the profits or income of the property, while in the hands of the receiver, are responsible for the satisfaction of claims for injuries resulting from the negligence of the receiver or of his employees. *Ryan v. Hays*, 62 Tex. 42. And see *International, etc., R. Co. v. Ormond*, 62 Tex. 274; *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264.

The case of *Texas, Pac. R. Co. v. Johnson*, 76 Tex. 421, 13 S. W. 463, followed, to the effect that in an action against a railway company for personal injuries received while the railway was in the hands of a receiver, and where the earnings of the road pending such receivership were more than the alleged claim, and had all been applied to betterments of the road in its improved condition, without sale, returned to the company and the receiver discharged, the injury complained of being such as would entitle the plaintiff to recover if the road were still in the hands of such receiver, the plaintiff could recover. And further, that an order of the federal court discharging the receiver and requiring all claimants to intervene in such case within a certain time, did not affect the liability of the railway company, because that court had no power to make such an order. *Texas, etc., R. Co. v. Boyd*, 6 Tex. Civ. App. 205, 24 S. W. 1086 (see 93 Tex. 740, no op.).

#### K. LIMITATION OF LIABILITY FOR NEGLIGENCE.

**General Rule as to Power to Limit by Contract.**—See, generally, the title CARRIERS, ante, p. 304.

The duty of a carrier of passengers to use extraordinary diligence to protect the lives and persons of his passengers can not be waived, even by express contract. (*Tex. Civ. App. 1899*),

*Ft. Worth & D. C. Ry. Co. v. Rogers*, 53 S. W. 366, 21 Tex. Civ. App. 605.

A common carrier can not by contract exempt itself from liability for injuries and damages to passengers resulting from its own negligence or that of its servants. *Missouri Pac. R. Co. v. Ivy*, 71 Tex. 409, 415, 9 S. W. 346; *Harris v. Howe*, 74 Tex. 534, 537, 12 S. W. 224; *Galveston, etc., R. Co. v. Parsley*, 6 Tex. Civ. App. 150, 156, 25 S. W. 64, affirmed in 93 Tex. 707, no op.; *Ft. Worth, etc., R. Co. v. Rogers*, 21 Tex. Civ. App. 605, 608, 53 S. W. 366; *Ft. Worth, etc., R. Co. v. Rogers*, 24 Tex. Civ. App. 382, 60 S. W. 61, affirmed in 94 Tex. 695, no op.; *Missouri, etc., R. Co. v. Flood*, 35 Tex. Civ. App. 197, 79 S. W. 1106, affirmed in 98 Tex. 625, no op.; *Collins v. Texas, etc., R. Co.*, 15 Tex. Civ. App. 169, 39 S. W. 643; *Missouri, etc., R. Co. v. Harrison (Civ. App.)*, 77 S. W. 1036, reversed in 97 Tex. 611.

Under Const. art. 10, § 2, declaring all railroads public highways, and all railroad companies common carriers; and Rev. St. 1895, art. 319, providing that the duties and liabilities of carriers in this state shall be the same as are prescribed by the common law; and article 320, providing that railroad companies shall not restrict their liability as it exists at common law, in any manner whatever, and all agreements for that purpose shall be invalid,—a railroad company can not, where it undertakes to carry a person, exempt itself from liability for damages occasioned by its negligence, or that of its servants. *Ft. Worth & D. C. Ry. Co. v. Rogers*, 53 S. W. 366, 21 Tex. Civ. App. 605.

"The obligation to convey passengers over its own line not only exists as a public duty independently of any contract to do so, but from considerations of public policy it can not even be modified by contract so as to exempt the carrier from the duty to protect the passenger from conse-

quences of the negligence of its agents and servants. *G. C. & S. F. Ry. v. McGown*, 65 Tex. 640." *Harris v. Howe*, 74 Tex. 534, 12 S. W. 224.

**Validity of Stipulations in Tickets, Passes, etc., Releasing from Liability.**

—A railroad passenger traveling on a free pass has the same rights against the company in case he is injured through the negligence of its servants that a paying passenger would have. Nor can the company, by contract, relieve itself from liability for its servants' negligence. *Gulf, C. & S. F. Ry. Co. v. McGown*, 65 Tex. 640.

A condition of a pass, that the person accepting and using it assumes all risks of accident and damage to his person and property, is invalid. *Missouri, K. & T. Ry. Co. of Texas v. Flood*, 79 S. W. 1106, 35 Tex. Civ. App. 197.

A stipulation in a free pass that the carrier shall not be liable for any personal injury sustained in consequence of the negligence of its agents, or otherwise, is void, and does not prevent the passenger from recovering for an assault committed by a porter of the carrier. *Galveston, H. & S. A. Ry. Co. v. Bean*, 99 S. W. 721, 45 Tex. Civ. App. 52.

A signed condition on a railroad pass, that the person using the same accepts "all risk of accident and damage to person and property," is void as against public policy. *Missouri, K. & T. Ry. Co. v. Flood* (Civ. App.), 70 S. W. 331.

A shipping contract which waived the carrier's common-law liability, and recited, *inter alia*, that, in consideration of a "free pass," the shipper assumed the care of the stock shipped, and waived all claims for personal injuries which might be received by him, was without consideration. *Texas & P. Ry. Co. v. Avery*, 46 S. W. 897, 19 Tex. Civ. App. 235.

Under Const. art. 10, § 2, declaring railroads public highways, and railroad

companies common carriers, and *Sayles' Ann. Civ. St.* 1897, arts. 319, 320, imposing on railroads common-law duties and liabilities, and forbidding them to limit or restrict such liability by general or special notice, or any contract whatever, a railroad can not contract away its liability for injuries to a newsboy employed by another corporation to sell its papers, etc., on the trains of the railroad, by an antecedent release, though the execution thereof by the newsboy is imposed as a condition of affording him transportation. *Texas & P. Ry. Co. v. Fenwick*, 78 S. W. 348, 34 Tex. Civ. App. 222, affirmed in 98 Tex. 635, no op.

A railroad company can not, by a release taken from a freight train passenger who pays the usual fare, contract against liability for injury resulting from its own negligence. *Ft. Worth & D. C. Ry. Co. v. Rogers*, 24 Tex. Civ. App. 382, 60 S. W. 61.

**As to effect of stipulations in ticket as to amount of damages recoverable,** see ante, "Recovery of Damages for Wrongful Ejection," V, D, 15, g.

**Stipulations as to Relation to Company of Persons Carried by It.**—A common carrier can not limit its liability by stipulating that a person shall occupy a relation which he does not in fact occupy, as by stipulating with an owner of cattle that an assistant carried on the cattle train was an employee of the company, and not a passenger. *Missouri Pacific Railway Co. v. Ivy*, 71 Tex. 409, 9 S. W. 346.

A shipper of stock given a pass to accompany the same is a passenger, entitled to recover of the carrier for injury through negligence of employees, notwithstanding stipulation in contract that he feed and water his stock, and during the passage be deemed an employee of the company, and assume all risks incident to his employment. *St. Louis, etc., R. Co. v. Nelson* (Civ. App.), 44 S. W. 179, affirmed in 93 Tex. 718, no op.

**Contracts with Railroad for Carriage of Employees of Express Companies, News Companies, etc.**—Express company is not bound by agreement with railroad by which it agrees to assume all loss or damage to indemnify railroad against injuries to express messenger resulting from railroad's negligence. *San Antonio, etc., R. Co. v. Adams*, 6 Tex. Civ. App. 109, 24 S. W. 839.

A railroad company may contract with an express company for exemption from liability for injuries to its goods or the agents in charge of them, although the injuries may be caused by the negligence of its servants; because the contract of carrier is not that of a common carrier. *Missouri, etc., R. Co. v. Carter*, 95 Tex. 461, 68 S. W. 159.

**Contract Exempting from Liability for Injuries on Connecting Line.**—See, generally, the title CONNECTING CARRIERS.

# **L. LIABILITY OF CARRIER AS AFFECTED BY CONTRIBUTORY NEGLIGENCE OF PASSENGER.**

## **1. General Rule Stated, Construed and Applied.**

### **a. General Rule as to Effect of Contributory Negligence.**

The usual rule that when an injured person is guilty of contributory negligence he can not recover for the injuries even though the party inflicting the injury was also guilty of negligence, applies to actions against carriers of passengers for injuries to passengers or persons lawfully on their conveyance. *Houston, etc., R. Co. v. Gorbett*, 49 Tex. 573, 581; *Galveston, etc., R. Co. v. Le Gierse*, 51 Tex. 189; *Cunningham v. International R. Co.*, 51 Tex. 503; *Houston, etc., R. Co. v. Leslie*, 57 Tex. 83; *Galveston, etc., R. Co. v. Davidson*, 61 Tex. 204; *Texas, etc., R. Co. v. Cole*, 66 Tex. 562, 564, 1 S. W. 629; *International, etc., R. Co. v. Folliard*, 66 Tex. 603, 1 S. W.

624; *Gulf, etc., R. Co. v. Williams*, 70 Tex. 159, 8 S. W. 78; *Gulf, etc., R. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19; *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264; *St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266; *Texas, etc., R. Co. v. Overall*, 82 Tex. 247, 18 S. W. 142; *Conwill v. Gulf, etc., R. Co.*, 85 Tex. 96, 19 S. W. 1017; *St. Louis, etc., R. Co. v. Cassaday*, 92 Tex. 525, 50 S. W. 125; *Galveston, etc., R. Co. v. Morris*, 94 Tex. 505, 61 S. W. 709, affirming 60 S. W. 813; *Parks v. San Antonio, etc., Co.*, 100 Tex. 222, 94 S. W. 331, reversing 93 S. W. 130; *Gulf, etc., R. Co. v. Buford*, 2 Tex. Civ. App. 115, 117, 21 S. W. 272 (see 85 Tex. 430); *Texas, etc., R. Co. v. Boyd*, 6 Tex. Civ. App. 205, 24 S. W. 1086 (see 93 Tex. 740, no op.); *Missouri, etc., R. Co. v. Perry*, 8 Tex. Civ. App. 78, 82, 27 S. W. 496; *Missouri, etc., R. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905; *St. Louis, etc., R. Co. v. Rice*, 9 Tex. Civ. App. 509, 29 S. W. 525; *Wilcox v. San Antonio, etc., R. Co.*, 11 Tex. Civ. App. 487, 33 S. W. 379, affirmed in 93 Tex. 653, no op.; *Missouri, etc., R. Co. v. McElree*, 16 Tex. Civ. App. 182, 41 S. W. 843, affirmed in 93 Tex. 735, no op.; *Galveston, etc., R. Co. v. Scott*, 21 Tex. Civ. App. 24, 50 S. W. 477, affirmed in 93 Tex. 707, no op.; *St. Louis, etc., R. Co. v. Ricketts*, 22 Tex. Civ. App. 515, 54 S. W. 1090; *International, etc., R. Co. v. Rhoades*, 21 Tex. Civ. App. 459, 52 S. W. 979; *Texas, etc., R. Co. v. Rea*, 27 Tex. Civ. App. 549, 65 S. W. 1115; *Oxsher v. Houston, etc., R. Co.*, 29 Tex. Civ. App. 420, 67 S. W. 550, affirmed in 95 Tex. 684, no op.; *Houston, etc., R. Co. v. Bryant*, 31 Tex. Civ. App. 483, 72 S. W. 885; *Chicago, etc., R. Co. v. Buie*, 31 Tex. Civ. App. 654, 73 S. W. 853, affirmed in 97 Tex. 628, no op.; *Gulf, etc., R. Co. v. Phillips*, 32 Tex. Civ. App. 238, 74 S. W. 793; *Williams v. Galveston, etc., R. Co.*, 34 Tex. Civ. App. 145, 78 S. W. 45, affirmed in 98 Tex. 637, no op.; *Galveston, etc., R.*

*Co. v. Scott*, 34 Tex. Civ. App. 501, 79 S. W. 642, affirmed (see 98 Tex. 617, no op.); *Texas, etc., R. Co. v. Long*, 35 Tex. Civ. App. 339, 80 S. W. 114; *Ratteree v. Galveston, etc., R. Co.*, 36 Tex. Civ. App. 197, 81 S. W. 566, affirmed in 98 Tex. 629, no op.; *Missouri, etc., R. Co. v. Cannady*, 36 Tex. Civ. App. 646, 82 S. W. 1069, affirmed in 98 Tex. 625, no op.; *San Antonio, etc., R. Co. v. Jackson*, 38 Tex. Civ. App. 201, 85 S. W. 445, affirmed in 101 Tex. 657, no op.; *Texas, etc., Railroad v. Ellison*, 39 Tex. Civ. App. 172, 87 S. W. 213; *Missouri, etc., R. Co. v. Wolfe*, 40 Tex. Civ. App. 381, 89 S. W. 778; *St. Louis, etc., R. Co. v. Parks*, 40 Tex. Civ. App. 480, 90 S. W. 343, affirmed in 101 Tex. 656, no op.; *Texas, etc., R. Co. v. Bump*, 43 Tex. Civ. App. 297, 95 S. W. 29, affirmed in 101 Tex. 663, no op.; *Houston, etc., R. Co. v. Easton*, 44 Tex. Civ. App. 95, 97 S. W. 833, affirmed in 102 Tex. 585, no op.; *Texas, etc., R. Co. v. Harrington*, 44 Tex. Civ. App. 386, 98 S. W. 653; *Feagin v. Gulf, etc., R. Co.*, 45 Tex. Civ. App. 251, 100 S. W. 346; *Rambie v. San Antonio, etc., R. Co.*, 45 Tex. Civ. App. 422, 100 S. W. 1022, affirmed in 102 Tex. 590, no op.; *Ft. Worth, etc., R. Co. v. Gribble*, 46 Tex. Civ. App. 78, 102 S. W. 157; *Walling v. Trinity, etc., R. Co.*, 48 Tex. Civ. App. 35, 106 S. W. 417, affirmed, no op.; *El Paso Elec. R. Co. v. Ruckman*, 49 Tex. Civ. App. 25, 107 S. W. 1158, affirmed, no op.; *Gulf, etc., R. Co. v. Hodges* (Civ. App.), 24 S. W. 563; *Missouri, etc., R. Co. v. Wylie* (Civ. App.), 26 S. W. 85; *St. Louis, etc., R. Co. v. Herberger* (Civ. App.), 27 S. W. 145; *Gulf, etc., R. Co. v. Scott* (Civ. App.), 27 S. W. 827; *Sanchez v. San Antonio, etc., R. Co.* (Civ. App.), 27 S. W. 922, affirmed in 88 Tex. 117; *Gulf, etc., v. Younger*, 10 Tex. Civ. App. 141, 29 S. W. 948; *Gulf, etc., R. Co. v. Shieder*, 88 Tex. 152, 30 S. W. 902; *Gulf, etc., R. Co. v. Jordan* (Civ. App.), 33 S. W.

690; *Gulf, etc., R. Co. v. Flatt* (Civ. App.), 36 S. W. 1029; *Missouri, etc., R. Co. v. Martin* (Civ. App.), 44 S. W. 703; *St. Louis, etc., R. Co. v. Patterson* (Civ. App.), 73 S. W. 987; *St. Louis, etc., R. Co. v. Massay* (Civ. App.), 76 S. W. 585; *St. Louis, etc., R. Co. v. Cannon* (Civ. App.), 81 S. W. 778, affirmed in 98 Tex. 630, no op.; *Galveston, etc., R. Co. v. De Castillo* (Civ. App.), 83 S. W. 25; *Mercher v. Texas, etc., R. Co.* (Civ. App.), 85 S. W. 468, affirmed in 101 Tex. 648, no op.; *Gulf, etc., R. Co. v. Turner* (Civ. App.), 93 S. W. 195; *St. Louis, etc., R. Co. v. Johnson* (Civ. App.), 94 S. W. 162, reversed in 100 Tex. 237; *El Paso Elec. R. Co. v. Kitt* (Civ. App.), 99 S. W. 587; *Dallas, etc., R. Co. v. Lasch* (Civ. App.), 99 S. W. 729; *San Antonio, etc., R. Co. v. Trigo* (Civ. App.), 101 S. W. 254; *Selman v. Gulf, etc., R. Co.* (Civ. App.), 101 S. W. 1030; *Texas, etc., R. Co. v. Pollard*, 2 App. Civ. Cases, §§ 481, 484; *International, etc., R. Co. v. Gorman*, 2 App. Civ. Cases, § 776; *Gulf, etc., R. Co. v. Head*, 4 App. Civ. Cases, § 209, 15 S. W. 504.

The liability of a carrier for injuries to a passenger, even in a case in which the carrier has not used the proper degree of care, may be defeated by the contributory negligence of the passenger. *Texas & Pacific Ry. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264.

A passenger can not recover from a carrier notwithstanding defendant's negligence, where the passenger has so far contributed to the accident by the want of ordinary care, that but for that the accident would not have happened. *Texas & P. R. Co. v. Pollard*, 2 White & W. Civ. Cas. Ct. App. § 484.

Where a risk is taken voluntarily by a passenger, without fault of the carrier or inducement to procure him to do so, and he is injured and his injury is attributable to the motion and speed the cars are making, without the accident being associated with any other

fault or act of the company, he is guilty of contributory negligence barring recovery. *Hollman v. Houston & T. C. R. Co.*, 2 Posey, Unrep. Cas. 557.

In an action for injuries alleged to have been caused by defendant railway company's failure to stop its train at a station long enough for plaintiff's wife to board it, where negligence of defendant's servants in starting the train when they knew plaintiff was in a position of danger was not alleged, an instruction to find for defendant if the train was stopped long enough, and failure of plaintiff's wife to board it was due to her own negligence, was erroneous, because requiring coincident freedom from negligence on the part of defendant and contributory negligence on the part of plaintiff's wife. *International & G. N. R. Co. v. Anchonda* (Civ. App.), 68 S. W. 743.

The undisputed evidence having shown that plaintiff's effort to get off the train was the efficient cause of the injury, it was not error to instruct that, if plaintiff's endeavor to get off the train either caused or contributed to his injury, plaintiff could not recover. *Williams v. Galveston, H. & S. A. Ry. Co.*, 78 S. W. 45, 34 Tex. Civ. App. 145.

The court instructed that, if a passenger who refused to pay fare for a child, was told by the conductor that she must take the child from the train, and thereafter, before the train reached a certain passenger station, the passenger voluntarily left the train, without the knowledge of the conductor or brakeman, and without being required to do so, a verdict should be returned in favor of defendant, even though in leaving the train plaintiff sustained the injury complained of. Held, that the instruction did not present the defense of contributory negligence, since, while plaintiff could not recover if she voluntarily left the train without the knowledge of defendant's servants, she also could not recover if

she left the train with the knowledge of defendant's servants, if she did it in such a manner as to be guilty of contributory negligence. *Ft. Worth & D. C. Ry. Co. v. Gribble*, 102 S. W. 157, 46 Tex. Civ. App. 78.

An instruction, in an action by a husband for injuries to his wife while a passenger, that the carrier was responsible to plaintiff if its failure to use the proper degree of care was the proximate cause of the injury, though the wife might have been guilty of negligence, unless it appeared that she could, by the exercise of ordinary care, have avoided the consequences of the negligence of the carrier, was misleading, because susceptible of the construction that plaintiff might recover notwithstanding the negligence of the wife. *Texas & N. O. R. Co. v. Harrington*, 98 S. W. 653, 44 Tex. Civ. App. 386.

An instruction that if plaintiff's wife alighted from the train at her destination, if she did so when the train was in motion, and if it was negligence for her so to do, and such negligence proximately caused or contributed to her injury, if she was injured, the jury should find for defendant, regardless of whether the train was negligently started or whether it was suddenly started without warning, was proper. *San Antonio & A. P. Ry. Co. v. Jackson*, 85 S. W. 445, 38 Tex. Civ. App. 201.

**Effect of Act as Dependent upon Capability to Appreciate Danger.—**

A boy who, by reason of his age and lack of discretion, was unable to appreciate the danger of jumping from a moving street car, could not be held guilty of contributory negligence in so doing. (Civ. App.), *Denison & S. Ry. Co. v. Carter*, 79 S. W. 320, judgment reversed 82 S. W. 782, 98 Tex. 196, 107 Am. St. Rep. 626.

**b. Effect as Dependent upon Doctrine of Proximate Cause.**

**In General.**—In order that the



negligence of the injured person may preclude a recovery for injuries resulting from the negligence of the carrier such negligence must be the proximate cause of the injury. *St. Louis, etc., R. Co. v. Foster*, 46 Tex. 517, 103 S. W. 194, affirmed in 102 Tex. 591, no op.; *Galveston, etc., R. Co. v. Le Gierse*, 51 Tex. 189; *Houston, etc., R. Co. v. Leslie*, 57 Tex. 83; *Kansas, etc., R. Co. v. Dorrough*, 72 Tex. 108, 10 S. W. 711; *Mills v. Missouri, etc., R. Co.*, 94 Tex. 242, 59 S. W. 874, reversing 57 S. W. 291; *Parks v. San Antonio, etc., Co.*, 100 Tex. 222, 94 S. W. 331, 98 S. W. 1100, reversing 93 S. W. 130; *Gulf, etc., R. Co. v. Danshank*, 6 Tex. Civ. App. 385, 25 S. W. 295; *St. Louis, etc., R. Co. v. Rice*, 9 Tex. Civ. App. 509, 29 S. W. 525; *Chicago, etc., R. Co. v. Armes*, 32 Tex. Civ. App. 32, 74 S. W. 77, affirmed in 97 Tex. 628, no op.; *International, etc., R. Co. v. Anchonda*, 33 Tex. Civ. App. 24, 75 S. W. 557, affirmed, no op.; *St. Louis, etc., R. Co. v. Smith*, 34 Tex. Civ. App. 612, 79 S. W. 340, affirmed in 98 Tex. 630, no op.; *San Antonio, etc., R. Co. v. Jackson*, 38 Tex. Civ. App. 201, 85 S. W. 445, affirmed in 101 Tex. 657, no op.; *Texas, etc., R. Co. v. Bump*, 43 Tex. Civ. App. 297, 95 S. W. 29, affirmed in 101 Tex. 663, no op.; *Texas, etc., R. Co. v. Harrington*, 44 Tex. Civ. App. 386, 98 S. W. 653; *Malone v. Texas, etc., R. Co.*, 49 Tex. Civ. App. 398, 109 S. W. 430; *Missouri, etc., R. Co. v. Martin* (Civ. App.), 44 S. W. 703; *St. Louis, etc., R. Co. v. Cannon* (Civ. App.), 81 S. W. 778, affirmed in 98 Tex. 630, no op.; *Galveston, etc., R. Co. v. De Castillo* (Civ. App.), 83 S. W. 25; *St. Louis, etc., R. Co. v. Johnson* (Civ. App.), 94 S. W. 162, reversed in 100 Tex. 237; *El Paso Elec. R. Co. v. Kitt* (Civ. App.), 99 S. W. 587; *Dallas, etc., R. Co. v. Lasch* (Civ. App.), 99 S. W. 729; *Hardin v. Ft. Worth, etc., R. Co.* (Civ. App.), 100 S. W. 995; *San Antonio, etc., R. Co. v. Trigo* (Civ. App.),

101 S. W. 254; *Selman v. Gulf, etc., R. Co.* (Civ. App.), 101 S. W. 1030; *Texas, etc., R. Co. v. Pollard*, 2 App. Civ. Cases, §§ 481, 484.

The plaintiff must be guilty of want of ordinary care, and this want of ordinary care must proximately contribute to the injury. *Gulf, etc., R. Co. v. Danshank*, 6 Tex. Civ. App. 385, 25 S. W. 295.

In an action against a railroad company for injuries to a passenger while attempting to board a train at a station, requested instructions which make the failure of plaintiff to exercise ordinary care a bar to a recovery, without the condition that it must have contributed to the injuries, are properly refused. *St. Louis Southwestern Ry. Co. of Texas v. Cannon*, 81 S. W. 778, affirmed 98 Tex. 630.

In an action for injuries to a passenger, an instruction requiring plaintiff's negligence to have proximately contributed to her injury, in order to defeat her recovery, was proper. *St. Louis & S. F. R. Co. v. Smith*, 79 S. W. 340, 34 Tex. Civ. App. 612.

In an action for injuries to plaintiff while boarding defendant's car, plaintiff having testified that he had secured a firm footing on the steps of the car when the door was closed upon him by defendant's servant, thereby knocking him down, an instruction that plaintiff's negligence, if any, would preclude a recovery, regardless of whether such negligence was the proximate cause of his injuries, was subject to criticism. *Malone v. Texas & P. Ry. Co.*, 109 S. W. 430, 49 Tex. Civ. App. 398.

Negligence of a passenger, injured in leaving train on account of its suddenly starting, will not preclude a recovery, unless it contributed to the injury. *Chicago R. I. & T. Ry. Co. v. Armes*, 74 S. W. 77, 32 Tex. Civ. App. 32.

Where plaintiff, a passenger on a freight train, was injured while in a

freight car when a coupling was being made, it was error to instruct that if plaintiff was negligent he could not recover even though he was injured as a result of the jar incident to coupling made, since this allowed his negligence to bar his recovery, irrespective of the proximate cause of the injury. *Hardin v. Ft. Worth & D. C. Ry. Co.* (Civ. App.), 100 S. W. 995.

Where plaintiff was injured by being in a freight car when it was being switched, the fact that he was traveling on the train under a contract that he would not be in any freight car while switching was being done would not bar a recovery, unless his negligence in not being aware that switching was being done contributed to the accident. *Hardin v. Ft. Worth & D. C. Ry. Co.* (Civ. App.), 100 S. W. 995.

In an action for injuries to a passenger while in a freight car while a coupling was being made, it was error to instruct that if plaintiff remained in the car when the engine was approaching, when he should have left the car, he could not recover. *Hardin v. Ft. Worth & D. C. Ry. Co.* (Civ. App.), 100 S. W. 995.

Where a passenger was injured in a freight car, it was error to instruct that if he took no precaution to protect himself against the jar ordinarily incident to an approaching coupling "which he knew or in the exercise of ordinary care ought to have known, was about to occur from said coupling," he could not recover. *Hardin v. Ft. Worth & D. C. Ry. Co.* (Civ. App.), 100 S. W. 995.

A passenger, on finding that the ticket agent was not in his office, boarded a train without a ticket. An employee in charge of the train required him to alight and procure a ticket. The agent, on being asked to sell him one, directed him to board the train which was then in motion. Held, that the passenger's act in leaving the

train was not the proximate cause of an injury sustained while attempting to board the moving train. *San Antonio & A. P. Ry. Co. v. Trigo* (Civ. App.), 101 S. W. 254.

**Test as to Whether Negligence Proximate Cause.**—"Whether or not negligence of the defendant constituted a proximate cause of plaintiff's injury must be determined from a consideration of everything that happened. It would be a mistaken way of viewing the evidence to take separately each act or omission which may be found to have been negligent and inquire if it alone constituted the proximate cause. The combined effect of all may be considered, and when this is done, and if it be also found that no negligence of plaintiff caused or contributed to the result, we think it can not be said as matter of law that there was not the proper causal connection between the conduct of defendant and the injury to plaintiff." *Mills v. Missouri, etc., R. Co.*, 94 Tex. 242, 253, 59 S. W. 874, reversing 57 S. W. 291.

**Instances in Which Negligence of Passenger Held Proximate Cause.**—Plaintiff, while at defendant's depot to take a train, saw an engine about 250 yards away, which he knew had to come to the depot to couple with the train that would start in a minute or two. He then took his way towards the train, and, without turning in the direction that he knew the engine to be, and without listening, stepped on the main track immediately in front of the engine, and was injured. Held, that his negligence proximately contributed to his injury, though the company was negligent, in that no signal was given, and the engine was running at a dangerous rate of speed. *Missouri, K. & T. Ry. Co. of Texas v. Martin* (Civ. App.), 44 S. W. 703.

If a passenger would not have fallen from a car platform but for his drunkenness, it was the proximate cause of the accident. *Houston, etc., R. Co. v.*

Bryant, 31 Tex. Civ. App. 483, 72 S. W. 885.

**Instructions as to Proximate Cause.—**

A charge that contributory negligence of the plaintiff which "caused or contributed" to the injury would defeat a recovery was not error for failure to state that it must have "proximately" contributed to the injury. *Ratteree v. Galveston, etc., R. Co.*, 36 Tex. Civ. App. 197, 81 S. W. 566, affirmed in 98 Tex. 629, no op.

A charge in an action against a carrier for negligent injuries did not submit as doubtful the question whether plaintiff's negligence contributed to his injury, merely because it instructed the jury that if they should "find that plaintiff himself was guilty of contributory negligence, and by his own negligence contributed to his injury," he could not recover. *Chicago, R. I. & P. Ry. Co. v. Buie*, 73 S. W. 853, 31 Tex. Civ. App. 654.

It has been held that where the negligent act of a person injured unquestionably contributed to his injury, it is improper to charge that the jury must further find such act to have been the proximate or a proximate cause. If the act is one of contributory negligence, it must be, in the nature of things, a proximate cause. *Ebert v. Gulf, etc., R. Co. (Civ. App.)*, 49 S. W. 1105; *Gulf, etc., R. Co. v. Rowland*, 90 Tex. 365, 38 S. W. 756, reversing 35 S. W. 31; *Texas, etc., R. Co. v. McCoy*, 90 Tex. 264, 38 S. W. 36.

A passenger, on arriving at her destination, did not get off the train until after it had started again, and she was injured. The court charged that if she failed to use such diligence in getting off as a person of ordinary prudence would have used, and the want of such care was the immediate proximate cause of the injury, she could not recover. Held, that the instruction was error, as presupposing the possible existence of other causes for the injury attributable to the car-

rier. *Texas & P. Ry. Co. v. Mitchell (Civ. App.)*, 45 S. W. 945.

**c. Degree of Care Required of Passenger.**

**In General.**—The test of whether one was guilty of contributory negligence would seem to be not what would be done by a prudent man, generally, but what a man of ordinary prudence and care would do under similar circumstances to avoid injury. *Missouri, etc., R. Co. v. Wylie (Civ. App.)*, 26 S. W. 85.

If plaintiff failed to exercise that degree of care which a man of ordinary prudence would have exercised, and was injured thereby, he can not recover. *Missouri, K. & T. Ry. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905.

A passenger must use reasonable care to avoid an injury or to avoid increasing the damages resulting therefrom if possible. *Texas & P. Ry. Co. v. Rea*, 27 Tex. Civ. App. 549, 65 S. W. 1115.

A passenger is legally required only to use ordinary care in order to free himself from contributory negligence. *St. Louis, etc., R. Co. v. Foster*, 46 Tex. Civ. App. 517, 103 S. W. 194, affirmed in 102 Tex. 591, no op.; *Houston, etc., R. Co. v. Gorbett*, 49 Tex. 573, 581; *Houston, etc., R. Co. v. Leslie*, 57 Tex. 83; *International, etc., R. Co. v. Hassell*, 62 Tex. 256; *St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266; *Conwill v. Gulf, etc., R. Co.*, 85 Tex. 96, 19 S. W. 1017; *Gulf, etc., R. Co. v. Rowland*, 90 Tex. 365, 38 S. W. 756, reversing 35 S. W. 31; *St. Louis, etc., R. Co. v. Ricketts*, 96 Tex. 68, 70 S. W. 315; *Texas, etc., R. Co. v. Boyd*, 6 Tex. Civ. App. 205, 24 S. W. 1086 (see 93 Tex. 740, no op.); *Gulf, etc., R. Co. v. Danshank*, 6 Tex. Civ. App. 385, 25 S. W. 295; *Missouri, etc., R. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905; *Texas, etc., R. Co. v. Pierce*, 10 Tex. Civ. App. 429, 30 S. W. 1122; *Houston, etc., R. Co. v. Stewart*, 14

Tex. Civ. App. 703, 705, 37 S. W. 770; Houston, etc., R. Co. v. Dotson, 15 Tex. Civ. App. 73, 80, 38 S. W. 642, affirmed in 93 Tex. 686, no op.; Texas, etc., R. Co. v. Born, 20 Tex. Civ. App. 351, 354, 50 S. W. 613, affirmed in 93 Tex. 740, no op.; Galveston, etc., R. Co. v. Scott, 21 Tex. Civ. App. 24, 50 S. W. 477, affirmed in 93 Tex. 707, no op.; International, etc., R. Co. v. Rhoades, 21 Tex. Civ. App. 459, 52 S. W. 979; St. Louis, etc., R. Co. v. Ferguson, 26 Tex. Civ. App. 460, 64 S. W. 797, affirmed in 95 Tex. 685, no op.; Texas, etc., R. Co. v. Rea, 27 Tex. Civ. App. 549, 65 S. W. 1115; Missouri, etc., R. Co. v. Hay, 28 Tex. Civ. App. 318, 67 S. W. 171; International, etc., R. Co. v. Anchonda, 33 Tex. Civ. App. 24, 75 S. W. 557, affirmed, no op.; San Antonio, etc., R. Co. v. Jackson, 38 Tex. Civ. App. 201, 85 S. W. 445, affirmed in 101 Tex. 657, no op.; Texas, etc., R. Co. v. Bump, 43 Tex. Civ. App. 297, 95 S. W. 29, affirmed in 101 Tex. 663, no op.; Houston, etc., R. Co. v. Easton, 44 Tex. Civ. App. 95, 97 S. W. 833, affirmed in 102 Tex. 585, no op.; International, etc., R. Co. v. Hugen, 45 Tex. Civ. App. 326, 100 S. W. 1000, affirmed in 102 Tex. 585, no op.; Walling v. Trinity, etc., R. Co., 48 Tex. Civ. App. 35, 106 S. W. 417, affirmed, no op.; Missouri, etc., R. Co. v. Wylie (Civ. App.), 26 S. W. 85; St. Louis, etc., R. Co. v. Herberger (Civ. App.), 27 S. W. 145; Sanchez v. San Antonio, etc., R. Co. (Civ. App.), 27 S. W. 922, affirmed in 88 Tex. 117; St. Louis, etc., R. Co. v. Patterson (Civ. App.), 73 S. W. 987; St. Louis, etc., R. Co. v. Massay (Civ. App.), 76 S. W. 585; St. John v. Gulf, etc., R. Co. (Civ. App.), 80 S. W. 235; Galveston, etc., R. Co. v. De Castillo (Civ. App.), 83 S. W. 25; St. Louis, etc., R. Co. v. Johnson (Civ. App.), 94 S. W. 162, reversed in 100 Tex. 237; Dallas, etc., R. Co. v. Lasch (Civ. App.), 99 S. W. 729; Texas, etc., R. Co. v. Pollard, 2 App. Civ. Cases, §§ 481, 484; Gulf, etc., R. Co. v. Head,

4 App. Civ. Cases, § 209, 15 S. W. 504.

"It is not the least degree of fault on the part of plaintiff that will prevent him from a recovery; but it must be such a degree as to amount to a want of ordinary or reasonable care on his part, under the circumstances at the time of the injury." Houston, etc., R. Co. v. Leslie, 57 Tex. 83, quoting Houston, etc., R. Co. v. Gorbett, 49 Tex. 573.

Acquaintance with the peculiar construction of a platform at a station does not require a greater degree of caution than is incumbent on all persons in boarding a car. Gulf, etc., R. Co. v. Fox (Sup.), 6 S. W. 569.

The rule that slight fault on the part of a passenger will not prevent his recovery from a railway company for personal injuries caused by the negligence of its employees applies where the passenger lingered after announcement of the station, and was hurried out upon the depot platform after the train had started. Houston & T. C. Ry. Co. v. Gorbett, 49 Tex. 573.

Where a drunken passenger is put off a train at a place where he could, by ordinary care, have avoided injury, he can not recover for injuries received from following the train. Missouri Pac. R. Co. v. Evans, 71 Tex. 361, 368, 9 S. W. 325.

Passenger leaving train at station other than destination through railroad's fault in selling ticket, is bound to use ordinary care to prevent unnecessary injuries. Texas, etc., R. Co. v. Cole, 66 Tex. 562, 563, 1 S. W. 629; G., C. & S. F. R. Co. v. Head, 4 App. Civ. Cases, § 209, 15 S. W. 504.

**Exercise of Proper Care Question for Jury.**—The question of whether a person intending to board a train at night and accompanied by a conductor carrying a lantern, saw the gully into which he fell, or should have seen the same in the exercise of proper care, is properly left to the jury. San Antonio, etc., R. Co. v. Turney, 33 Tex.

Civ. App. 626, 78 S. W. 256, affirmed in 98 Tex. 631, no op.

**Instructions as to Degree of Care Held Correct.**—In an action against a railroad for damages for personal injuries to a passenger, a charge that contributory negligence precluding recovery by plaintiff is not the least degree of fault or negligence on his part, but it must be of such degree as to amount to want of ordinary or reasonable care on his part under circumstances at time of injury, is correct. *Gulf, etc., R. Co. v. Danshank*, 6 Tex. Civ. App. 385, 388, 25 S. W. 295.

In an action for injuries to a passenger, an instruction that, if she was guilty of negligence by jumping from the step of the car to the platform—that is, if a person of ordinary care would not have done so under the circumstances—and by so doing she contributed to her injury, if she was injured, plaintiff could not recover, sufficiently submitted plaintiff's alleged contributory negligence to the jury. *Missouri, K & T. Ry. Co. of Texas v. Wolf*, 89 S. W. 778, 40 Tex. Civ. App. 381.

A charge that negligence as applied to a passenger is a failure to exercise ordinary care for his own safety—that is, such care as an "ordinarily prudent person" would exercise under the same or similar circumstances—was not erroneous in failing to require the passenger to use such care as a "person of ordinary prudence" would exercise. *St. Louis Southwestern Ry. Co. v. Texas v. Parks*, 90 S. W. 343, 40 Tex. Civ. App. 480.

In an action for injuries received while alighting from a train, an instruction that if plaintiff did not use the care in getting off that an ordinarily prudent woman would have used under like circumstances, she could not recover, unless she took no more risk than an ordinarily prudent woman would have done, though awkwardly constructed, is not misleading. *St.*

*Louis S. W. Ry. Co. of Texas v. Herberger* (Civ. App.), 27 S. W. 145.

An instruction in an action against a railroad company for injuries to a pregnant passenger, which states that it was the duty of the plaintiff to exercise reasonable care, and that no recovery can be had if the journey was dangerous, is not defective in not stating that the degree of care so required was the care required of persons in such physical condition. *St. Louis S. W. Ry. Co. v. Ferguson*, 64 S. W. 797, 26 Tex. Civ. App. 460.

A request, based on evidence that plaintiff was 63 years old, weighed 264 pounds, and was somewhat deaf, that the degree of care required of him was to use such discretion and care as one of ordinary care in same physical condition would have used, was covered by one given that it was plaintiff's duty to use such care and prudence to prevent injury to himself as one of ordinary prudence would have used under similar circumstances. *Texas & P. Ry. Co. v. Born*, 50 S. W. 613, 20 Tex. Civ. App. 351.

In an action for injury to a passenger, an instruction authorizing recovery if plaintiff was a youth of tender years, and did not know of the track's defective condition, and the conductor did know thereof and negligently failed to warn plaintiff, or if a step on the car was negligently defective, and plaintiff was injured through the carrier's negligence in either respect, was not objectionable as requiring of plaintiff a higher degree of care than required by law, in that if plaintiff knew of the track's defective condition, being a youth, he was only bound to use such care as a person of ordinary prudence of his years would have exercised, whereas, the instruction required the jury to believe plaintiff knew nothing of the defective condition, where the instruction followed plaintiff's pleading, and the court instructed that, in deter-

mining whether plaintiff was negligent, the jury should look to all the evidence, considering his age and discretion, and that, if he did not exercise such discretion as a similar person would have exercised in the same circumstances, the jury should find for the carrier, and that the law does not fix any precise age when one is exempt from that degree of care expected from persons of ordinary care, but leaves the question to the jury, looking to plaintiff's age, his intelligence, and opportunity to judge of the danger of the act charged to be negligent. *Walling v. Trinity & Brazos Valley Ry. Co.*, 106 S. W. 417, 48 Tex. Civ. App. 35.

In an action by a mail agent for injuries caused by his head coming in contact with a box car negligently left too near the main line on a switch, it appeared that the box car was about 400 yards from the station; that it was customary for mail agents to put their heads out of the window on approaching the station; that the whistle was sounded as usual for the station, but, some stock being too near the track, it was sounded a second time, and the train slackened up, to avoid running into them; and that the agent probably could not have seen anything on the outside without opening the door. Held, that a charge that if the jury believed it was necessary for the agent, in the discharge of his duty, to project his head from the car at the station, the fact that he put his head out before it was actually necessary, on account of the distance of the train from the passenger platform, would not prevent his recovery, if the jury believed that the acts of defendant's servants in charge of the train were such as would reasonably induce the agent, situated as he was, to believe that he was at the usual place for projecting his head in performance of his duty, was not erroneous. *Houston & T. C. Ry. Co. v. Hampton*, 64 Tex. 427.

**Instructions Held Questionable or Erroneous.**—In an action by a passenger for injuries it is error to require the jury to find that plaintiff used that "high care" which a person of ordinary prudence would have used, etc., as plaintiff was legally required only to use ordinary care in order to free himself from contributory negligence. *St. John v. Gulf, C. & S. F. Ry. Co.* (Civ. App.), 80 S. W. 235.

In an action for damages against a railway company for injuries to plaintiff's wife, it was alleged that the train carried her by her destination, and that, when it finally stopped, she jumped from the steps, and was injured. The court charged that, if the train was stopped for a reasonable time at such destination, and that if, when the wife did get off, she did so voluntarily, or upon the invitation of a person not a servant of the company, then plaintiff could not recover, "provided an ordinarily prudent person would not have done as the wife did under the circumstances." Held, that such qualifying clause was erroneous and misleading. *Texas & P. Ry. Co. v. Woods*, 8 Tex. Civ. App. 462, 28 S. W. 416.

In a suit for injuries received while riding with other passengers on top of a caboose, it was misleading to define "ordinary care" in the charge as "that degree of care which may be reasonably expected of a person in the situation of plaintiff at the time the injury was received." *St. Louis S. W. Ry. Co. of Texas v. Rice*, 9 Tex. Civ. App. 509, 29 S. W. 525.

In an instruction making the negligence of plaintiff depend on whether the care exercised was of that degree "which very prudent persons are accustomed to use under like circumstances," the use of the word "accustomed" is questionable and should be omitted. *Malone v. Texas & P. Ry. Co.*, 109 S. W. 430, 49 Tex. Civ. App. 398.

In an action for injuries to a passenger, an instruction to find for defendant, if plaintiff, in alighting from the car, jumped from the side door, instead of leaving by the steps, if this was negligence, does not properly submit the question whether a prudent man would have remained in the car, or, if not, would have left it at the time, place, and manner that plaintiff did. *Missouri, K. & T. Ry. Co. of Texas v. Hay*, 67 S. W. 171, 28 Tex. Civ. App. 318.

In a personal injury action brought by a passenger, an instruction that if the plaintiff saw that the step box was not in its usual place when she attempted to alight from the train, or if, by ordinary care, she could have known that fact in time to prevent her injury, it was her duty to do so, and, if she failed in any other way to exercise ordinary care to protect herself from injury in alighting, she could not recover, is erroneous, since it authorized the jury to infer that the court meant to tell them that her conduct in alighting from the car in the way she did was not the exercise of ordinary care. *Selman v. Gulf, C. & S. F. Ry. Co. (Civ. App.)*, 101 S. W. 1030.

An instruction, in an action by a passenger against a carrier for injuries sustained by falling off a poorly-lighted depot platform, that it was the duty of the passenger to exercise such attention to a notice given to passengers not to leave the train at a certain place "as a passenger of ordinary attention would have done," was erroneous and misleading. *Texas & P. Ry. Co. v. Taylor (Civ. App.)*, 58 S. W. 166, reversed on rehearing 58 S. W. 844.

In an action for an injury to a passenger in alighting from a train, the court charged that she could not recover if she was negligent, and did not use proper care, and that she was bound to use "ordinary care," which

it defined as "that degree of care a person would use under similar circumstances." Held prejudicial to defendant. *St. Louis, A. & T. Ry. Co. v. Finley*, 79 Tex. 85, 15 S. W. 286.

#### d. Province of Court and Jury.

**In General.**—Whether or not the plaintiff in an action against a carrier of passengers for negligent injuries was guilty of contributory negligence barring his recovery is a question of fact for the jury under appropriate instructions, where the circumstances raise a question upon the subject. *Galveston, etc., R. Co. v. Le Gierse*, 51 Tex. 189; *Galveston, etc., R. Co. v. Smith*, 59 Tex. 406, 407; *Missouri, etc., R. Co. v. Rodgers*, 89 Tex. 675, 36 S. W. 243, reversing 35 S. W. 412; *Gulf, etc., R. Co. v. Bell*, 93 Tex. 632, 57 S. W. 939; *Mills v. Missouri, etc., R. Co.*, 94 Tex. 242, 59 S. W. 874, reversing 57 S. W. 291; *St. Louis, etc., R. Co. v. Rickets*, 96 Tex. 68, 70 S. W. 315; *Dallas, etc., R. Co. v. Payne*, 98 Tex. 211, 82 S. W. 649; *Texas, etc., R. Co. v. Bagwell*, 3 Tex. Civ. App. 256, 22 S. W. 829, affirmed in 93 Tex. 651, no op.; *Gulf, etc., R. Co. v. Brown*, 4 Tex. Civ. App. 435, 23 S. W. 618; *Houston, etc., R. Co. v. Stewart*, 14 Tex. Civ. App. 703, 705, 37 S. W. 770; *International, etc., R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102, 38 S. W. 401, affirmed (see 93 Tex. 711, no op.); *International, etc., R. Co. v. Williams*, 20 Tex. Civ. App. 587, 50 S. W. 732, affirmed in 93 Tex. 644, no op.; *Clairborne v. Missouri, etc., R. Co.*, 21 Tex. Civ. App. 648, 53 S. W. 837, 57 S. W. 336; *St. Louis, etc., R. Co. v. Humphreys*, 25 Tex. Civ. App. 401, 62 S. W. 791, affirmed in 94 Tex. 710, no op.; *Texas, etc., R. Co. v. Rea*, 27 Tex. Civ. App. 549, 65 S. W. 1115; *Texas, etc., R. Co. v. Funderburk*, 30 Tex. Civ. App. 22, 68 S. W. 1006, affirmed in 95 Tex. 688, no op.; *St. Louis, etc., R. Co. v. Cannon*, 31 Tex. Civ. App. 437, 71 S. W. 992; *Gulf, etc., R. Co. v. Phillips*, 32 Tex. Civ.

App. 238, 74 S. W. 793; *Yecker v. San Antonio, etc., Co.*, 33 Tex. Civ. App. 239, 76 S. W. 780, affirmed in 97 Tex. 652, no op.; *San Antonio, etc., R. Co. v. Turney*, 33 Tex. Civ. App. 626, 78 S. W. 256, affirmed in 98 Tex. 631, no op.; *Williams v. Galveston, etc., R. Co.*, 34 Tex. Civ. App. 145, 78 S. W. 45, affirmed in 98 Tex. 637, no op.; *Denison, etc., R. Co. v. Johnson*, 36 Tex. Civ. App. 115, 81 S. W. 780, affirmed in 98 Tex. 614, no op.; *El Paso Elect. R. Co. v. Harry*, 37 Tex. Civ. App. 90, 83 S. W. 735; *San Antonio, etc., R. Co. v. Jackson*, 38 Tex. Civ. App. 201, 85 S. W. 445, affirmed in 101 Tex. 657, no op.; *Lewis v. Houston Elec. Co.*, 39 Tex. Civ. App. 625, 88 S. W. 489, 112 S. W. 593; *St. Louis, etc., R. Co. v. Morgan*, 44 Tex. Civ. App. 155, 98 S. W. 408, affirmed in 102 Tex. 592, no op.; *Galveston, etc., R. Co. v. Morrison*, 46 Tex. Civ. App. 186, 102 S. W. 143, affirmed in 102 Tex. 582, no op.; *St. Louis, etc., R. Co. v. Foster*, 46 Tex. Civ. App. 517, 103 S. W. 194, affirmed in 102 Tex. 591, no op.; *Chicago, etc., R. Co. v. Cleaver*, 48 Tex. Civ. App. 294, 106 S. W. 721, affirmed, no op.; *Texas Mid. Railroad v. Ritchey*, 49 Tex. Civ. App. 409, 108 S. W. 732, affirmed, no op.; *San Antonio, etc., R. Co. v. Trigo*, 49 Tex. Civ. App. 523, 108 S. W. 1193, affirmed, no op.; *Missouri, etc., R. Co. v. Meyers* (Civ. App.), 35 S. W. 421; *San Antonio, etc., R. Co. v. Dykes* (Civ. App.), 45 S. W. 758; *Martin v. St. Louis, etc., R. Co.* (Civ. App.), 56 S. W. 1011; *Gulf, etc., R. Co. v. Cleveland* (Civ. App.), 61 S. W. 951; *Houston, etc., R. Co. v. Moss* (Civ. App.), 63 S. W. 894; *St. Louis, etc., R. Co. v. Keitt* (Civ. App.), 76 S. W. 311, affirmed in 97 Tex. 645, no op.; *Mercher v. Texas, etc., R. Co.* (Civ. App.), 85 S. W. 468, affirmed in 101 Tex. 648, no op.; *St. Louis, etc., R. Co. v. Ratley* (Civ. App.), 87 S. W. 407, affirmed in 101 Tex. 656, no op.; *Davis v. St. Louis, etc., R. Co.* (Civ. App.), 92 S. W. 831; *Nix v. San Anto-*

*nio, etc., Co.* (Civ. App.), 94 S. W. 335; *Hardin v. Ft. Worth, etc., R. Co.* (Civ. App.), 100 S. W. 995; *Selman v. Gulf, etc., R. Co.* (Civ. App.), 101 S. W. 1030; *Gist v. International, etc., R. Co.* (Civ. App.), 102 S. W. 457; *Houston, etc., R. Co. v. Johnson* (Civ. App.), 103 S. W. 239; *Missouri, etc., R. Co. v. Price*, 48 Tex. Civ. App. 210, 106 S. W. 700.

In such an investigation, however, the court must first determine whether or not the facts in evidence are sufficient to make an issue. There must, in all cases, be special circumstances surrounding and characterizing the act claimed to constitute contributory negligence. If these fairly admit of question as to whether or not the act was negligent, a case is made for the jury, but if they leave no doubt and suggest no question of the kind, there is nothing for the jury to determine. *Gulf, etc., R. Co. v. Bell*, 93 Tex. 632, 57 S. W. 939.

Where, in an action for injuries to a passenger, the latter's contributory negligence was raised by both pleadings and evidence, it was not error for the court to submit such issue to the jury. *Yecker v. San Antonio Traction Co.*, 76 S. W. 780, 33 Tex. Civ. App. 239.

Where, in an action for injuries to a passenger, the answer alleged that plaintiff was hurt while undertaking to alight, and the evidence showed that he alighted with extraordinary force, the court was justified in submitting the issue whether plaintiff alighted from the car before it stopped. *San Antonio Traction Co. v. Warren* (Civ. App.), 85 S. W. 26, affirmed in 101 Tex. 553, no op.

**Applications of Rule.**—As to the right and duty of the jury to determine the question of contributory negligence in particular instances, see post, "Applications of Rule," V. L, 1, f.



**Facts Held Not to Raise Issue of Contributory Negligence or Require Charge Thereon.**—Where a passenger

train, by negligence of the railroad's servants, ran against a freight car which was driven on the main track by a storm, and injured plaintiff, who was a passenger on the train and was standing in the aisle of the car at the time of the collision, the court is not required to submit a charge on the question of contributory negligence, since the facts do not raise that question. *Gulf, etc., R. Co. v. Bell*, 93 Tex. 632, 57 S. W. 939.

In an action for injuries sustained by being thrown against a car stove by a jar caused by coupling cars, the fact that plaintiff, then a child three years old, was at the time sitting with her mother by the stove for protection from cold, does not constitute contributory negligence. *Texas Cent. Ry. Co. v. Stuart*, 1 Tex. Civ. App. 642, 20 S. W. 962.

Where plaintiff, while standing in the closet of defendant's passenger car, was thrown against a stepladder, leaning against the wall of the closet, by a sudden lurch of the train, and in consequence of which he fell against the window, breaking the glass, and injuring his eye and face, such facts did not raise the issue of contributory negligence. *St. Louis Southwestern Ry. Co. of Texas v. Smith*, 86 S. W. 943, 38 Tex. Civ. App. 507.

Where the evidence shows that it was the duty of a railroad's employees to assist passengers off the train, and no employee was present for that purpose, the mere fact that plaintiff's wife took her child and grip along at the time of leaving the train does not raise the issue of contributory negligence, so as to require a charge thereon. *Missouri, K. & T. Ry. Co. of Texas v. Corse*, 101 S. W. 522, 46 Tex. Civ. App. 60.

In an action for injuries received by a street-car passenger in a col-

lision with a railroad train at a crossing, the evidence showed that she was sitting in the street car with her back to the approaching train, and was not aware of its presence until the collision. Held, that a refusal to submit the issue of contributory negligence was proper. *Gulf, C. & S. F. Ry. Co. v. Pendry*, 87 Tex. 553, 29 S. W. 1038, 47 Am. St. Rep. 125.

In an action for injuries to a person accompanying a shipment of stock, evidence that he notified an employee of the defendant that a calf was down, and with the consent of the employee entered the car to get the calf on its feet, and while there was injured by the sudden jerking of the car, does not raise the question of contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Lindsey* (Civ. App.), 101 S. W. 863.

**e. Instructions.**

**Duty to Instruct on Issue of Contributory Negligence.**—Where a carrier contended that injuries to passenger were occasioned by contributory negligence, an instruction presenting such issue held improperly refused. *Texas, etc., R. Co. v. McKenzie*, 30 Tex. Civ. App. 293, 70 S. W. 237.

In an action against a railroad company for personal injuries, defendant pleaded that the injury was caused by plaintiff's negligence and there was evidence from which such negligence might have been found. Held, that it was error to refuse a requested charge on the issue of contributory negligence. *Houston & T. C. Ry. Co. v. Stewart*, 14 Tex. Civ. App. 703, 37 S. W. 770.

In an action for injuries to a passenger, where there was evidence tending to sustain defendant's plea of contributory negligence, and the general charge of the court submitted the issue of contributory negligence without directly covering the point, presented in a special charge requested, that if the jury believed the incline on

which the accident occurred was wet and slippery, and its being so was obvious to a person intending to walk down it, and that, if they further believed that the injured person had a child in her arms, and attempted hurriedly to descend the incline, without noticing how or where she was stepping, and that her intention to walk down in the manner which she did was a failure to use ordinary care, and that if such failure caused or contributed to cause the accident, they should find for the defendant, the refusal of the special charge was error. *Missouri, K. & T. Ry. Co. of Texas v. Criswell* (Civ. App.), 88 S. W. 373.

In an action against a street railroad company for injuries to a passenger, where defendant pleaded contributory negligence, and the evidence raised the issue, a requested special charge by the defendant affirmatively presenting this defense should have been given, notwithstanding a general charge that, if plaintiff's injuries were caused by defendant's negligence, then unless plaintiff was guilty of contributory negligence she was entitled to recover, and that, if plaintiff was guilty of contributory negligence, then she was not entitled to recover. *Dallas Consol. Electric St. Ry. Co. v. Lasch* (Civ. App.), 99 S. W. 729.

Where a passenger alleged that defendant's train did not stop at her destination, which defendant denied, and pleaded that she was negligent in not getting off the train, and that if plaintiff was injured, as alleged, by remaining in a damp and cold depot at the next station, at which she alighted, it was caused by her not seeking comfortable quarters that were available, such allegations presented distinct issues, which the court should have treated separately in the charge. *St. Louis & S. W. Ry. Co. of Texas v. Ricketts*, 54 S. W. 1090, 22 Tex. Civ. App. 515.

In an action against a railroad com-

pany for injuries to a passenger who was struck by a passing train while attempting to board another train, there was evidence that he voluntarily went to a dangerous place, at which passengers were not ordinarily received. The court defined contributory negligence in the abstract, and stated that all the circumstances in evidence should be considered in determining whether plaintiff was guilty of negligence. Held not a sufficient application of the law to the facts in the case to justify a refusal of a charge to find for defendant if said evidence was believed. *Judgment* (Civ. App. 1898), 48 S. W. 6, reversed. *St. Louis S. W. Ry. Co. of Texas v. Casseday*, 50 S. W. 125, 92 Tex. 525.

**Relevancy.**—In an action by a man and his wife against a steamship company for injuries sustained by the wife owing to her having fallen on a slippery deck, the court charged that, to entitle plaintiffs to recover, they must show by the preponderance of the evidence that her injuries were caused without negligence on the part of plaintiffs, or either of them. Held, that, there being no evidence from which any inference of negligence could be drawn against the husband, the charge was erroneous. *Gillum v. New York, etc., Co.* (Civ. App.), 76 S. W. 232.

In such a case, where the issue necessarily involved the relation and attitude of the parties, and there was evidence tending to show that plaintiff had insisted on getting off the train where she did, an instruction that, while it is the duty of railroad companies to use a high degree of care, they are not insurers of the safety of passengers, but that passengers must themselves use reasonable care, could not be said to be irrelevant. *Conwill v. Gulf, C. & S. F. Ry. Co.*, 85 Tex. 96, 19 S. W. 1017.

**Refusal of Instructions as to Matters Already Covered.**—When the instruction in an action for injuries to a

passenger correctly state the consequences of every act of negligence on the part of the passenger which is supported by the evidence, it is not error to refuse a general instruction that, if the injury was caused by her negligence, she could not recover. *St. Louis, etc., R. Co. v. Ferguson*, 26 Tex. Civ. App. 460, 64 S. W. 797, affirmed in 95 Tex. 685, no op.

Plaintiff, a woman, was injured in alighting from a train by stepping down onto a box, which tipped. Held, that an instruction that if plaintiff stepped carelessly or accidentally on or near the edge of the box, and her fall was occasioned thereby, the jury should find for defendants, was properly refused; a proper instruction on contributory negligence having been given. *Missouri Pac. Ry. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368.

In an action for injury to a passenger from falling from a train, and getting his foot under the wheels, a requested charge that if plaintiff fell from the train, and afterwards, through his own fault, got his foot under the wheels at another time and place, he could not recover for such additional injuries so received, was covered by a charge given,—that if plaintiff did any act that a man of ordinary prudence would not have done, contributing to his injury, he could not recover. *Galveston, H. & S. A. Ry. Co. v. Scott*, 50 S. W. 477, 21 Tex. Civ. App. 24.

In an action for injuries to a passenger while alighting from a train, the court charged that if when plaintiff attempted to alight, he carried a grip on his back and a valise in his hand, and that an ordinarily prudent person situated as plaintiff was would not have attempted to alight while so incumbered, and plaintiff failed to exercise the care that an ordinarily prudent person would have exercised under the same or similar circumstances,

and such failure caused or contributed to his injury, or, if plaintiff as he was coming down the steps stumbled and started to fall, and was caught by defendant's servant, defendant was not liable. Held, that such instruction covered a request to charge that if plaintiff stumbled or fell while he was in the act of alighting and was injured in consequence to any extent, and was caused to fall by any reason except the moving of the footstool by the porter as alleged, then he could not recover. *St. Louis Southwestern Ry. Co. of Texas v. Johnson* (Civ. App.), 94 S. W. 162.

Where, in an action against a railroad company for injuries to a passenger while attempting to board a train at a station, the only issues submitted to the jury were as to the length of time the train stopped, and as to whether the train was negligently started, the refusal to give a charge which sought to confine the effect of the evidence, as to the ticket office not being opened until the train arrived, to the point as to whether the passenger exercised sufficient care in boarding the train, was not error, as the jury could not have weighed that fact, except for the purpose of ascertaining whether the passenger had been diligent in her efforts to board the train. *St. Louis Southwestern Ry. Co. of Texas v. Cannon* (Civ. App.), 81 S. W. 778, affirmed in 91 Tex. 630.

**Form and Sufficiency.**—In an action for injuries to passengers, instructions as to proximate cause and contributory negligence are sufficient, though they give no technical definitions thereof, where there is an explanation of the law as applied to the facts which was of more assistance to the jury than any mere definitions could have been. *Sickles v. Missouri, K. & T. Ry. Co. of Texas*, 13 Tex. Civ. App. 434, 35 S. W. 493.

In an action for death of a passenger, the court did not err in its gen-

eral charge in eschewing the technical expressions as to contributory negligence, where the charge correctly laid down the rule in language intelligible to the jury. *I. & G. N. R. Co. v. Ormand*, 64 Tex. 485.

Contributory negligence consists in the performance of some negligent act or negligently omitting to do some act, which, co-operating with some act or omission of the defendant, contributes to the injury; hence the omission of the modifier "negligently" in an instruction on that subject, in a personal injury action by a passenger, is error. *Selman v. Gulf, C. & S. F. Ry. Co.* (Civ. App.), 101 S. W. 1030.

**Instruction as to Comparative Negligence Properly Refused.**—Where a passenger who had just alighted from defendant's train was injured by falling off the platform at the station, which was unlighted except by a small lamp, an instruction on comparative negligence that if plaintiff was guilty of negligence which caused or contributed to her injuries she could not recover, though her negligence was less than that of defendant, was properly refused as inapplicable. *Missouri, K. & T. Ry. Co. of Texas v. Cannady*, 82 S. W. 1069, 36 Tex. Civ. App. 646.

**As to propriety, form and sufficiency of instructions in particular instances,** see post, "Applications of Rule," V, L, 1, f.

#### f. Applications of Rule.

##### (1) Violation of Rules of Carrier.

**Not Negligence Per Se.**—A requested instruction which assumes negligence on the part of plaintiff in violating a rule of the railway is incorrect since this is not negligence per se, but is for the determination of the jury. *St. Louis, etc., R. Co. v. Ball*, 28 Tex. Civ. App. 287, 66 S. W. 879.

**Evidence as to Rules of Carrier Where Violation Relied on as Contributory Negligence.**—In an action

against a railroad company for injuries to a passenger in which defendant pleads contributory negligence consisting of a violation of its rules, the written rules are the best evidence and parol testimony of such rules is not admissible without the establishment of a proper foundation therefor. *Texas & P. Ry. Co. v. Boyd*, 6 Tex. Civ. App. 205, 24 S. W. 1086.

##### (2) Violation of Conditions in Contract of Carriage.

An instruction in an action against a railway company for injuries to a shipper of live stock while riding on the engine drawing the train, that the contract by which he agreed to ride in the caboose was a valid contract, and that, if he was acting as a reasonably prudent person in riding on the engine, he was entitled to recover, was not objectionable as containing inconsistent propositions, for it merely gave effect to the contract which made proof of a violation prima facie evidence of negligence. (Civ. App.), *Missouri, K. & T. Ry. Co. of Texas v. Avis*, 91 S. W. 877, 41 Tex. Civ. App. 72, judgment affirmed 93 S. W. 424.

##### (3) Violation of Statutes or Ordinances.

Where one, not an employee, attempts to board a moving train within the corporate limits of a town, in violation of an ordinance prohibiting any person not an employee of the road from jumping on or off a moving train, and is injured in so doing, he is guilty of contributory negligence, as a matter of law, though he intended to become a passenger. (Civ. App.) *Mills v. Missouri, K. & T. Ry. Co. of Texas*, 57 S. W. 291, judgment reversed (Sup.), 59 S. W. 874, 94 Tex. 242, 55 L. R. A. 497.

In an action against a street railway for injuries to a passenger caused by an electric shock which threw him from the car while he was preparing to disembark, the car being within a

few feet of the crossing at which he expected to leave, and moving slowly, it was not error to refuse to admit in evidence a city ordinance making it an offense for a passenger to jump off of a moving street car. *Denison & S. Ry. Co. v. Johnson*, 81 S. W. 780, 36 Tex. Civ. App. 115.

In the case of a boy ten years old, injured in jumping off from a street car in motion, the city ordinance making it a misdemeanor so to do should have been admitted in evidence as bearing on the question of contributory negligence. *Denison, etc., R. Co. v. Carter*, 98 Tex. 196, 82 S. W. 782, reversing 79 S. W. 320.

Where plaintiff, a minor, was injured while alighting from a street car, and he claimed that he got off on the demand of the motorman, who testified that plaintiff and others entered the car without his permission, and that, on his stating to them that they must ride inside the car or get off, plaintiff jumped from the car, and was injured, as it was slowing up, evidence of a city ordinance making it a misdemeanor for any person other than an employee or officer of the railroad company to jump from a street car while in motion was admissible on the issue of plaintiff's contributory negligence. Judgment (Civ. App.), 79 S. W. 320, reversed. *Denison & S. Ry. Co. v. Carter*, 82 S. W. 782, 98 Tex. 196, 107 Am. St. Rep. 626.

#### (4) Boarding or Alighting from Moving Train or Street Car.

**In General.**—According to the Texas decisions it would seem that it is not negligence per se for a passenger to board or alight from a moving train at a station, unless it is moving so fast as to make the danger of boarding or alighting obvious to a person of ordinary prudence. *Galveston, etc., R. Co. v. Le Gierse*, 51 Tex. 189; *Galveston, etc., R. Co. v. Smith*, 59 Tex. 406, 407; *Mills v. Missouri, etc., R. Co.*, 94 Tex. 242, 59 S. W. 874, re-

versing 57 S. W. 291; *Gulf, etc., R. Co. v. Rowland*, 90 Tex. 365, 38 S. W. 756, reversing 35 S. W. 31; *Galveston, etc., R. Co. v. Morris*, 94 Tex. 505, 61 S. W. 709, affirming 60 S. W. 813; *Dallas, etc., R. Co. v. Payne*, 98 Tex. 211, 82 S. W. 649, reversing 78 S. W. 1085; *Texas, etc., R. Co. v. Bingham*, 2 Tex. Civ. App. 278, 279, 21 S. W. 569; *Texas, etc., R. Co. v. Bagwell*, 3 Tex. Civ. App. 256, 22 S. W. 829, affirmed in 93 Tex. 651, no op.; *Gulf, etc., R. Co. v. Brown*, 4 Tex. Civ. App. 435, 23 S. W. 618; *Houston, etc., R. Co. v. Stewart*, 14 Tex. Civ. App. 703, 705, 37 S. W. 770; *International, etc., R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102, 38 S. W. 401, affirmed (see 93 Tex. 711, no op.); *Texas, etc., R. Co. v. Elliott*, 26 Tex. Civ. App. 106, 61 S. W. 726; *Texas, etc., R. Co. v. Funderburk*, 30 Tex. Civ. App. 22, 68 S. W. 1006, affirmed in 95 Tex. 688, no op.; *Gulf, etc., R. Co. v. Shelton*, 30 Tex. Civ. App. 72, 69 S. W. 653, affirmed in 96 Tex. 301; *Texas, etc., R. Co. v. Long*, 35 Tex. Civ. App. 339, 80 S. W. 114; *Denison, etc., R. Co. v. Johnson*, 36 Tex. Civ. App. 115, 81 S. W. 780, affirmed in 98 Tex. 614, no op.; *El Paso Elec. R. Co. v. Harry*, 37 Tex. Civ. App. 90, 83 S. W. 735; *San Antonio, etc., R. Co. v. Jackson*, 38 Tex. Civ. App. 201, 85 S. W. 445, affirmed in 101 Tex. 657, no op.; *Lewis v. Houston Elec. Co.*, 39 Tex. Civ. App. 625, 88 S. W. 489, 112 S. W. 593; *Texas, etc., R. Co. v. Whitley*, 43 Tex. Civ. App. 346, 96 S. W. 109, affirmed in 101 Tex. 664, no op.; *Galveston, etc., R. Co. v. Morrison*, 46 Tex. Civ. App. 186, 102 S. W. 143, affirmed in 102 Tex. 582, no op.; *Chicago, etc., R. Co. v. Cleaver*, 48 Tex. Civ. App. 294, 106 S. W. 721, affirmed, no op.; *Missouri, etc., R. Co. v. Meyers* (Civ. App.), 35 S. W. 421; *San Antonio, etc., R. Co. v. Trigo*, 49 Tex. Civ. App. 523, 108 S. W. 1193, affirmed, no op.; *San Antonio, etc., R. Co. v. Dykes*

(Civ. App.), 45 S. W. 758; *Martin v. St. Louis, etc., R. Co.* (Civ. App.), 56 S. W. 1011; *Gulf, etc., R. Co. v. Cleveland* (Civ. App.), 61 S. W. 951; *Houston, etc., R. Co. v. Moss* (Civ. App.), 63 S. W. 894; *St. Louis, etc., R. Co. v. Massay* (Civ. App.), 76 S. W. 585; *Mercher v. Texas, etc., R. Co.* (Civ. App.), 85 S. W. 468, affirmed in 101 Tex. 648, no op.; *St. Louis, etc., R. Co. v. Ratley* (Civ. App.), 87 S. W. 407, affirmed in 101 Tex. 656, no op.; *Dallas, etc., R. Co. v. Lasch* (Civ. App.), 99 S. W. 729; *Selman v. Gulf, etc., R. Co.* (Civ. App.), 101 S. W. 1030; *Gist v. International, etc., R. Co.* (Civ. App.), 102 S. W. 457; *Missouri, etc., R. Co. v. Price*, 48 Tex. Civ. App. 210, 106 S. W. 700.

Ordinarily it is for the jury to determine whether the passenger's act is negligence under all the circumstances. *Missouri, etc., R. Co. v. Price*, 48 Tex. Civ. App. 210, 106 S. W. 700; *Chicago, etc., R. Co. v. Cleaver*, 48 Tex. Civ. App. 294, 106 S. W. 721, affirmed, no op. And see cases cited to preceding paragraph.

An attempt to get upon a slowly moving train is not negligence per se but the question whether or not the act is negligence under the circumstances of a case is one for the jury. *Mills v. Missouri, Kansas & T. Ry. Co. of Texas*, 94 Tex. 242, 59 S. W. 874.

"The rule of the law, in this regard, seems to be that whether a passenger is guilty of contributory negligence in attempting to alight from a moving car, is a question for the jury to determine in view of all the attending and surrounding circumstances, and not a question of law for the decision of the court. 3 *Thomp. on Neg.*, §§ 3565, 3015." *El Paso Elec. R. Co. v. Harry*, 37 Tex. Civ. App. 90, 83 S. W. 735.

In an action for injuries to a passenger by falling from the car, it was not error to refuse to instruct that it

was negligence for the injured passenger to jump off a moving train, since this took the matter of contributory negligence from the jury. *Galveston, H. & N. Ry. Co. v. Morrison*, 102 S. W. 143, 46 Tex. Civ. App. 186.

It is not negligence per se to assist one to get on a moving train. *Houston & T. C. R. Co. v. Stewart*, 37 S. W. 770, 14 Tex. Civ. App. 703.

Where a passenger was injured in jumping from a train slowing up at a flag station to which he had purchased a ticket, his contributory negligence was a question of fact for the jury. *San Antonio & A. P. Ry. Co. v. Dykes* (Civ. App.), 45 S. W. 758.

A passenger did not assume the risk of injury by stepping straight out from a car step after the train had started, unless he knew that such method of alighting was dangerous and liable to result in injury. *St. Louis, etc., R. Co. v. Bryant*, 46 Tex. Civ. App. 601, 103 S. W. 237, affirmed in 101 Tex. 591, no op.

In an action by a passenger against a railroad company for personal injuries, where the evidence was conflicting, both as to whether it was one of defendant's trainmen, or a fellow passenger, who advised plaintiff to step from the train as he did, whereby he was injured, and as to the speed at which the train was moving, the court did not err in refusing a new trial on the ground that the evidence "shows that plaintiff leaped out at right angles from the train, at night, when it was moving fast, at a place unknown to him." *Texas & P. Ry. Co. v. Bagwell*, 3 Tex. Civ. App. 256, 22 S. W. 829.

In an action for injuries sustained by a passenger in leaving a moving train in the belief that it had arrived at his destination, evidence held sufficient to require a submission of plaintiff's case to the jury. *Long v. Red River, T. & S. Ry. Co.* (Civ. App.), 85 S. W. 1048.

Where one boards a passenger train

for the purpose of assisting a lady and her children aboard, with the intention of then getting off, the conductor having notice thereof, and the train starts before he has a reasonable time to do this, the question of his contributory negligence in then attempting to alight is for the jury; the speed of the train not being such as to make his act a clearly reckless one. *Gist v. International & G. N. Ry. Co.* (Civ. App.), 102 S. W. 457.

Plaintiff boarded defendant's train to assist his wife, a passenger, telling the conductor at the time of his purpose. The train remained at the station only one or two minutes, and when plaintiff was only four seats from the door in which he entered, and before he had seated his wife, it started, whereupon plaintiff attempted to get off, and by a sudden lurch was thrown to the ground and injured. Held, that plaintiff's contributory negligence was a question for the jury. *Texas & P. Ry. Co. v. Funderburk*, 68 S. W. 1006, 30 Tex. Civ. App. 22.

Whether plaintiff, who, when informed by the conductor that the train would stop at a certain station to allow him to get off, leaped from the train while it was in motion, was guilty of negligence, was for the jury. *Missouri, K. & T. Ry. Co. of Texas v. Meyers* (Civ. App.), 35 S. W. 421.

**Application of Rule to Street Railways.**—The attempt of a passenger to board a street car while it is in motion is not contributory negligence, as matter of law. *Lewis v. Houston Electric Co.* (Civ. App.), 88 S. W. 489, 39 Tex. Civ. App. 625.

Where a passenger on a street car signaled the car to stop for him to alight, and he testified that, on the car slowing up and then increasing its speed, he concluded it was not going to stop, whereupon he jumped off and was injured, the question of his contributory negligence was for the jury. Judgment, *Dallas Rapid*

*Transit Ry. Co. v. Payne* (Civ. App.), 78 S. W. 1085, reversed. *Dallas Rapid Transit Co. v. Payne*, 82 S. W. 649, 98 Tex. 211.

Whether a passenger is guilty of contributory negligence in attempting to alight from a moving street car is a question for the jury. *El Paso Elec. R. Co. v. Harry*, 27 Tex. Civ. App. 90, 83 S. W. 735.

An instruction that though plaintiff requested the conductor of the street car to let her off at S. street, and he failed to do so, and plaintiff was taken beyond the usual stopping place on said street, "such fact would not authorize or justify the plaintiff in leaving said car while in motion, and if she voluntarily so left the car, and such conduct was negligence which caused or contributed to her injury," they should find for defendant, was erroneous in leaving the question of her negligence to the jury, after telling them that she was not justified in leaving the car while in motion, though she was being carried past her stopping place. *El Paso Electric Ry. Co. v. Ruckman*, 107 S. W. 1158, 49 Tex. Civ. App. 25.

Whether a passenger preparing to disembark from a slowly moving street car within a few feet of the crossing at which he expected to leave was guilty of contributory negligence was a question of fact. *Denison & S. Ry. Co. v. Johnson*, 81 S. W. 780, 36 Tex. Civ. App. 115.

Where plaintiff attempted to alight from one of defendant's cars while the same was in motion, and under such circumstances that a person of ordinary care would not have so acted, she was not entitled to recovery for injuries resulting from the attempt. *Dallas Consol. Electric St. Ry. Co. v. Lasch* (Civ. App.), 99 S. W. 729.

**Effect of Act as Dependent on Capacity to Appreciate Danger.**—An instruction, in an action for injuries to an infant while attempting to

board a moving train, that in determining the issue of contributory negligence the jury should consider the infant's age, intelligence, and discretion, may be given, where there is evidence that the infant was, on account of his age, so wanting in intelligence that he could not appreciate the danger of boarding a moving train. *San Antonio & A. P. Ry. Co. v. Trigo* (Civ. App.), 101 S. W. 254.

Whether a boy between eight and nine years old, and of fair intelligence for his years, was of sufficient discretion to appreciate the danger of riding on freight cars in a railroad yard and guilty of contributory negligence, precluding a recovery for an injury received in consequence of jumping from a train there, was for the jury. *Davis v. St. Louis, etc., R. Co.* (Civ. App.), 92 S. W. 831.

**Advice or Order of Carrier's Employee as Justifying Passenger's Act.**

—A passenger is not guilty of negligence per se in jumping from a moving train by the advice or order of the conductor or other authorized servant of the carrier on whose opinion or judgment in the matter he has a right to rely, if the danger of such act would not be apparent to a man of ordinary prudence. *International, etc., R. Co. v. Rhoades*, 21 Tex. Civ. App. 459, 52 S. W. 979; *Gulf, etc., R. Co. v. Brown*, 4 Tex. Civ. App. 435, 23 S. W. 618; *Texas, etc., R. Co. v. Bingham*, 2 Tex. Civ. App. 278, 21 S. W. 569; *Ft. Worth, etc., R. Co. v. Viney* (Civ. App.), 30 S. W. 252; *Central Tex., etc., R. Co. v. Hoard* (Civ. App.), 49 S. W. 142.

Where a passenger was injured in alighting from a moving train he can not recover, even if he was not guilty of negligence, unless the agents of defendant in charge of the train invited him to so alight, and in so doing he acted with ordinary prudence. *International & G. N. Ry. Co. v. Rhoades* (Civ. App.), 51 S. W. 517.

If the car is in rapid motion, or the circumstances are such to indicate that it is dangerous to alight, neither the advice nor directions of the conductor will justify the act. *Houston, etc., R. Co. v. Leslie*, 57 Tex. 83.

And the fact that the passenger is being carried by the station at which he wishes to alight will not excuse his act. *Houston, etc., R. Co. v. Leslie*, 57 Tex. 83.

"By reason of the rapid speed of a train, or the existence of facts and circumstances at the time that a passenger attempts to board or leave it, the indications of danger may be so apparent and obvious that one must necessarily be charged with knowledge of its existence; and in such a case the court might conclude, as a matter of law, that it would be contributory negligence to attempt to leave or board the train under the circumstances. But in a case of the character before us, where it is shown by the facts that the train was going at a slow rate of speed, and where the appellee alighted there was a depot platform, which he had the right to expect was in a reasonably safe condition, and where the disembarkation was at the request of one whom he had the right to believe would not have given a command unless it was safe for him to alight, it can not be said that leaving the train under the circumstances was contributory negligence. *Texas, etc., R. Co. v. Bingham*, 2 Tex. Civ. App. 278, 21 S. W. 569; *International, etc., R. Co. v. Downing*, 16 Tex. Civ. App. 643, 41 S. W. 190, affirmed in 93 Tex. 643, no op.; *Gulf, etc., R. Co. v. Brown*, 4 Tex. Civ. App. 435, 23 S. W. 618; *Kansas, etc., R. Co. v. Dorrough*, 72 Tex. 108, 10 S. W. 711; *Mills v. Missouri, etc., R. Co.*, 94 Tex. 242, 59 S. W. 874, reversing 57 S. W. 291; *Galveston, etc., R. Co. v. Sanchez* (Civ. App.), 65 S. W. 893." *Gulf,*



etc., *R. Co. v. Shelton*, 30 Tex. Civ. App. 72, 69 S. W. 653, affirmed in 96 Tex. 301.

In *Kansas, etc., R. Co. v. Dorrough*, 72 Tex. 108, 10 S. W. 711, it was held that the invitation of the conductor to a person to attempt to board a moving train was not of itself a justification of such attempt, but was a fact proper to be looked to in determining the question of contributory negligence.

In an action for injuries sustained by jumping off a moving train, a charge calculated to lead the jury to believe that plaintiff could recover, if the conductor negligently told him to get off, was erroneous, since this would not be true, if plaintiff did not rely on what the conductor said, or was not justified by the circumstances in doing so. *Central Texas & N. W. Ry. Co. v. Hoard* (Civ. App.), 49 S. W. 142.

A passenger alighting from a moving train at the direction of the conductor or brakeman is not, as a matter of law, guilty of contributory negligence, where there was no obvious danger either in the locality where he alighted or the rate of speed of the train. *Gulf, C. & S. F. Ry. Co. v. Brown*, 4 Tex. Civ. App. 435, 23 S. W. 618.

It is not contributory negligence for a passenger, inexperienced in getting on and off trains, believing that the train was moving slowly by a station, though it was too dark to see how fast it was moving, to jump off at the usual stopping place under the direction, and relying on the skill and care of the conductor, where the train was not going so fast that the danger of alighting was obvious to one so inexperienced. *International & G. N. Ry. Co. v. Rhoades*, 21 Tex. Civ. App. 459, 52 S. W. 979.

Where company is negligent in not stopping train at station, and passenger is not negligent in jumping from

moving train on advice of servant, passenger may recover for injuries. *Texas, etc., R. Co. v. Bingham*, 2 Tex. Civ. App. 278, 279, 21 S. W. 569.

Where a passenger on a train under the control of a switch crew was ordered by the only member thereof present to alight, he had a right to presume that such employee had authority to give such commands. (Civ. App. 1902) *Gulf, C. & S. F. Ry. Co. v. Shelton*, 69 S. W. 653; *Id.*, 70 S. W. 359. Affirmed (1903) 72 S. W. 165, 96 Tex. 301.

Plaintiff flagged a train at a flag station. The train did not stop, though the signal was seen, but, as it passed, the conductor seized a coat that was upon plaintiff's arm, and told him to jump on, in attempting to do which he was injured. Plaintiff testified that he did not know how fast the train was running, but thought he could safely board it. Another witness testified that the train was running six or eight miles an hour. Held, that a verdict for plaintiff would not be set aside on appeal, on the ground of contributory negligence. *Kansas & G. S. L. R. Co. v. Dorrough*, 72 Tex. 108, 10 S. W. 711.

Where a child 11 years old attempted to board a slowly moving train in compliance with the direction of the railroad station agent, and fell between the cars, and was injured, he was not negligent as a matter of law, though he knew that his act was dangerous. *San Antonio & A. P. Ry. Co. v. Trigo*, 108 S. W. 1193, 49 Tex. Civ. App. 523.

Where plaintiff, who had boarded a train to assist another and her children to board and procure seats was inexperienced in riding on and getting off and on trains, and did not know the speed at which the train was going, it having started before he alighted, or the danger of alighting therefrom, and in so doing he relied on the conductor's statement that the train was

going slowly and he could alight with safety, and it was dark, he was not guilty of contributory negligence in attempting to alight from the train so as to bar a recovery for injury thereby sustained. *Missouri, K. & T. Ry. Co. of Texas v. Hibbitts*, 109 S. W. 228, 49 Tex. Civ. App. 419.

Where a passenger, who had been misled by a statement of the conductor to believe that a change of cars was necessary, attempted to alight while the train was in motion, under the direction and command of an employee, the company was not relieved of liability by an announcement by the conductor in the coach as to what change was required, which the passenger could have heard had he not been asleep. (1902) *Gulf, C. & S. F. Ry. Co. v. Shelton*, 69 S. W. 653, 30 Tex. Civ. App. 72; (Civ. App. 1092), *Id.*, 70 S. W. 359. Affirmed (1903) 72 S. W. 165, 96 Tex. 301.

A passenger boarded a train and paid his fare to a regular station at which the train did not stop under the company's rules. Such passenger was ignorant of the rules, and the conductor agreed to stop the train at or near the station for him to get off. Near the station the train slowed up, and such passenger and the conductor went out on the platform, where the conductor repeatedly told him to get off, which he at first declined to do, but finally did attempt to get off, and the train gave a sudden jerk, throwing him to the ground and injuring him. Held, that such passenger was not guilty of contributory negligence. *Texas & P. Ry. Co. v. Elliott*, 61 S. W. 726, 26 Tex. Civ. App. 106.

A passenger who, knowing that it was dangerous to do so, attempted to board a moving train on a switch track near a station platform at which it would have stopped and afforded him an opportunity to get on, was guilty of contributory negligence in

law, although, while the train was standing on the switch track, he was signaled to by a brakeman in such a manner as to suggest to him that he board the train. *Texas Midland R. R. v. Ellison*, 87 S. W. 213, 39 Tex. Civ. App. 172.

The gist of an action for injury to a passenger in jumping at the direction of another from a train on its being stopped after carrying her past her destination lies in the fact of being wrongfully carried beyond her station and directed by an employee to jump off for the jump might as well have injured her at the depot, and if not made under the direction of an employee, the carrier would not be liable for her injury. *Texas & P. Ry. Co. v. Woods*, 15 Tex. Civ. App. 612, 40 S. W. 846.

One riding on a train under a special agreement with the conductor that the train would slack up enough for him to alight with safety at a certain place can not hold the railroad responsible for injuries sustained in alighting from the train at the place agreed upon, where he acted upon his own motion and judgment, without the knowledge or concurrence of the conductor, at a time when the train was in fact going too fast to permit him to alight in safety, although he used ordinary care in judging and determining that it was safe for him to alight. Judgment (Civ. App. 1904), 84 S. W. 365, reversed. *St. Louis Southwestern Ry. Co. of Texas v. Highnote*, 86 S. W. 923, 99 Tex. 23.

In an action against a railroad for injuries to a passenger between whom and the conductor it was agreed that the train should slow up at a certain point, and the passenger should alight therefrom while it was moving, a charge that plaintiff assumed whatever risk there was in the act, provided the train was slowed up as agreed, or what was reasonably understood by the conductor to be a safe speed for plaintiff to alight, was not subject to

the objection of submitting the issue as to the understanding of the conductor on the safety of the speed, but merely related to the risk assumed by plaintiff. (Civ. App. 1904) *St. Louis Southwestern Ry. Co. of Texas v. Highnote*, 84 S. W. 365, judgment reversed (1905) 86 S. W. 923, 99 Tex. 23.

In an action against a railroad for injuries to a passenger, between whom and the conductor it was agreed that the train was to slow up and he was to alight therefrom while it was moving, a charge based on the theory that the agreement was to stop the train for plaintiff to alight was properly refused. (Civ. App. 1904) *St. Louis Southwestern Ry. Co. of Texas v. Highnote*, 84 S. W. 365, judgment reversed (1905) 86 S. W. 923, 99 Tex. 23.

A passenger alighting from a slowly moving train, in the dark, on a depot platform, at the request of an employee, was not guilty of contributory negligence. (1902) *Gulf, C. & S. F. Ry. Co. v. Shelton*, 69 S. W. 653, 30 Tex. Civ. App. 72; (Civ. App. 1902) *Id.*, 70 S. W. 359. Affirmed (1903), 72 S. W. 165, 96 Tex. 301.

It is not contributory negligence for a passenger inexperienced in getting on and off trains, and believing that the train was moving slowly by his station, though it was too dark to see how fast it was moving, to jump off at the usual stopping place, under the direction, and relying on the skill and care, of the conductor, where the train was not going so fast that the danger of alighting was obvious to one so inexperienced. *International & G. N. Ry. Co. v. Rhoades* (Civ. App.), 51 S. W. 517.

A train did not stop at the station long enough for plaintiff's wife to get off, but after it had again started, and when a short distance from the station, it slowed up for her to get off, without stopping. At the request of the brakeman, she jumped off while the train was moving, and was in-

jured. Held, that she was not negligent. *Ft. Worth & D. C. Ry. Co. v. Viney* (Civ. App.), 30 S. W. 252.

A female passenger, whose train is not stopped at her destination, but the speed of which is slackened so as to enable male passengers to alight in her presence, is not guilty of contributory negligence in jumping off the train, pursuant to directions given her by the carrier's servants. *Texas & N. O. Ry. Co. v. Bingham*, 2 Tex. Civ. App. 278, 21 S. W. 569.

Evidence in an action for injuries to one while boarding a moving train, after he had been ordered to alight therefrom and procure a ticket, examined, and held, that the question whether the order to alight was given by an employee on the train was for the jury. *San Antonio & A. P. Ry. Co. v. Trigo* (Civ. App.), 101 S. W. 254.

Where a passenger on a train, who has been carried beyond his place of destination by reason of his being asleep, unknown to the carrier, when notice of the place was given, and the train stopped, is injured by his jumping from the train while it is in motion, being advised by a brakeman that it was not dangerous to do so, the carrier is not liable, as the giving of such advice is not a duty delegated to brakeman. *Missouri, K. & T. Ry. Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496.

**Violation of Statute or Ordinance by Carrier as Affecting General Rule as to Contributory Negligence.**—In an action against a railroad company for the death of a passenger while attempting to board a train at a station, a charge that if the train did not stop at the station five minutes as required by statute the company was liable, was erroneous for eliminating the question of contributory negligence of decedent in attempting to board the train in motion. Gal-

veston, Harrisonburg & S. A. R. Co. v. Le Gierse, 51 Tex. 189.

A passenger on a railway car who leaps from it when the train is in such rapid motion as to render the act manifestly unsafe, can not recover damages for the personal injuries suffered by his thus leaping from the car; nor are his rights affected by the act of the employees managing the train, in not stopping at the depot where the passenger stepped in the car the five minutes required by statute, whereby he was being carried away without his consent. *Houston, etc., R. Co. v. Leslie*, 57 Tex. 83.

A town ordinance making it unlawful to run trains at a greater speed than six miles per hour within the limits of the town was for the protection of persons who might be lawfully on or crossing the track and had no application to one attempting to board a moving train at a station. *Houston & T. C. R. Co. v. Schutte* (Civ. App.), 91 S. W. 806.

Where it was agreed between a passenger and the conductor that the train should slow up at a certain point to permit the passenger to alight, the passenger had the right to assume when he did alight that the train was not moving at a rate faster than that authorized by an ordinance of the city in which it was running. (Civ. App. 1904) *St. Louis Southwestern Ry. Co. of Texas v. Highnote*, 84 S. W. 365, judgment reversed (1905), 86 S. W. 923, 99 Tex. 23.

A municipal ordinance limiting the speed of trains within the city to six miles per hour is for the protection of persons who are lawfully upon or crossing the track of the railroad, and a violation thereof by the railroad does not constitute negligence with reference to passengers upon a train who leave the same while it is in motion. Judgment (Civ. App. 1904), 84 S. W. 365, reversed. *St. Louis Southwestern Ry. Co. of Texas v. Highnote*, 86 S. W. 923, 99 Tex. 23.

A passenger who is injured while attempting, without the knowledge of those in charge of the train, to alight therefrom at a crossing, can not complain that failure to bring the train to a full stop as required by Rev. St. 1895, art. 4507, is negligence. *Mercher v. Texas Midland R. R.* (Civ. App.), 85 S. W. 488.

**Effect of Act as Dependent upon Whether Train at or between Stations.**

—In *Gulf, etc., R. Co. v. Cleveland* (Civ. App.), 61 S. W. 951, the court states the rule, as laid down by the decisions, to be that the act of a passenger in alighting from a train at a station is not contributory negligence per se, and that this issue should be submitted to a jury, except, perhaps, in very exceptional cases; the rule being based on the fact that at stations the carrier owes the passenger certain duties with regard to alighting. But where a passenger undertakes to alight from a train while it is in motion at other than a stopping place, without any act of the carrier's servants concurring in or inducing the act, and without any notice or knowledge by its servants that such act is contemplated, there is nothing upon which to charge defendant with negligence. If a person, whether a passenger or trespasser, received his injury in jumping from the train before it reached the station, under such circumstances, he can not recover, whether he was careful in doing so or not.

The evidence showed that the injuries received were caused by plaintiff's alighting from a train between stations while it was running at its ordinary speed. Held, that plaintiff was guilty of contributory negligence. *High v. International & G. N. R. Co.* (Civ. App.), 55 S. W. 526, affirmed in 93 Tex. 709, no op.

If by his own fault and negligence, a passenger is carried beyond his place of destination, and attempts to get off the train while it is in motion,

without being compelled to do so by the carrier, he assumes the risk of such act, and can not recover for consequent injuries. *Missouri, K. & T. Ry. Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496.

A passenger who has been carried past his station is guilty of contributory negligence in alighting from a fast moving train in the dark. *For-dyce v. Allen* (Civ. App.), 26 S. W. 437, 438.

**Effect of Act Dependent upon Exercise of Proper Care by Passenger.**

—If a passenger on leaving a car while in motion took no more risk in so doing than a man of ordinary prudence would have taken under similar circumstances, he was not negligent. *Gulf, C. & S. F. Ry. Co. v. Rowland*, 90 Tex. 365, 38 S. W. 756.

Stepping from a moving railway train, which checks its speed at a station instead of stopping, as required by law, is not necessarily negligence in him who thus steps from it and is thereby injured. If in stepping from the train he takes no more risk than a man of ordinary prudence would take under like circumstances, he is not thereby precluded from recovering for injuries sustained. *Galveston, H. & S. A. Ry. Co. v. Smith*, 59 Tex. 406.

If a train stops at a station a reasonable time for a passenger to alight with safety, and the passenger in attempting to leave the train does not act as a person of ordinary care and prudence would act under the circumstances, and his failure to exercise ordinary care contributes to his injury, he can not recover. *Texas Midland R. R. v. Ritchey*, 108 S. W. 732, 49 Tex. Civ. App. 409.

**Custom as to Alighting as Exonerating Passengers from Contributory Negligence.**—Where a passenger attempted to alight from a train at a crossing without notifying those in

charge of the train, the facts that it was a known custom for passengers to alight at the crossing, and that the train started forward with a jerk which threw the passenger from the step, did not relieve him from the effect of his own contributory negligence. *Mercher v. Texas Midland R. R.* (Civ. App.), 85 S. W. 468.

**Necessity for Finding That Plaintiff Knew Train Was in Motion.**—In an action by a passenger for personal injuries it was improper to condition the finding of contributory negligence on alighting from a moving train on a finding that plaintiff knew it was moving. *Galveston, H. & S. A. Ry. Co. v. Hubbard* (Civ. App.), 70 S. W. 112.

**Evidence.**—Where a passenger had been instructed and directed by an employee to leave a moving train, evidence that no one stopped or offered to stop the train, or cautioned him not to alight, was admissible on the question of contributory negligence. (1902) *Gulf, C. & S. F. Ry. Co. v. Shelton*, 69 S. W. 653, 30 Tex. Civ. App. 72; (Civ. App. 1902) *Id.*, 70 S. W. 359. Affirmed (1903), 72 S. W. 165, 96 Tex. 301.

In an action for injuries to a passenger who alighted from a moving train in the belief that it had arrived at his destination, plaintiff should have been allowed to testify as to whether the action of the brakeman in making room for plaintiff, and stating to others that plaintiff wanted to get off, had anything to do with his getting off. *Long v. Red River, T. & S. Ry. Co.* (Civ. App.), 85 S. W. 1048.

Where plaintiff was charged with contributory negligence in alighting from a train in motion, his testimony that he thought it safe to attempt it, and that the platform was lighted and the place smooth, is admissible as showing his reasons for so doing. *International & G. N. R. Co. v. Satter-*

white, 47 S. W. 41, 19 Tex. Civ. App. 170.

Where a passenger was injured in attempting to board a moving train, which was equipped with gates leading to the platform, which were to be closed while the train was in motion, evidence that the passenger had repeatedly seen the gateman close the gates before leaving stations is admissible, with evidence that the gates were opened when he attempted to get on, as bearing on the character of his attempt to enter the train. Judgment (Civ. App.), 57 S. W. 291, reversed. *Mills v. Missouri, K. & T. Ry. Co. of Texas*, 59 S. W. 874, 94 Tex. 242, 55 L. R. A. 497.

In an action against a carrier for injuries sustained by a minor passenger, who alleged that he was pushed off the platform of a car by the porter, it was proper for the plaintiff to prove that when the train reached his destination he went to the front door of the car to open it and get out, but found it locked, in order to show the exercise of reasonable diligence on his part in attempting to alight. *International & G. N. R. Co. v. Hugen*, 100 S. W. 1000, 45 Tex. Civ. App. 326.

It was not error to admit evidence that other persons who had attended ladies on the train jumped off just before and in the presence of plaintiff, and that they were not injured, as tending to produce a conclusion in plaintiff's mind that he too might jump with safety. *Texas & P. Ry. Co. v. Crockett*, 66 S. W. 114, 27 Tex. Civ. App. 463.

Where the question of the portion of the train in which a passenger was, or whether he was attempting to leave the train at the time when he was injured, is in issue in an action against the company therefor, evidence of plaintiff's reason for being in a particular part of the train or for leaving the train is admissible.

*Gulf, C. & S. F. Ry. Co. v. Cleveland* (Civ. App.), 61 S. W. 951.

Where plaintiff alleged that after he had secured a firm footing on the steps of defendant's car as a passenger one of defendant's employees negligently and violently closed the door of the vestibule, thereby knocking plaintiff from the train, causing the injury complained of, evidence was admissible that plaintiff and others had frequently boarded trains at the same station when in as rapid motion as the train at the time under consideration, as tending to show whether plaintiff was using the degree of caution and prudence required of him. *Malone v. Texas & P. Ry. Co.*, 109 S. W. 430, 49 Tex. Civ. App. 398.

**Instructions—Duty to Instruct.**—In an action by a passenger against a railroad company to recover for personal injuries sustained while jumping from a moving train, held the failure to charge on whether plaintiff was guilty of contributory negligence was error, the court's attention having been called thereto by a refused instruction on that question, though such refused instruction was not technically correct. *Texas, etc., R. Co. v. Atchison* (Civ. App.), 54 S. W. 1075.

In an action for injuries to a passenger alighting from a moving train, it was error for the court, in affirmatively submitting plaintiff's view of the case to the jury, to charge them to find for plaintiff if they found certain facts, without including in the charge the question of contributory negligence. *Texas Southern R. Co. v. Long*, 80 S. W. 114, 35 Tex. Civ. App. 339.

Where the only negligence alleged is the sudden starting of the car before plaintiff could alight, and a witness testified that plaintiff "did not start to get off the car until the conductor had started the car," the refusal to instruct that plaintiff could not recover if he attempted to alight

while the car was in motion is error. *El Paso Electric Ry. Co. v. Boer* (Civ. App.), 108 S. W. 199.

In an action for injuries to a passenger while attempting to board a train in motion, defended on the ground of contributory negligence, the carrier was entitled to a charge that if the passenger boarded a moving train, and knew that it was dangerous and that it was negligence on his part to make the attempt, and that negligence proximately contributed to the injuries, a verdict for the carrier should be rendered. *San Antonio & A. P. Ry. Co. v. Trigo* (Civ. App.), 101 S. W. 254.

**Charge as to Proximate Cause.—**

Where in an action against a railroad company for injuries to a passenger while alighting from a car, the only ground of contributory negligence pleaded or proven was that plaintiff negligently attempted to alight from the car while it was in motion, a charge that, in order to find for defendant on the ground of contributory negligence, the jury must find, not only that plaintiff was negligent in attempting to alight from the moving car, but that such negligence was the proximate cause of the injury, was erroneous. *Dallas, etc., St. R. Co. v. McAllister*, 41 Tex. Civ. App. 131, 90 S. W. 933. See, also, *Texas, etc., R. Co. v. McCoy*, 90 Tex. 264, 38 S. W. 36; *Gulf, etc., R. Co. v. Rowland*, 90 Tex. 365, 38 S. W. 756, reversing 35 S. W. 31; *Gulf, etc., R. Co. v. Hill*, 29 Tex. Civ. App. 12, 70 S. W. 103; *Gulf, etc., R. Co. v. Bryant*, 30 Tex. Civ. App. 4, 66 S. W. 804; *Mercher v. Texas, etc., R. Co.* (Civ. App.), 85 S. W. 468, 470, affirmed in 101 Tex. 648, no op.; *Ebert v. Gulf, etc., R. Co.* (Civ. App.), 49 S. W. 1105; *Wilcox v. San Antonio, etc., R. Co.*, 11 Tex. Civ. App. 487, 33 S. W. 379, 381, affirmed in 93 Tex. 653, no op.; *Gulf, etc., R. Co. v. Lovett* (Civ. App.), 74 S. W. 570, af-

firmed in 97 Tex. 436; *Dallas, etc., R. Co. v. Ison*, 37 Tex. Civ. App. 219, 83 S. W. 408.

Where a passenger jumps from a moving train and is injured, the alighting from the train is, as a matter of law, the immediate cause of the injury, and hence an issue of proximate cause is not involved. *Central Texas & N. W. Ry. Co. v. Hoard* (Civ. App.), 49 S. W. 142.

In an action for injuries to a passenger through falling from the platform of a car on which he was riding, a charge on his contributory negligence need not state that it must have been the proximate cause of the injury. *Ebert v. Gulf, C. & S. F. Ry. Co.* (Civ. App.), 49 S. W. 1105.

Where plaintiff alleged that, while alighting from defendant's train at a station, he was violently thrown down and injured by defendant's negligence in starting the train suddenly, and defendant alleged that plaintiff's injuries were due to his negligence in jumping from a moving train, the only issue raised was as to which party was negligent; rendering an instruction as to proximate cause erroneous, as misleading. *Gulf, C. & S. F. Ry. Co. v. Rowland*, 38 S. W. 756, 90 Tex. 365.

Where the immediate cause of an injury was a passenger's re-entering his train at destination, and jumping therefrom while it was in motion, a charge on proximate cause was properly refused. *Texas & P. Ry. Co. v. Born*, 50 S. W. 613, 20 Tex. Civ. App. 351.

Where, in an action for injuries to a passenger while alighting from a street car, defendant claimed that plaintiff jumped from the car while it was still in motion and offered evidence to such effect, an instruction that, if plaintiff was guilty of contributory negligence in alighting from the car, and such negligence proximately caused the injury, plaintiff was

not entitled to recover, was not erroneous as submitting as an issue the question whether the supposed negligence of plaintiff, if established, necessarily contributed to his fall, about which there was no question. *Parks v. San Antonio Traction Co.*, 100 Tex. 222, 94 S. W. 331, 98 S. W. 1100, reversing 93 S. W. 130.

**Instructions Held Proper.**—A charge is proper that if plaintiff in leaving a moving train was contributorily negligent he can not recover. *Gulf, etc., Ry. v. Buford*, 2 Tex. Civ. App. 115, 117, 21 S. W. 272 (see 85 Tex. 430).

In a suit against a railroad company for personal injuries suffered by plaintiff in attempting to alight from defendant's train, an instruction to find for defendant if, "at the time plaintiff attempted to leave said train," it "was running at such speed as rendered it unsafe for plaintiff to attempt to leave the train," and "plaintiff did, while the train was so moving, negligently attempt to leave said train," and his effort so to do was the immediate, proximate cause of plaintiff's being injured, correctly enunciates the rule as to contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. McElree* (Civ. App.), 41 S. W. 843, 16 Tex. Civ. App. 182.

Plaintiff's wife was injured by a fall while alighting from a train, and she testified that she had several bundles, and started to get off as soon as she could after the train stopped. The court charged the jury to find for plaintiff if his wife used reasonable diligence to get off, conditioned as she was, and the train started with a jerk, and caused her to fall, while she was using ordinary care, but that, though the train did not stop long enough, the jury should find for defendant if she tried to get off while the train was moving, and in so doing was herself guilty of a want of ordinary care; and that plaintiff could not recover if the train stopped long

enough, and his wife negligently remained on the train until it started, and then tried to get off. Held, that there was no error prejudicial to defendant. *Texas & P. Ry. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

In an action by a passenger for injuries received while attempting to alight from a slowly moving train, an instruction that if the jury believe a person of ordinary prudence would not have attempted to leave the train under the circumstances, or that defendant's servants stopped the train at the station for a time reasonably sufficient for plaintiff to alight in safety, or used such high degree of care as to enable her to alight in safety, as very cautious and prudent persons would have done under the circumstances, then to find for defendant, sufficiently guards the rights of defendant on the issue of contributory negligence. *St. Louis S. W. Ry. Co. of Texas v. Massay* (Civ. App.), 76 S. W. 585.

In an action for injuries to an alighting passenger, a charge that if the passenger left or attempted to leave defendant's train before it reached the accustomed place for stopping, and while it was still in motion, and in so doing failed to exercise that degree of care which an ordinarily prudent man would have exercised under the same circumstances, and if such failure contributed to his injuries, there could be no recovery therefor, even though defendant negligently failed to stop the train at the station, correctly stated the law of contributory negligence under the circumstances. *Galveston, H. & S. A. Ry. Co. v. De Castillo* (Civ. App.), 83 S. W. 25.

In an action against a carrier for injuries to a passenger owing to defendant not having stopped the train on which plaintiff was a passenger a sufficient length of time to enable him to alight in safety, it appeared



that, when plaintiff's station was called, he went to the rear end of the car and attempted to leave by the door by which he had entered, but found it locked, whereby he was obliged to pass to the other end of the car in order to alight. A special charge stated that it was the duty of plaintiff to use ordinary care for his own safety, and that, if in attempting to alight from the train he failed to use ordinary care to see whether the rear door of the car was fastened and in first going back to that door and in returning to the other in attempting to leave the train while it was in motion, or in the manner in which he attempted to go down the steps, and if a person of ordinary care would not have acted in such manner, and his failure to use ordinary care in any of such particulars proximately contributed to his injury, it would amount to contributory negligence. Held, that the charge fully and clearly stated the law on the issue of contributory negligence. *Houston & T. C. R. Co. v. Easton*, 97 S. W. 833, 44 Tex. Civ. App. 95.

A charge that if plaintiff was negligent in attempting to board a moving train, and such negligence proximately caused or contributed to his injury, plaintiff could not recover, was not erroneous as submitting as an issue the question whether the negligence of plaintiff, if established, necessarily contributed to his injury. *Missouri, K. & T. Ry. Co. of Texas v. Davis* (Civ. App.), 108 S. W. 1022.

Where, in an action for injuries to a passenger while alighting from a street car, defendant claimed that plaintiff jumped from the car while it was still in motion and offered evidence to such effect, an instruction that, if plaintiff was guilty of contributory negligence in alighting from the car, and such negligence proximately caused the injury, plaintiff was not entitled to recover, was not erroneous

as submitting as an issue the question whether the supposed negligence of plaintiff, if established, necessarily contributed to his fall about which there was no question. *Parks v. San Antonio Traction Co.*, 94 S. W. 331, 100 Tex. 222, remanding *San Antonio Traction Co. v. Parks* (Civ. App.), 93 S. W. 130, which is reversed (Sup.) 98 S. W. 1100.

In an action against a railroad company for injuries received in alighting from a moving train, a charge that in determining whether plaintiff was guilty of contributory negligence in getting off the train the jury should consider the speed of the train, nature of the ground where he alighted, hour of day or night, distance to ground, plaintiff's age and physical condition, his experience in getting off trains in motion, and his manner of getting off, etc., is not subject to the objection that it failed to state whether the circumstances enumerated were to be considered as for or against plaintiff, since the question submitted to the jury was that of contributory negligence *vel non*, and had the court instructed that the circumstances were to be considered for or against plaintiff, it would have been objectionable as on the weight of the evidence. *St. Louis Southwestern Ry. Co. of Texas v. Cunningham*, 106 S. W. 407, 48 Tex. Civ. App. 1.

**Instructions Held Erroneous.**—In an action for injuries received from a defect in a platform while alighting from a train, an instruction that if plaintiff leaped from the train while it was in rapid motion, and disembarked in a reckless and negligent manner, he could not recover, is erroneous, as the train need not be moving rapidly, if plaintiff negligently leaped from it, and it is not necessary that there be a concurrence of negligence and recklessness. *Missouri K. & T. Ry. Co. v. Wylie* (Civ. App.), 26 S. W. 85.

In an action against a railroad company for injuries received from a defective platform while alighting from, a moving train, where the pleadings put in issue the question of contributory negligence, it is reversible error to instruct that plaintiff can not recover if he leaped from the train in a reckless manner, without also submitting the issue of contributory negligence in leaping from the train at all. *Missouri, K. & T. Ry. Co. v. Wyllie* (Civ. App.), 33 S. W. 771.

A passenger who was guilty of contributory negligence in attempting to board a moving train at the time and place that he made the attempt, can not recover for injuries sustained, regardless of whether or not he got off the train at a point which was not intended as a place for passengers to alight, or whether or not he was guilty of negligence in so alighting from the train, and a charge requiring the jury to find all those facts conjunctively in order to render a verdict for defendant is erroneous. *Texas Midland R. R. v. Ellison*, 87 S. W. 213, 39 Tex. Civ. App. 172.

In an action for personal injuries to a street car passenger, the court instructed that if the jury believe that it was negligence on the part of plaintiff to have so taken up her position, if she did so, upon the running board, and to have so attempted to step from said board to the ground while the car was moving, etc. The jury were elsewhere instructed that if she took a position on the running board before the car stopped, and this was negligence, the verdict must be for defendant; and, also, that if she left the car while in motion, and this was negligence, to find for defendant. Held, that the instructions must have conveyed to the jury that negligence in either one or the other of said acts would require a finding for defendant, and the instruction first given did not require reversal on the ground

that where the doing of a single act on the part of plaintiff may constitute negligence, it is error for the court to charge that, to render plaintiff guilty of contributory negligence, the jury must find that she did two or more acts, and that in doing each of them she was negligent. *El Paso Electric Ry. Co. v. Ruckman*, 107 S. W. 1158, 49 Tex. Civ. App. 25.

In an action for injuries to a passenger by the premature starting of a train, an instruction that alighting from a moving train was not an act of negligence, unless the then conditions and circumstances made it so, of which the jury was the judge, was objectionable as misleading. *Gulf, C. & S. F. Ry. Co. v. Booth* (Civ. App.), 97 S. W. 128.

"The jury might well have inferred from the charge that, as a matter of law, the general rule is that it is not negligence to get off a moving train, and that the circumstances must be produced to prove an exception. It tended to confuse, rather than guide, the jury to a correct verdict." *Gulf, etc., R. Co. v. Booth* (Civ. App.), 97 S. W. 128.

In an action against a railroad company for injuries to plaintiff's wife resulting from negligence in not properly stopping its train at a station, it is error to instruct that if the wife hurriedly left the train on its stopping a second time, without waiting for assistance from the trainmen, the company was not liable for injuries happening to her while so alighting, since alighting from the train without waiting for assistance is not negligence per se, and it was a question for the jury whether, under the circumstances of the particular case, it constituted contributory negligence. *Martin v. St. Louis S. W. Ry. Co. of Texas* (Civ. App.), 56 S. W. 1011.

A charge "Although you may believe from the evidence that defendant's train did not stop at C. station

a sufficient length of time to permit plaintiffs to board said car with safety as alleged in their petition, yet, if you should further believe from the evidence that an ordinarily prudent person under the same circumstances in the exercise of ordinary care could have boarded said train with safety, your verdict must be for the defendant" is contradictory. *Houston & T. C. Ry. Co. v. Stewart*, 14 Tex. Civ. App. 703, 37 S. W. 770.

Where defendant's evidence was sufficient to warrant a finding that plaintiff jumped from defendant's street car while it was in motion, it was error to instruct that, if plaintiff was guilty of contributory negligence in alighting from the car, and such negligence proximately caused the injury, plaintiff was not entitled to recover, since if he was guilty of negligence in alighting under the circumstances, the negligence was the proximate cause of his injuries. (Civ. App.) *San Antonio Traction Co. v. Parks*, 93 S. W. 130, remanded *Parks v. San Antonio Traction Co.*, 100 Tex. 222, 94 S. W. 331, and reversed in 98 S. W. 1100.

It is not error to refuse to charge that failure to stop at a station "does not justify a person in attempting to board a train in motion," where the jury have already been told that plaintiff can not recover if he attempted to board the train while in motion, and when an ordinarily prudent man would not have made the attempt. *Kansas & G. S. L. R. Co. v. Dorough*, 72 Tex. 108, 10 S. W. 711.

Where plaintiff, who had been employed as a railroad station agent, telegraph operator, and expressman, was injured while being transported in a freight car with his furniture, testified that he remained in the car at a junction point where the injury occurred for the reason that he did not know when the car would continue the journey, it was not error to re-

fuse to charge that, if he remained in the car while in the yards at the junction on the side tracks, his act in so doing was negligence. *Texas & P. Ry. Co. v. Adams*, 72 S. W. 81, 32 Tex. Civ. App. 112.

In an action for injuries to a passenger, defendant requested an instruction that "though you may believe that plaintiff was injured, yet, unless you believe that she was injured by and through the negligence of the defendant in suddenly starting or lurching the car forward, you should find for defendant," was erroneous, where the case was submitted, not only on the theory stated in the instruction, but also on the theory that the car did come to a stop, but that it slowed down, and plaintiff, thinking it was about to stop, attempted to alight, and was thrown to the ground. *El Paso Electric Ry. Co. v. Ruckman*, 107 S. W. 1158, 49 Tex. Civ. App. 25.

In an action against a street railroad for injuries to plaintiff's wife through the negligent starting of a car while she was alighting therefrom, an instruction that if the car stopped and the wife made no effort to get off until it started, and then attempted to alight, and such act was contributory negligence, the jury should find for defendant, that being one phase of the case presented by the evidence, was not objectionable as excluding the inference that the wife could have been guilty of contributory negligence under other evidence given. *El Paso Electric Ry. Co. v. Sierra* (Civ. App.), 109 S. W. 986.

In an action to recover for injuries and mental anguish suffered by plaintiff in being thrown from a train in attempting to board it, and being separated from her children, an instruction to find for defendant if plaintiff caused her children to board the train in motion, and, while it was still in motion, attempted to board it, unless an ordinarily prudent person would have

done so under like circumstances, is properly refused. *International & G. N. Ry. Co. v. Anchonda*, 75 S. W. 557, 33 Tex. Civ. App. 24.

**Instances in Which Act of Passenger Held Contributory Negligence Precluding Recovery.**—A boy who, after assisting relatives to board a train, walked rapidly out while it was moving, in the dark, and, without taking time to see where he was jumping, jumped out into space, was negligent, and not entitled to recover for his injuries. *Oxsher v. Houston, E. & W. T. Ry. Co.*, 67 S. W. 550, 29 Tex. Civ. App. 420.

Plaintiff was injured in attempting to alight at her place of destination from defendant's train, while in motion, the train having only stopped at the station a short while. Her testimony showed that at the time she attempted to alight she thought the train was moving too fast to permit her to do so safely. Held, that a verdict was properly directed for defendant on the ground of contributory negligence on the part of plaintiff. *Williams v. St. Louis S. W. Ry. Co.* (Civ. App.), 36 S. W. 329.

Plaintiff not having alighted from a train at his destination, the conductor promised to stop the train to enable him to do so, and pulled the bell cord for that purpose. Plaintiff got on the steps and stepped off while the train was still moving, without looking to see if it had stopped, and was injured. The train actually stopped within 20 feet of the place where plaintiff alighted. Held, that plaintiff was guilty of contributory negligence, precluding a recovery. *Fanning v. St. Louis Southwestern Ry. Co. of Texas*, 86 S. W. 354, 38 Tex. Civ. App. 513.

A railroad passenger can not recover for injuries to which his negligence in attempting to board a train while it was in motion contributed, though the conductor negligently failed to wait at the station for five

minutes, as required by Pasch. Dig. art. 6532. *Galveston, H. & S. A. Ry. Co. v. Le Gierse*, 51 Tex. 189.

It is negligence for a passenger to attempt to alight from a moving railway train, where the only reason for doing so is the failure of the train to stop at the station. *Fordyce v. Allen* (Civ. App.), 26 S. W. 437.

If a train stopped a sufficient length of time to enable a passenger to leave it, and he neglected to leave while so stopped, but carelessly and negligently jumped from it after it was in motion, and was injured, he could not recover. *Gulf, C. & S. F. Ry. Co. v. Rowland*, 90 Tex. 365, 38 S. W. 756.

A woman unaccustomed to boarding trains, who attempted to get on a train after it had started and was in motion and was gaining headway, can not recover for injuries received thereby, on account of her contributory negligence. *International & G. N. Ry. Co. v. Gorman*, 2 Willson, Civ. Cas. Ct. App. § 776.

**Instances in Which Such Acts Held Not Contributory Negligence.**—In an action by a husband to recover for injuries to his wife while alighting from a railroad car, evidence held insufficient to show that the wife was guilty of contributory negligence. *Chicago, R. I. & P. R. Co. v. Cleaver*, 106 S. W. 721, 48 Tex. Civ. App. 294.

One who, while being ejected from a train, jumps before the train stops, because he is ordered to, is not guilty of contributory negligence. *International & G. N. Ry. Co. v. Hassell*, 62 Tex. 256, 50 Am. Rep. 525.

A passenger started to get off the train, as soon as it stopped, on the usual side, but, seeing another train between that and the depot, and nobody to help her, she tried to get off the other side. The train, however, started before she succeeded, and in jumping to the ground she was hurt. It did not appear that one side was

safer to alight than the other, though there was a brakeman on the other side, assisting passengers, but not at plaintiff's car. Held, that the passenger was free from negligence. *Gulf, C. & S. F. Ry. Co. v. Vinson* (Civ. App.), 24 S. W. 956.

In an action against a street railway for injuries to a passenger attempting to alight, where there was evidence that at the time of the accident the car was within a few feet of the crossing where plaintiff expected to leave the same, and was going at a slow rate of speed, so that it was not dangerous to disembark at that time, a finding that plaintiff, who was injured in consequence of an electric shock which threw him from the car, was not guilty of contributory negligence, was warranted. *Denison & S. Ry. Co. v. Johnson*, 81 S. W. 780, 36 Tex. Civ. App. 115.

In an action for injuries sustained on jumping from a moving train, plaintiff having been aboard the train for the purpose of seating his wife and children, the evidence showed that the train did not stop a reasonable time, and that when plaintiff left the train it was dark, and the grounds not lighted, but that it was at a place where passengers got on and off, and, though the train was moving at a rate of from 6 to 12 miles an hour, plaintiff did not know of the speed owing to the darkness, and that two other men jumped from the train just ahead of plaintiff without injury. Held, that the evidence was sufficient to warrant a finding that plaintiff was not negligent in jumping off. *Texas & P. Ry. Co. v. Crockett*, 66 S. W. 114, 27 Tex. Civ. App. 463.

In an action for injuries to a child while attempting to board a railroad train after it had started, evidence held to sustain a finding that the injury resulted from the carrier's negligence. *San Antonio & A. P. Ry. Co. v. Trigo*, 108 S. W. 1193, 49 Tex. Civ. App. 523.

A passenger did not assume the risk of injury by stepping straight out from a car step after the train had started, unless he knew that such method of alighting was dangerous and liable to result in injury. *St. Louis Southwestern Ry. Co. of Texas v. Bryant*, 103 S. W. 237, 46 Tex. Civ. App. 601.

In an action for injuries to a child while attempting to board a railroad train after it had started, evidence held to sustain a finding that the child was not negligent. *San Antonio & A. P. Ry. Co. v. Trigo*, 108 S. W. 1193, 49 Tex. Civ. App. 523.

One waiting to board an approaching street car, who took a position which was safe with reference to the ordinary cars which the street railroad used, and with which he was familiar, having no notice up to the time he was struck by it that an approaching car was of a greater width than the ordinary cars, was not guilty of contributory negligence. *Denison & S. Ry. Co. v. Craig*, 80 S. W. 865, 35 Tex. Civ. App. 548.

Nor did he assume the risk of such car's striking him. *Denison & S. Ry. Co. v. Craig*, 80 S. W. 865, 35 Tex. Civ. App. 548.

Evidence in an action against a carrier to recover for personal injuries to a passenger considered, and held not to show contributory negligence as a matter of law. *Feagin v. Gulf, C. & S. F. Ry. Co.*, 100 S. W. 346, 45 Tex. Civ. App. 251.

#### (5) Riding in Position of Danger.

##### (a) In General.

**Assumption of Risk of Dangerous Position.**—When a passenger voluntarily takes a more hazardous place upon the train to ride than was provided by the carrier for passengers, and such hazard was known or might have been known by the use of ordinary care, he thereby assumes the risk of the increased danger of such position. *St. Louis, etc., R. Co. v. Rice*, 9 Tex. Civ. App. 509, 29 S. W. 525; *Texas, etc., R.*

*Co. v. Boyd*, 6 Tex. Civ. App. 205, 24 S. W. 1086 (see 93 Tex. 740 no op.), Chicago, etc., *R. Co. v. Martin*, 35 Tex. Civ. App. 186, 79 S. W. 1101, affirmed in 98 Tex. 612, no op.; Texas, etc., *R. Co. v. Bump*, 43 Tex. Civ. App. 297, 95 S. W. 29, affirmed in 101 Tex. 663, no op.; *Lovett v. Gulf*, etc., *R. Co.*, 97 Tex. 436, 79 S. W. 514, affirming 74 S. W. 570; *Wilcox v. San Antonio*, etc., *R. Co.*, 11 Tex. Civ. App. 487, 33 S. W. 379, affirmed in 93 Tex. 653, no op.; *Walling v. Trinity*, etc., *R. Co.*, 48 Tex. Civ. App. 35, 106 S. W. 417, affirmed, no op.; *Runnells v. Pecos*, etc., *R. Co.*, 40 Tex. Civ. App. 150, 107 S. W. 647; Missouri, etc., *R. Co. v. Avis*, 41 Tex. Civ. App. 72, 91 S. W. 872, affirmed in 100 S. W. 33; St. Louis, etc., *R. Co. v. Morgan*, 44 Tex. Civ. App. 155, 98 S. W. 408, affirmed in 102 Tex. 592, no op.; Gulf, etc., *R. Co. v. Gorman*, 6 Tex. Civ. App. 230, 25 S. W. 992.

If his injuries were brought about by the voluntary act of plaintiff in assuming a hazardous position, and the same were such as a person of ordinary care and prudence would not have taken, he can not recover. Texas, etc., *R. Co. v. Boyd*, 6 Tex. Civ. App. 205, 24 S. W. 1086 (see 93 Tex. 740, no op.), citing *Houston*, etc., *R. Co. v. Clemmons*, 55 Tex. 88, 90; *H. & T. C. R. Co. v. Richards*, 59 Tex. 373, 377; *Rucker v. Missouri Pac. R. Co.*, 61 Tex. 499; Gulf, etc., *R. Co. v. Ryan*, 69 Tex. 665, 7 S. W. 83; San Antonio, etc., *R. Co. v. Wallace*, 76 Tex. 636, 13 S. W. 565; Houston, etc., *R. Co. v. Moore*, 49 Tex. 31, 47.

Where the defendant railway company agreed to carry a lumber company's employees to and from work, an employee, by riding on a car which was being pushed in front of the engine, was not guilty of contributory negligence. *Trinity Val. R. Co. v. Stewart* (Civ. App.), 62 S. W. 1085.

Generally, as to the assumption of risk incident to usual operation of train, see ante, "Assumption of Risks

Ordinarily or Usually Incident to Mode of Transportation," V, D, 6, d, (4).

**Effect of Consent of Conductor as Justifying Passenger's Act.**—The consent of the conductor will not justify a passenger in occupying a place of obvious danger not designed for the use of passengers, and which a man of ordinary prudence would not have occupied, even though, owing to an extraordinary influx of passengers, it be impossible for him to find room inside the car. *St. Louis*, etc., *R. Co. v. Rice*, 9 Tex. Civ. App. 509, 29 S. W. 325.

**Burden of Proof as to Incapacity of Injured Person to Appreciate Danger.**—

In an action against a railway company for injury to a minor the burden is upon plaintiff to show by affirmative proof that he was not of such discretion as to realize the danger of placing himself in a position where he was likely to be injured. *Cockrell v. Texas*, etc., *R. Co.*, 36 Tex. Civ. App. 559, 82 S. W. 529.

A 15 year old boy is presumed to be sufficiently intelligent to appreciate the danger of riding upon the platform of a railway car; and the burden is upon him in an action for injuries sustained while so riding to show he lacked such intelligence and discretion. *Walling v. Trinity & Brazos Valley Ry. Co.*, 106 S. W. 417, 48 Tex. Civ. App. 35.

**(b) Riding upon Engine.**

**In General.**—Though an engine drawing a stock train is not the place provided for shippers traveling on a drover's pass in which to ride and a caboose is provided in which they are to ride, it is not negligence as a matter of law for a shipper to ride on the engine. (Civ. App.), *Missouri, K. & T. Ry. Co. of Texas v. Avis*, 91 S. W. 877, 41 Tex. Civ. App. 72, judgment affirmed, 93 S. W. 424.

A passenger who rides on the engine with a view to gaining information to secure his promotion in the service of

the road; and who knows, or should know, that it is more unsafe to ride on the engine than on the cars, assumes the risk of such increased danger, and can not recover for injuries proximately caused thereby, though he was on the engine by invitation of the engineer, with knowledge of the conductor. *Texas & P. Ry. Co. v. Boyd*, 6 Tex. Civ. App. 205, 24 S. W. 1086.

One who, without authority from the railway company, rides upon the footboard of a switch engine not in good condition, and not used for carrying passengers, is guilty of contributory negligence which will preclude him from recovering for injuries resulting from the engineer running the engine at a dangerous rate of speed, whether such conduct of the engineer was only want of ordinary care, or was gross negligence, but without willful purpose to injure. *Wilcox v. San Antonio, etc., R. Co.*, 11 Tex. Civ. App. 487, 33 S. W. 379, affirmed in 93 Tex. 653, no op.

Where plaintiff, who was directed to ride on the footboard of an engine by a brakeman to whom he had paid an amount less than the fare, was injured while attempting to climb over the tender at the alleged invitation of the engineer, by the engineer causing a violent and sudden jerk of the engine, plaintiff was not guilty of contributory negligence as a matter of law. *Clairborne v. Missouri, K. & T. Ry. Co. of Texas*, 57 S. W. 336, 21 Tex. Civ. App. 648.

**Ignorance of Rule and Customary Violation Thereof as Exonerating Passenger.**—The fact that a passenger was ignorant of a rule prohibiting any one except the engineer and fireman from riding on an engine, and the fact that such rule was habitually violated, do not exonerate him from negligence in riding on an engine. *Texas & P. Ry. Co. v. Boyd*, 6 Tex. Civ. App. 205, 24 S. W. 1086.

**Instructions.**—An instruction, in an action against a railway company for

injuries to a shipper of stock while riding on the engine, that if the shipper knew that the engine was a more dangerous place in which to ride than the caboose, and plaintiff, while riding on the engine, knew that he was violating a rule of the company, he was guilty of negligence precluding a recovery, was not open to the objection that it meant to infer that the caboose was a dangerous place in which to ride. (Civ. App.), *Missouri, K. & T. Ry. Co. of Texas v. Avis*, 91 S. W. 877, 41 Tex. Civ. App. 72, judgment affirmed 93 S. W. 424.

**(c) Riding in Improper Place on Freight Train.**

**In General.**—Where the presence of the plaintiff upon a freight train was not with consent of the railway company, and contributed to his injury he can not recover for such injury, there being no evidence of gross negligence on part of the railway company. *Gulf, etc., R. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19.

If a shipper traveling on a drover's pass places himself in a position of danger not ordinary to passengers on freight trains, he assumes the risks incident to such acts. *Receivers v. Armstrong*, 4 Tex. Civ. App. 146, 150, 151, 23 S. W. 236.

Where, in violation of the known orders of the railroad company, though with the permission of the conductor, deceased took passage on a freight train, and voluntarily assumed a dangerous position thereon, going upon an open flat car instead of into the caboose, and was killed through a derailment of the train caused by running it at an excessive rate of speed over a rough track, he was guilty of such contributory negligence as precluded a recovery for his death. Following *Missouri, etc., R. Co. v. Rodgers*, 89 Tex. 675, 677, 36 S. W. 243, reversing 35 S. W. 412. Under such facts the court would have been warranted in giving a charge which as-

sumed that deceased was guilty of contributory negligence in so riding upon the train if he knew the rule was in force forbidding persons to ride on freight trains, and that the officers of the company were trying to enforce the rule, although the conductor may have given him permission to ride thereon. *Chicago, etc., R. Co. v. Martin*, 35 Tex. Civ. App. 786, 79 S. W. 1101, affirmed in 98 Tex. 612, no op.

In *Lovett v. Gulf, etc., R. Co.*, 97 Tex. 436, 79 S. W. 514, affirming 74 S. W. 570, the plaintiff, in riding upon a gravel train, was in a position from which he would easily be threatened by jerks and jolts to which such conveyances are subject, even when carefully operated. It was held that, in availing himself of the permission to ride, he assumed all the risks which arose from the character of the conveyance and the ordinary method of operating it.

Where the top of a caboose was not provided for the carriage of passengers, and was obviously a place of danger, it was error, in an action by a passenger for injuries received while riding there, to refuse to instruct that plaintiff could not recover, though he went there with the conductor's consent, and because there was no room inside, although it was charged that no recovery could be had if plaintiff "was negligent in going upon the top of the car, and remaining there until he was injured, and his negligence was the proximate cause of the injury." *St. Louis, S. W. Ry. Co. v. Rice*, 9 Tex. Civ. App. 509, 29 S. W. 525.

Where a passenger was injured by an overhanging water spout while riding on top of a caboose, and it was not shown in an action for such injuries that the top of the car was prepared by the company for passengers, it was error to charge that it was defendant's duty to use ordinary care to construct and maintain its water tanks and fixtures so as to avoid injuries to its pas-

sengers. *St. Louis, S. W. Ry. Co. of Texas v. Rice*, 9 Tex. Civ. App. 509, 29 S. W. 525.

The evidence showed that plaintiff was attempting to enter the caboose at the place fixed for employees when he was struck by the pipe of a water tank, and there was nothing to show that it was obviously dangerous so to enter, or that plaintiff was negligent in the manner of his attempt to enter. Held, that a verdict in his favor would not be disturbed. *Missouri Pac. Ry. Co. v. Callahan* (Sup.) 12 S. W. 833.

**Admissibility of Evidence That Act of Plaintiff Was at Conductor's Request.**—Evidence that, after plaintiff, who was traveling with cattle, reached the car top, and was sitting down, the conductor sent for him to come to the caboose to sign a statement that the cattle were in good order at the end of defendant's line, which they were then nearing, is admissible, where plaintiff is injured in so doing, as having some bearing on the question of contributory negligence. *Missouri Pac. Ry. Co. v. Callahan* (Sup.), 12 S. W. 833.

**Evidence Held to Show Knowledge of Danger of Position.**—Evidence that plaintiff was a bright, smart boy, over 16 years of age, had attended school seven years, was familiar with trains and had ridden in freight cars before, and the further fact that on the occasion of his injury when he got on top of the box car he took the precaution to brace his feet against the handhold and to grasp the running board with his hands, held sufficient, to show knowledge of the danger of riding thus and of falling asleep in that position, and to justify the court in refusing to submit to the jury the question of his knowledge and realization of his danger. *Cockrell v. Texas, etc., R. Co.*, 36 Tex. Civ. App. 559, 82 S. W. 529.

**Instructions.**—In an action for injuries sustained by a passenger riding in a freight car, an instruction that



plaintiff assumed the risks "incident to whatever jerking and pushing of said car against other cars that was necessary" in the handling of the car, was not erroneous in the use of the word "necessary," and in failing to charge that a recovery could not be had if the car was handled in the usual and proper manner. *Texas & P. Ry. Co. v. Adams*, 72 S. W. 81, 32 Tex. Civ. App. 112.

In an action against a railway company for the negligent injury of a passenger riding on a freight train in the cupola of a caboose, an instruction that if the jury believed it was more dangerous to ride in the cupola than on the floor of the car, but that a person of ordinary prudence, in the same circumstances, would have ridden in the cupola, plaintiff was not negligent, and an instruction that if the cupola was a place of obvious danger defendant should recover, did not conflict. *St. Louis Southwestern Ry. Co. of Texas v. Morgan*, 98 S. W. 408, 44 Tex. Civ. App. 155.

**Question of Contributory Negligence One for Jury.**—Whether it was contributory negligence for a passenger on a freight train to ride in the cupola of the caboose is a question for the jury to determine from all the circumstances. *St. Louis Southwestern Ry. Co. of Texas v. Morgan*, 98 S. W. 408, 44 Tex. Civ. App. 155.

**(d) Riding in Baggage or Mail Car.**

**Riding in Baggage Car.**—A passenger on a railway train went into the baggage car to get water, none being provided elsewhere for the passengers, and had been there five minutes when the accident occurred. Held, that he was guilty of contributory negligence. *Houston & T. C. R. Co. v. Clemmons*, 55 Tex. 88, 40 Am. Rep. 799.

Charge in action for damages for personal injuries which instructs that if injured party was riding in a baggage car which was used by defendant railroad as a smoking car he may

recover, but that if at the time of the accident he was occupying a position of obvious danger he could not recover, is not contradictory. *East Line, etc., R. Co. v. Smith*, 65 Tex. 167, 172.

In an action against a railroad company for wrongful death, the fact that intestate, a soldier, was riding in the baggage car, did not affect defendant's liability; intestate being there under orders from his commanding officers, and with the consent of the employees in charge of the train. *Galveston H. & S. A. Ry. Co. v. Parsley*, 6 Tex. Civ. App. 150, 25 S. W. 64.

Where a passenger on a railway train went to the baggage car after he had reached his station, and was fatally injured by the moving of the train while assisting defendant's employees in getting out his baggage, it was for the jury to determine whether he was negligent. *International & G. N. Ry. Co. v. Ormond*, 64 Tex. 485.

**Riding in Mail Car.**—Where the plaintiff, who was a United States mail agent, was riding in the proper place in his car, the fact that such car was more dangerous to ride in than other cars in no way affects the right of recovery. *Gulf, C. & S. F. Ry. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 23 Am. St. Rep. 345, 11 L. R. A. 486.

The fact that cars were equipped with new coupling springs and thus required more than usual force to couple cars does not charge railway mail clerk at work while cars were being switched, with negligence in not having ceased his work for the time, where the use of such new springs was not common and he was not notified that they were about to be used. *Houston, etc., R. Co. v. McCullough*, 22 Tex. Civ. App. 208, 210, 55 S. W. 392, affirmed in 93 Tex. 731, no op.

**(e) Standing upon Platform of Railroad Car.**

**In General.**—In the absence of statute or rule of the company prohibit-

ing same, it would seem that riding or standing on the platform of a railway car is not negligence per se, but is a question for the jury, under the attendant circumstances. *Bonner v. Glenn*, 79 Tex. 531, 15 S. W. 572; *Galveston, etc., R. Co. v. Morris*, 94 Tex. 505, 61 S. W. 709, affirming 60 S. W. 813; *Gaunce v. Gulf, etc., R. Co.*, 20 Tex. Civ. App. 33, 48 S. W. 524; *Ft. Worth, etc. R. Co. v. Rogers*, 24 Tex. Civ. App. 382, 383, 60 S. W. 61, affirmed in 94 Tex. 695, no op.; *St. Louis, etc., R. Co. v. Ball*, 28 Tex. Civ. App. 287, 66 S. W. 879; *International, etc., R. Co. v. Welsh* (Civ. App.), 24 S. W. 854; *Missouri, etc., R. Co. v. Brown* (Civ. App.), 39 S. W. 326; *Houston, etc., R. Co. v. Johnson* (Civ. App.), 103 S. W. 239.

It being a question for the jury whether it was contributory negligence for plaintiff to go upon the rear platform, an instruction which assumed he was negligent was properly refused. *Missouri, etc., R. Co. v. Brown* (Civ. App.), 39 S. W. 326.

In an action by a passenger against a railway company for personal injuries, it appeared that, while the train stopped to fix something about the engine, plaintiff left the coach, to see what was the matter; that the engineer, hearing a freight train, which had been signaled to stop, rapidly approaching from behind, immediately started the train; that plaintiff, after jumping on the platform of a coach, instead of immediately entering, turned to another passenger, and advised him to get on; that before he entered the coach the approaching freight struck his train, whereby plaintiff was injured; and that neither the passengers in the coaches, nor those who remained on the ground, were injured. Plaintiff testified that he did not expect a collision. Held, that it was a question for the jury whether plaintiff was negligent in not having remained on the ground, or in not having immediately

entered the coach after getting on. *Gulf, C. & S. F. Ry. Co. v. Downman* (Civ. App.), 28 S. W. 922.

Where a freight train on which plaintiff was riding as a passenger broke in two, and owing to the negligence of the operatives of the train a collision resulted, in which plaintiff was injured, it was not error to submit to the jury the question whether plaintiff was guilty of contributory negligence in leaving the caboose and going on the platform after he had knowledge that the train had broken in two. *Ft. Worth & D. C. Ry. Co. v. Rogers*, 60 S. W. 61, 24 Tex. Civ. App. 382.

Though a passenger assumes the risks that are incident to a proper and ordinary operation of a train when he goes upon the platform of a car before reaching the station, he does not thereby assume the risk of a danger created by a careless, unexpected, and negligent act. *Houston & T. C. Ry. Co. v. Johnson* (Civ. App.), 103 S. W. 239.

In an action by a passenger for personal injuries, whether plaintiff was guilty of contributory negligence in going out on the platform with his bundles, before reaching the station, held a question for the jury. *Houston & T. C. Ry. Co. v. Johnson* (Civ. App.), 103 S. W. 239.

Where plaintiff, a negro, boarded an excursion train, and there was evidence that the seats and room in the coach for negroes were occupied by whites, so that plaintiff was crowded onto the platform, and the conductor refused a transfer to a train following, though he had authority to make such transfer, it was not error to refuse an instruction stating that plaintiff was not guilty of contributory negligence in standing on the platform, as the question of negligence was for the jury. *Williams v. International & G. N. R. Co.*, 67 S. W. 1085, 28 Tex. Civ. App. 503.

A negro passenger is not guilty of contributory negligence in riding on the platform of a railroad car, when there is no room to sit or stand in the coaches, in which alone such passengers are allowed to ride, though there may be such room in the other coaches. *International & G. N. R. Co. v. Williams*, 50 S. W. 732, 20 Tex. Civ. App. 587.

A person, having traveled on freight trains of defendant before, boarded one, and offered to pay his fare. The conductor refused it, and told him he would have to get off. The passenger offered to get off, if the train were stopped, which was refused, and he was told to get off when the train reached a hill which it was then approaching. Going on the platform before the hill was reached, he fell off; he testifying that he was kicked off by the conductor, which the conductor denied. Held, that the passenger was not negligent in boarding the train, and in voluntarily going on the platform preparatory to jumping off. *Texas & P. Ry. Co. v. Kelly* (Civ. App.), 47 S. W. 809.

**Assumption of Risks Incident to Such Position.**—A boy passenger riding on the platform and a defective step of a railway car assumed the risk of injury through such step, and the swaying of the train caused by defective track and roadbed, if he knew the step was defective and that the car was swaying, unless he was insufficiently intelligent to be able to understand the danger of so riding. *Walling v. Trinity & Brazos Valley Ry. Co.*, 106 S. W. 417, 48 Tex. Civ. App. 35.

If a boy passenger on a railway train had intelligence enough to understand that it was more dangerous to ride on a car platform or on the steps than inside the car, no duty devolved upon the company to prevent him from so riding. *Walling v. Trinity & Brazos Valley Ry. Co.*, 106 S. W. 417, 48 Tex. Civ. App. 35.

**Effect of Request by Conductor That Passenger Enter Car.**—The customary violation of the rule against passengers riding on the platforms of cars can not avail a passenger who was requested by the conductor and porter to enter the car, and not stand on the platform. *Houston & T. C. R. Co. v. Bryant*, 72 S. W. 885, 31 Tex. Civ. App. 483.

**Instructions.**—The evidence being conflicting as to whether plaintiff was warned that it was dangerous to go out or remain on the platform, so that his being there was contributory negligence, or whether he was on the platform at the invitation of the conductor, under which circumstance his being there would not necessarily be negligence, the court should have instructed concerning contributory negligence, special charges having been asked calling his attention to the omission to so charge. *St. Louis S. W. Ry. Co. v. Ball*, 66 S. W. 879, 28 Tex. Civ. App. 287.

In an action by a passenger for personal injuries, where there was evidence that the danger that caused plaintiff's fall was one that was incident to the proper handling of the train, it was error to refuse an instruction that if the jury believed that the plaintiff went upon the platform of defendant's car while it was in rapid motion for the purpose of alighting therefrom, and that, while on the platform, he was thrown therefrom and injured by reason of a jerk or lurch of the train, still plaintiff could not recover for the injuries occasioned thereby if they were so occasioned, unless the jury believed, from the preponderance of the testimony, that the jerk or lurch was unusual or violent, and not such as was incident to the ordinary and proper operation of the train, and unless they further found plaintiff was not guilty of contributory negligence in going upon the platform under the circumstances which proximately in part brought about the injuries. *Hous-*

ton & T. C. Ry. Co. v. Johnson (Civ. App.), 103 S. W. 239.

In an action against a railway for injuries to a passenger while standing on the platform of a moving train, an instruction that it is not negligence of itself for a passenger to stand on the platform of a car, but it is for the jury to determine from all the circumstances of the case whether or not plaintiff was guilty of negligence, is improper, as calculated to mislead the jury, as standing on the platform of a moving train may or may not be negligence, which is to be determined by the jury from the circumstances of the particular case. *St. Louis S. W. Ry. Co. v. Ball*, 66 S. W. 879, 28 Tex. Civ. App. 287.

In an action against a railroad company for injuries to plaintiff's wife, where her evidence raised the question of contributory negligence, and the court submitted such issue only in a general way, it was error to refuse a charge, applicable to the evidence, that though defendant was negligent, if plaintiff's wife went out on the car platform so hurriedly that, when the train started, she was unable to remain on the steps, but had to jump off, and her injuries resulted therefrom, and her attempt to leave the train was a failure to use reasonable care, the verdict should be for defendant. *Gulf, C. & S. F. Ry. Co. v. Flatt* (Tex. Civ. App.) 36 S. W. 1029.

In a suit for injuries resulting from being thrown from a car platform by the jerk of the train, a charge assuming that plaintiff contributed to his injury by going on the platform is properly refused. *San Antonio, etc., R. Co. v. Choate*, 22 Tex. Civ. App. 618, 619, 56 S. W. 214, affirmed in 93 Tex. 718, no op.

An instruction that if the jury should find that plaintiff was guilty of any negligence in going on the platform or getting off the train, and such negligence caused or contributed to his in-

jury, they should find for plaintiff, was not error. *Williams v. Galveston, H. & S. A. Ry. Co.*, 78 S. W. 45, 34 Tex. Civ. App. 145.

In an action for injuries to a passenger caused by the train running into an open switch, an instruction that if the plaintiff voluntarily and unnecessarily left his seat, and went near or upon the platform of the car while the train was in motion, and assumed a position more hazardous than inside the car, and knew or could have known of such danger, plaintiff was guilty of contributory negligence, was not subject to objections that the proper standard to judge the act was not given to the jury. *Runnells v. Pecos & N. T. Ry. Co.*, 107 S. W. 647, 49 Tex. Civ. App. 150.

An instruction that if a railroad company was negligent in failing to furnish seats, so that a passenger rode on the platform, from which he was pushed by other passengers, and such negligence alone, or concurring with that of the other passengers, proximately caused the injury, the company would be liable, does not conflict with another instruction that if the company furnished standing room in the car, and the passenger knew, or by exercising reasonable care could have known, such fact, and that the platform was more dangerous, the company would not be liable. *International & G. N. R. Co. v. Williams*, 50 S. W. 732, 20 Tex. Civ. App. 587.

An instruction that if the jury find that the railroad company negligently failed to furnish sufficient cars to seat its passengers, one of whom thereupon stood on the platform, from which he was pushed by other passengers; that the company's failure was negligence, and that the injury was the proximate result thereof, or of such negligence concurring with that of other passengers,—the finding should be for the passenger injured,—leaves the question of contributory negligence to the

jury. *International & G. N. R. Co. v. Williams*, 50 S. W. 732, 20 Tex. Civ. App. 587.

**(f) Standing on Platform or Running Board of Street Car.**

It is not negligence per se for a passenger to stand upon the platform, steps or running board of an electric street car which is crowded; and the weight of authority also supports the rule that it is not contributory negligence, as a matter of law, for a passenger to stand upon the platform of a car or running board, whether there be vacant seats or not in the inside of the car. And whether the passenger be standing upon the platform, running board, or steps, the question of negligence and contributory negligence is held to be, in the majority of cases, questions for the jury to determine. *San Antonio, etc., Co. v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015, affirmed in 97 Tex. 646, no op.

In an action against a street railroad for injuries to a passenger who was riding on the front platform, and, becoming frightened, jumped from the car, it was proper to submit to the jury the question of the passenger's contributory negligence in taking a position on the front platform. *Moore v. Northern Texas Traction Co.*, 95 S. W. 652, 41 Tex. Civ. App. 583.

A passenger got on an open street car, which had a running board along each side and aisle through the center. It had no conductor. He put his fare in the box at the front end, and walked back on the running board to one of the only vacant seats near the rear, and as he was stepping up to take the seat he was struck by a girder of the bridge the car was crossing, and knocked off and injured. He was 60 years of age, weighed 220 pounds, and had passed over the bridge on the cars almost daily for six months, but testified that he had not noticed that the track was so near the girders as to endanger passengers standing on the

running board. There was no obstruction in the center aisle except the dresses of the lady passengers sitting next to it. Held not to be contributory negligence as matter of law. *San Antonio Traction Co. v. Bryant*, 70 S. W. 1015, 30 Tex. Civ. App. 437, affirmed in 97 Tex. 646, no op.

A boy, riding on the running board of a street car, putting one foot on the ground, and jerking it up again for amusement, was guilty of contributory negligence, if of sufficient discretion to understand the danger. (1905) *El Paso Electric Ry. Co. v. Kitt* (Civ. App.), 90 S. W. 678, judgment affirmed (1906) 91 S. W. 598.

In an action for injuries to a boy 10 years of age, allowed to ride on the front platform of defendant's street car, whether plaintiff was of such immature years and so wanting in intelligence that he could not appreciate the danger of riding on the front platform was for the jury. (Civ. App.) *Denison & S. Ry. Co. v. Carter*, 79 S. W. 320, judgment reversed 82 S. W. 782, 98 Tex. 196, 107 Am. St. Rep. 626.

**(g) Passing from One Car to Another While Train in Motion.**

**In General.**—It is not an act of negligence for a passenger to pass from one car of a railroad train to another car while such train is in motion, but the passenger assumes the risk incident to such undertaking from ordinary causes. *Sickles v. Missouri, etc., R. Co.*, 13 Tex. Civ. App. 434, 35 S. W. 493, affirmed in 93 Tex. 720, no op.; *Choate v. San Antonio, etc., R. Co.*, 90 Tex. 82, 89, 36 S. W. 247, 37 S. W. 319, reversing 35 S. W. 180; *Houston, etc., R. Co. v. Johnson* (Civ. App.), 103 S. W. 239.

The liability of the railroad company in such cases depends upon proof of negligence on its part that rendered the passage more than ordinarily dangerous, which could not be anticipated by the passenger. *Sickles v. Missouri, etc., R. Co.*, 13 Tex. Civ. App. 434, 35

S. W. 493, affirmed in 93 Tex. 720, no op.

A carrier's duty to exercise the highest degree of care to passengers in the maintenance of its track and the operation of the train extends to a passenger attempting to pass from one car to another of a moving train. *Galveston, H. & S. A. Ry. Co. v. Patillo*, 101 S. W. 492, 45 Tex. Civ. App. 572.

Where plaintiff was thrown from the platform of a rapidly moving train in the act of passing from one coach to another by sudden jerk thereof, a peremptory charge to find for defendant is erroneous; plaintiff's negligence should have been left to the jury. *Gaunce v. Gulf, etc., R. Co.*, 20 Tex. Civ. App. 33, 35, 38, 48 S. W. 524.

In an action for damages for injuries sustained by being thrown from the platform while passing from one car to another, a charge that the jury are to determine from the facts whether the plaintiff was negligent in so doing, is correct. *Sickles v. Missouri, etc., R. Co.*, 13 Tex. Civ. App. 434, 437, 35 S. W. 493, affirmed in 93 Tex. 720, no op.

Where, in an action against a carrier, it appears that plaintiff was thrown from the platform, where he had stopped while going from one car to another in search of a seat, it was not error to sustain an exception to that part of defendant's answer which alleged that the train was an excursion train, and that plaintiff took passage in consideration of the reduced fare, and with knowledge of the probable inconvenience incident thereto, and therefore assumed the risk, but did not allege that the plaintiff knew that he would not be provided with a seat, since leaving the car in search of a seat was not negligence in itself. (Civ. App.) *Galveston, H. & S. A. Ry. Co. v. Morris*, 60 S. W. 813, judgment affirmed (Sup.) 61 S. W. 709, 94 Tex. 505.

A passenger is not guilty of contribu-

tory negligence merely because he attempts to pass from one car to another of a moving train to do a favor for a lady passenger. *Galveston, H. & S. A. Ry. Co. v. Patillo*, 101 S. W. 492, 45 Tex. Civ. App. 572.

A male passenger while the train was in motion left the day coach, having no closet for men, for the smoking car to use a closet therein, and was injured in consequence of the negligence of a porter in closing the door to the smoker and smashing his fingers. There was no regulation of the carrier forbidding passengers to go from one car to another. Held, that the injury to the passenger did not result from a risk assumed by him. *St. Louis & S. F. R. Co. v. Neely*, 101 S. W. 481, 45 Tex. Civ. App. 611.

Evidence in action for injuries to a passenger caused by the parting of cars as he was passing from one to the other, held insufficient to raise the question of contributory negligence, on the ground that he was warned. *St. Louis Southwestern Ry. Co. of Texas v. Gammage* (Civ. App.), 96 S. W. 645.

Where plaintiff testified that he had been standing in the aisle of a passenger train because all the seats were taken, and that, as he was being trampled on by the crowding passengers, he started to go into another car, but stopped for a moment on the platform, from which he was thrown and injured, the fact that there was standing room in the coaches did not make it negligence per se for him to cross the platform. (Civ. App.) *Galveston, H. & S. A. Ry. Co. v. Morris*, 60 S. W. 813, judgment affirmed (Sup.) 61 S. W. 709, 94 Tex. 505.

Passenger passing from one coach to another while train is moving may recover for being thrown off by an unusual jerk since he merely assumes the risk of that nature incident from ordinary causes. *San Antonio, etc., R. Co. v. Choate*, 22 Tex. Civ. App. 618, 620, 56 S. W. 214, affirmed in 93 Tex.

718, no op.

Instance of evidence held sufficient to show that passenger passing from one coach to another was thrown off by an unusual jerk of the train while it was moving. *San Antonio, etc., R. Co. v. Choate*, 22 Tex. Civ. App. 618, 620, 56 S. W. 214, affirmed in 93 Tex. 718, no op.

In an action for injuries to a passenger while walking from one coach to another, the exclusion of evidence to show that the reason that he was going from one coach to the other was the insufficient heating of the car, is not error, where such fact was not controverted and the court in its charge assumed such to be the fact. *Sickles v. Missouri K. & T. Ry. Co. of Texas*, 13 Tex. Civ. App. 434, 35 S. W. 493.

On a cold night plaintiff was a passenger on defendant's train. The car he was in was not properly heated. While it was in rapid motion, he attempted to pass from such car to one in front; and when on the platform he slipped, and fell to the ground. Held, that it was harmless error to exclude evidence that it was customary for passengers to pass over the platforms of the cars in going from one coach to the other, and that they habitually did so, where there was no contest on such point, and the court charged that plaintiff had the right to pass from one coach to another in quest of a warmer one, and that it was not an act in itself that showed negligence, but the conditions and circumstances that surrounded the act would indicate its character. *Sickles v. Missouri, K. & T. Ry. Co. of Texas*, 13 Tex. Civ. App. 434, 35 S. W. 493.

In an action against a railroad company for personal injuries, plaintiff's evidence showed that, while rightfully on the platform, passing from one car to another as a passenger, a sudden and unusual jerk of the train, while it was running at a rate prohibited by law, threw him off his balance, and

the railing gave way, and he fell. The evidence was contradicted by the employees of defendant and by certain doctors, to whom plaintiff had made statements. Held error to peremptorily direct a verdict for defendant, under the statute providing that the jury in all cases shall be the exclusive judges of the facts proved and of the weight of the testimony. *Gaunce v. Gulf, C. & S. F. Ry. Co.*, 48 S. W. 524, 20 Tex. Civ. App. 33.

Where a passenger, who was injured by reason of a defective coupling between passenger cars, testified that he noticed the shaky condition of planks connecting the cars when he went over them first, but that when he returned he had forgotten the defect, and thought he could cross safely, he was not guilty of contributory negligence as a matter of law. *St. Louis S. W. Ry. Co. v. Keitt (Civ. App.)*, 76 S. W. 311, affirmed in 97 Tex. 645, no op.

Where plaintiff was thrown by a jerk from a car platform, to which he had gone while the train was in motion, a charge that, where a passenger goes from one car to another without notice to the trainmen, the company owes him no duty in respect to movements of the train while engaged in such act, was properly refused, since in passing from one car to another a passenger merely assumes the risks incident to such an undertaking from ordinary causes, and the questions of the negligence of defendant in causing the injury, and of the plaintiff's contributory negligence, are for the jury. *San Antonio & A. P. Ry. Co. v. Choate*, 56 S. W. 214, 22 Tex. Civ. App. 618.

#### (7) Riding on Trains before Road Open for Transportation.

In *Cunningham v. International R. Co.*, 51 Tex. 503, it was held that the act of the plaintiff in riding upon a train against the express wishes of the company, and before the road had been received and trans-

portation of passengers invited or allowed or the sale of tickets permitted, would, under the circumstances, have constituted such contributory negligence on the part of the plaintiff as to prevent his recovery against the defendant for a tort, unless willfully or wantonly committed, even had a right of action existed.

**(8) Crossing or Standing on Tracks at Station.**

Where plaintiff, a passenger on defendant's train, left his car at a station and in crossing the track without looking, a train which he knew was due struck him, he can not recover though noise of an engine standing nearby prevented his hearing the approaching train, defendant's servants not having seen him in time to avoid accident, notwithstanding his still being a passenger. *Sanchez v. San Antonio, etc., R. Co. (Civ. App.)*, 27 S. W. 922, 923, affirmed in 88 Tex. 117.

While a train was standing at a station, and passengers were crowding into it, a freight car was moved up on a siding, and into the crowd, injuring one who had seen the car, but did not know it was moving. Held, that he had a right to assume that the car would not be pushed into the crowd without warning, and hence his not keeping his eye on the car was not contributory negligence. (*Civ. App.* 1898) *St. Louis S. W. Ry. Co. of Texas v. Casseday*, 48 S. W. 6, reversed (1899) 50 S. W. 125, 92 Tex. 525.

**(9) Standing While Car Is in Motion.**

Plaintiff was a passenger on defendant's train, and was sleeping in a car, and just before reaching his station, the conductor woke him, and notified him that they were nearing his destination. Plaintiff got up, and stood in the aisle 8 or 10 feet from the smoking compartment while the train was still moving at its usual speed. While plaintiff was thus standing, the train struck a freight car, by negligence

of defendant's servants, and threw plaintiff against the smoking compartment, and injured him. The freight car had been driven partly onto the main track by a storm. Held, that in an action for the injury the court was not required to submit a charge on the question of contributory negligence, since the facts do not raise that question. *Gulf, C. & S. F. Ry. Co. v. Bell*, 57 S. W. 939, 93 Tex. 632.

The ruling of the supreme court on certified question herein (*Gulf, etc., R. Co. v. Bell*, 93 Tex. 632, 57 S. W. 939), that the facts did not require the submission of the issue of contributory negligence on the part of a passenger standing up in the aisle at the time of a collision, followed. *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579, 58 S. W. 614, affirmed in 94 Tex. 700, no op.

The fact that a passenger on a freight train was standing up in the caboose without holding onto anything when he was injured by being thrown to the floor by the shock caused by the backing up of the train to make a coupling did not, as a matter of law, make him guilty of contributory negligence. *Chicago, R. I. & P. Ry. Co. v. Buie*, 73 S. W. 853, 31 Tex. Civ. App. 654.

Where plaintiff was injured by the jerking of a freight car, in which he was transported as a passenger, while it was being switched in a junction railroad yard, the fact that he was standing at the time of his injury did not constitute contributory negligence, as a matter of law. *Texas & P. Ry. Co. v. Adams*, 72 S. W. 81, 32 Tex. Civ. App. 112.

**(10) Walking Through Car While Train in Motion.**

The fact that a passenger goes to a wash room for the purpose of washing his hands while the car is in motion, over an uneven road, does not per se render him guilty of contributory negligence in case he is in-



jured while standing before the basin. *Sturdivant v. Ft. Worth & D. C. Ry. Co.* (Civ. App.), 27 S. W. 170.

**(11) Placing Hand in Dangerous Position on Door of Car or Seat.**

A passenger on a railroad train, which had stopped at a station, placed his hand on the jamb of the car door. It was injured by the company's brakeman entering the car and closing the door. Held, in an action for such injury, that the passenger's negligence precluded his recovery. *Texas & P. Ry. Co. v. Overall*, 82 Tex. 247, 18 S. W. 142.

"Mr. Thompson in his work on *Carriers of Passengers*, p. 264, lays the rule down on this subject as follows: 'A passenger can not be said to be in the exercise of due care who voluntarily and unnecessarily places his hand upon the framework of the door of the carriage so that when the door is closed it must be inevitably crushed.'" *Galveston, etc., R. Co. v. Davidson*, 61 Tex. 204.

It appeared that a certain passenger train had reversible seats; that plaintiff, who was blind, entered such train, and, when preparing to take his seat, placed his hand on the iron bar of the seat, next to the aisle; that the bar was slightly raised at the time, and it fell, and mashed one of his fingers; and that it was the duty of the brakeman, before the train started, to go through the cars and turn all the seats in the direction the train would next go. Held, that whether defendant was negligent was a question for the jury. *Missouri, K. & T. Ry. Co. v. Dill* (Tex. Civ. App.), 40 S. W. 347.

**(12) Sitting by Open Window of Car or Resting Hand or Arm Therein.**

**Sitting by Open Window.**—A passenger is not guilty of contributory negligence in riding in a smoking car in front of an open window. *Missouri, K. & T. Ry. Co. of Texas v. Flood*, 79 S. W. 1106, 35 Tex. Civ. App. 197.

**Resting Arm in Window.**—It is not

contributory negligence for a passenger on entering a railroad car while it is running over a rough roadbed to rest his arm in an open window to steady himself without first examining the window to see if it is secure against falling on account of the jolting of the train. *Gulf, C. & S. F. Ry. Co. v. Killebrew* (Sup.), 20 S. W. 182.

**Putting Arm Outside Window.**—The fact that a passenger was sitting with his arm outside the window of the car does not, in law, preclude him from recovering for injuries inflicted on said arm while in that position, which would not have been inflicted had it been inside. *Gulf, C. & S. F. Ry. Co. v. Danshank*, 6 Tex. Civ. App. 385, 25 S. W. 295.

Where evidence in an action against a railroad for damages for personal injuries to passenger was conflicting as to plaintiff's position when injured and defense was contributory negligence, a charge that if plaintiff had his arm outside the car window and would not have been injured but for that fact, the jury should find for defendant, was properly refused. *Gulf, etc., Ry. v. Danshank*, 6 Tex. Civ. App. 385, 388, 25 S. W. 295.

**Leaning from Car Window.**—A passenger was fatally injured by striking against an open gate on a stock chute near a railroad track while leaning out of a car window. Held, that it was for the jury to determine whether he was negligent in thus exposing himself. *Gulf, C. & S. F. Ry. Co. v. Phillips*, 74 S. W. 793, 32 Tex. Civ. App. 238.

**(13) Remaining in Car While Same Being Switched.**

A passenger transported in a freight car held not guilty of contributory negligence in failing to leave the car while it was being switched in the yard at a junction point, during which he was injured. *Texas, etc., R. Co. v. Adams*, 32 Tex. Civ. App. 112, 72 S. W. 81, affirmed in 97 Tex. 648, no op.

**(14) Use of Means Provided by Carrier to Enter or Alight from Cars.**

In an action by a passenger for injuries received in attempting to enter a car defendant claimed that the attempt to enter the car with the facilities furnished by it was such contributory negligence as defeated a recovery. Held, that such claim, coming from a defendant whose servants had invited plaintiff to enter the car by means of the facilities furnished by defendant, was not entitled to favorable consideration, and that when a passenger has carefully used the means provided by the carrier to enter its cars at a regular station, the danger in attempting to enter must be very apparent to even a person without experience to justify setting aside a judgment in his favor. *Missouri Pac. Ry. Co. v. Watson*, 72 Tex. 631, 10 S. W. 731.

Where it appears that a woman in pregnancy was seriously injured in boarding a train at a regular station; that she was obliged to step from the ground to a height of 30 or 36 inches, no intervening step being provided, as was the custom; and that she used due care, with the means provided,—judgment for damages will not be disturbed on the ground of contributory negligence, though it also appears that she had some assistance from the company's employees, and that other women, and possibly at times she herself, had boarded the train in a similar manner, without injury. *Missouri Pac. Ry. Co. v. Watson*, 72 Tex. 631, 10 S. W. 731.

**(15) Use of Unusual Mode of Egress from Cars.**

A railroad company is not liable for injuries to a passenger, caused by his seeking an unusual mode of egress from the cars. *Ratteree v. Galveston, H. & S. A. Ry. Co.*, 81 S. W. 566, 36 Tex. Civ. App. 197.

A railroad company is entitled to designate certain doors and steps by

which its passengers shall leave its train and reserve others for the performance of necessary work. *Ratteree v. Galveston, H. & S. A. Ry. Co.*, 81 S. W. 566, 36 Tex. Civ. App. 197.

Plaintiff alighted from a train, and started along the platform, where it was dark, and walked off a place where it was between four and five feet high. He testified that he did not remember changing his gait from the time he left the train until he fell; that he did not remember looking for the top of the platform; that he noticed people leaving the train, and going down the lighted platform; that he did not walk along cautiously, but paid no attention to where he was going until he fell. Held, that plaintiff was guilty of contributory negligence. *Gulf, C. & S. F. Ry. Co. v. Hodges* (Civ. App.) 24 S. W. 563.

**(16) Carrying of Baggage by Passenger.**

A woman injured in leaving a train by reason of its suddenly starting could not be regarded as guilty of contributory negligence merely because she carried with her a grip weighing perhaps 60 pounds, there being no evidence that she was not in good health, and of sufficient strength to carry it as far as the platform. *Chicago, R. I. & T. Ry. Co. v. Armes*, 74 S. W. 77, 32 Tex. Civ. App. 32.

Negligence as a matter of law, barring recovery for injuries to a passenger by the movement of a train while he was ascending the steps of a car, was not shown by the fact that he had just recovered from an illness, and was weak and enfeebled, and attempted to board the train with two heavy grips. *Galveston, H. & S. A. Ry. Co. v. Fink*, 99 S. W. 204, 44 Tex. Civ. App. 544.

**(17) Act of Passenger in Boarding Crowded Car.**

In an action against a railway company for damages for injuries to plaintiff's wife by failure to provide seating

accommodations for her on a train on which she was a passenger, whereby she was compelled to stand and hold an infant child in her arms, evidence considered, and held to justify submission to the jury of the issue as to whether plaintiff was guilty of contributory negligence in boarding a crowded car, and in not relieving his wife of the burden of the child. *Texas & P. Ry. Co. v. Rea* (Civ. App.), 74 S. W. 939, affirmed in 97 Tex. 649, no op.

**(18) Remaining in Unheated Station or Car.**

A passenger desirous of taking passage on the last train on which his ticket is good is not justified, for the purpose of saving his ticket, in waiting at an unheated depot for the train which is delayed, unless a person of ordinary prudence would have taken the risk of sustaining injury to his health by reason of the cold. *Gulf, C. & S. F. Ry. Co. v. Turner* (Civ. App.), 93 S. W. 195.

Where a railway passenger, who is injured as a result of the cold and crowded condition of a train, became aware of its condition before it left the station, and could have abandoned it, his contributory negligence for failing to there abandon the train is a question for the jury. *Texas, etc., Ry. v. Rea*, 27 Tex. Civ. App. 549, 65 S. W. 1115.

A passenger having sued a carrier on the ground that she got sick because the depot where she had to wait for a train was not heated, defendant's requested charge that, if plaintiff sat out doors after a fire was built in the depot, and that caused her sickness, and a person of ordinary care would not have remained outside under the circumstances, she could not recover, which presented affirmatively defendant's theory as made by the evidence, and would have assisted the jury, should have been given. *St. Louis Southwestern Ry. Co. of Texas*

*v. Patterson* (Civ. App.), 73 S. W. 987.

In an action against a railroad company for injuries caused by exposure while wrongfully being kept waiting for depot to open, it was error to refuse to charge that railroad company is not liable for sickness or other consequences of exposure to cold and rain which reasonable care and prudence could have avoided. *Texas, etc., Ry. v. Pierce*, 10 Tex. Civ. App. 429, 430, 30 S. W. 1122.

In an action by a passenger, it appeared that when she was admitted to the waiting room her train was due by schedule in a few minutes, and that she had not been advised that the train was late, or, if late, that she could assume that it would not arrive at any time. The train did not arrive for an hour, and she contracted an illness, owing to the lack of a fire in the station. Held, that she was not guilty of contributory negligence in remaining at the station during the time that she had a right to expect the train. *International & G. N. R. Co. v. Johnson*, 95 S. W. 595, 43 Tex. Civ. App. 147.

Where, in an action for injuries received by a passenger while waiting in an unheated depot for a delayed train, the court charged that, if plaintiff was exposed to the cold through the negligence of the carrier, it was his duty to exercise reasonable care to protect himself, and if he failed to do so he could not recover, an instruction authorizing a finding for plaintiff for damages resulting from the failure to keep the depot warm was not erroneous for failing to explain that he could not recover if he failed to use reasonable care to protect himself. (Civ. App.) *International & G. N. R. Co. v. Addison*, 93 S. W. 1081, judgment reversed (Sup.) 97 S. W. 1037, 8 L. R. A. (N. S.) 880, 100 Tex. 241.

A white female passenger sustained injuries in consequence of the failure of the carrier to heat its coach. The

smoking and colored coaches and a sleeper were warm. It was not shown that the passenger knew that there was a sleeping car attached to the train, or that the other two coaches were warm. No one, in answer to her complaints, told her to go into other cars because they were warm. She could not, without violating the law, go into the negro coach, and females were not expected to occupy the smoking car. Held insufficient to raise the issue of contributory negligence of the passenger in failing to go into another coach. *Texas & N. O. R. Co. v. Harrington*, 98 S. W. 653, 44 Tex. Civ. App. 386.

**(19) Acts of Passengers Carried beyond Destination or Getting Off at Improper Place.**

A passenger who was carried beyond his station, and put off at one end of a trestle, his gun, which he had placed, as directed, in the baggage car, being put off at the other end, can not recover damages for personal injuries received by him by falling on the trestle while crossing with his gun, which he had gone to get, when he attempted to make the passage back with muddy and slippery feet. *International & G. N. R. Co. v. Folliard*, 66 Tex. 603, 1 S. W. 624.

Where a person is put off a railroad train at the wrong station, at night, through negligence of the company in selling tickets to a point on its line at which its trains do not stop, and the person fails to make any inquiry for a place to find shelter, when he might have found it upon inquiry, there being no houses or lights in sight, known to him, and the agent closing the depot almost immediately upon his arrival, held, that by walking to his destination, instead of trying to find shelter, he contributed to his own injury. *Texas & P. Ry. Co. v. Cole*, 66 Tex. 562, 1 S. W. 629.

Where a passenger was put off a train at the wrong station at night through the company's negligence in

selling her a ticket to a point where the train did not stop, it was her duty to use ordinary care to prevent injuries to herself greater than the situation demanded. *Texas & Pacific Ry. Co. v. Cole*, 66 Tex. 562, 1 S. W. 629.

In an action for damages for carrying plaintiff's wife past her destination, and compelling her to walk back, it is error to refuse a charge that if walking back to the depot did not cause her sickness, and if her friends offered to take her home from the depot, and she refused, and then walked a greater distance to her home, and this last walk caused or contributed to her sickness, then the plaintiff could not recover. *Gulf, C. & S. F. Ry. Co. v. Head*, 4 Willson, Civ. Cas. Ct. App. § 209, 15 S. W. 504.

If plaintiff got off without objection, and without requesting the conductor or other agent of the carrier to run the train back to the depot, he can recover no damages by reason of having to walk back to the depot. *Gulf, C. & S. F. Ry. Co. v. Head*, 4 Willson, Civ. Cas. Ct. App. § 209, 15 S. W. 504.

Plaintiff, who was a passenger, at night, alighted from the train, which had passed beyond his station, without objection, after being told by the conductor that the train had passed the station, and was "about" a certain place. Held, that plaintiff could not recover for injuries received by falling through a bridge in attempting to return to the station, as he assumed the risks incident to getting off where he did. *Gulf, C. & S. F. Ry. Co. v. Jordan* (Civ. App.), 33 S. W. 690.

Where passenger, told by conductor that train had passed usual place and was "about the dirt road," said "all right," got off in the dark and in going back, fell through bridge and was injured, having assumed the risk, he could not recover. *Gulf, etc. v. Jordan* (Civ. App.), 33 S. W. 690, citing Con-

will *v. Gulf, etc., R. Co.*, 85 Tex. 96, 19 S. W. 1017.

It was not contributory negligence for plaintiff, incumbered with two small valises, to alight at a place, near the station platform, requiring him to jump to avoid a ditch, other passengers having done so in the presence of the conductor, who was preparing to start the train, though plaintiff was familiar with the surroundings. *Texas & P. Ry. Co. v. McLane (Civ. App.)*, 32 S. W. 776.

If by defendant's fault plaintiff was carried by the depot a distance of a mile, according to plaintiff's testimony, and 250 yards, according to others, and was not fully informed of the difficulties in the way of getting back, burdened as she was with two children, and without money, and the time being about midnight, it was not her duty to go to the next city, rather than to attempt to get back home. *Galveston, H. & H. Ry. Co. v. Crispi*, 73 Tex. 236, 11 S. W. 187.

**Continuance of Interrupted Journey by Passenger as Contributory Negligence.**—In *St. Louis, etc., R. Co. v. Foster*, 46 Tex. Civ. App. 517, 103 S. W. 194, affirmed in 102 Tex. 591, no op., the plaintiff was, by reason of the negligence of the carrier's employee, caused to alight at the wrong station. It was held that it was the natural thing for her to continue her journey, and if she adopted means for that purpose, such as an ordinarily prudent person would have done and her suffering and discomfort were the natural and proximate result of the means she adopted, the railway company was liable therefor, citing *St. Louis, etc., R. Co. v. Ricketts*, 96 Tex. 68, 70 S. W. 315.

Where a passenger was informed by a brakeman that he was on the right train but, after going a few hundred yards, was put off by the conductor as being on the wrong train, and in trying to walk back on the railway track

he fell through trestle work, he was not guilty of contributory negligence. *Houston & T. C. Ry. Co. v. Devainy*, 63 Tex. 172.

The act of a passenger who was carried past her destination in riding back in an open hack was not, as a matter of law, a failure to use such ordinary prudence as would preclude her recovery for injuries sustained thereby from exposure to the weather. *St. Louis Southwestern Ry. Co. v. Ricketts*, 96 Tex. 68, 70 S. W. 315.

Where a railroad company has wrongfully carried a passenger beyond his destination it ought to foresee that they would do that which is prudent for them to do under the circumstances and to contemplate any exposure to which they would be subjected in a natural and prudent effort to return. It is the right of persons wrongfully carried past their destination to go back, and the question is, whether or not, in choosing the means of transportation and in their other conduct they act as persons of ordinary prudence; and this is a question for the jury. *St. Louis, etc., R. Co. v. Ricketts*, 96 Tex. 68, 70 S. W. 315.

Where the next train was not due until the next evening, and the passenger was a stranger in the little place at which she got off, and did not know the conditions as to hotels and boarding houses, but was dressed in winter wear, and wore a shoulder cape, making the trip by buggy was not negligence per se. *St. Louis Southwestern Ry. Co. of Texas v. Foster*, 103 S. W. 194, 46 Tex. Civ. App. 517.

**(20) Physical Condition of Passenger as Constituting Contributory Negligence.**

Where a plaintiff was injured in alighting from a train, the fact that she was old, crippled, and deaf, and traveling alone, held not contributory negligence as a matter of law. *Texas, etc., R. Co. v. Reid (Civ. App.)*, 74 S. W. 99.

A pregnant woman, who is injured by the negligent coupling of cars while on a railroad journey, is not precluded from recovering on the ground of negligence in undertaking the journey, unless such journey, under the circumstances, would be dangerous. *St. Louis S. W. Ry. Co. v. Ferguson*, 64 S. W. 797, 26 Tex. Civ. App. 460.

A railroad company is liable for an injury to a pregnant passenger, caused by its negligence in allowing a car to collide with a train, though such collision would not have injured an ordinary passenger, and the company or its agents had no knowledge of the passenger's condition. *St. Louis, etc., R. Co. v. Ferguson*, 26 Tex. Civ. App. 460, 64 S. W. 797, affirmed in 95 Tex. 685, no op.

## 2. Acts of Passenger in Emergency.

The instinctive effort of one on board a conveyance to escape peril brought about by the carrier's negligence will not constitute contributory negligence, barring a recovery. *Sickles v. Missouri, etc., R. Co.*, 13 Tex. Civ. App. 434, 438, 35 S. W. 493, affirmed in 93 Tex. 720, no op.; *Williams v. Galveston, etc., R. Co.*, 34 Tex. Civ. App. 145, 78 S. W. 45, affirmed in 98 Tex. 637, no op.; *Denison, etc., R. Co. v. Freeman*, 38 Tex. Civ. App. 152, 85 S. W. 55; *Houston, etc., R. Co. v. Norris (Civ. App.)*, 41 S. W. 708; *La Prelle v. Fordyce*, 4 Tex. Civ. App. 391, 23 S. W. 453; *Gulf, etc., R. Co. v. Tullis*, 41 Tex. Civ. App. 219, 91 S. W. 317; *International, etc., R. Co. v. Neff*, 87 Tex. 303, 28 S. W. 283, reversing 26 S. W. 784; *Houston, etc., R. Co. v. Elvis*, 31 Tex. Civ. App. 280, 72 S. W. 216, affirmed in 97 Tex. 636, no op.; *Horton v. Houston, etc., R. Co.*, 46 Tex. Civ. App. 639, 103 S. W. 467, affirmed in 102 Tex. 585, no op.

"The rule is sound and just which holds the party guilty of negligence responsible for the result, if that negligence has caused another to be sur-

rounded by such circumstances as to him appear to threaten the destruction of his life or serious injury to his person, whether that person be prudent or imprudent, if in an effort to save his life he makes a choice of means from which injury results, and notwithstanding it may turn out that if he had done differently, or had done nothing, he would have escaped injury altogether." *Derison, etc., R. Co. v. Freeman*, 38 Tex. Civ. App. 152, 85 S. W. 55, quoting *International, etc., R. Co. v. Neff*, 87 Tex. 303, 309, 28 S. W. 283, reversing 26 S. W. 784, and citing *Texas, etc., R. Co. v. Watkins*, 88 Tex. 20, 26, 29 S. W. 232; *Jackson v. Galveston, etc., R. Co.*, 90 Tex. 372, 375, 38 S. W. 745, affirming 37 S. W. 786. See, also, *Missouri, etc., R. Co. v. Rogers*, 91 Tex. 52, 40 S. W. 956, reversing 40 S. W. 849.

The rule that instinctive effort to escape peril brought about by carrier's negligence is not contributory negligence, is only applicable where the acts or omissions have thrown the person off his guard or where he is overcome by sudden terror. *Sickles v. Missouri, etc., R. Co.*, 13 Tex. Civ. App. 434, 438, 35 S. W. 493, affirmed in 93 Tex. 720, no op.

"It is the imminent appearance of danger that threatens the destruction of life or serious bodily injury, brought about by the negligence of another, that relieves one from contributory negligence, rendering it immaterial whether he acted prudently or imprudently, in his effort to save his life, or himself from serious bodily injury; and makes him who was guilty of the negligence responsible for the injury caused the other in his effort to escape the apprehended peril, regardless of the means by which he undertook to avert it. Fear of a slight injury does not justify one in encountering the risk of a greater injury to avoid it. The fear of death or serious injury naturally results from the apprehension of imminent danger of the col-

lision of railway trains. And it is this fear, when brought about by the negligence of the company, that justifies one in encountering peril in order to escape it, and renders the company liable if he is injured in such endeavor." *Williams v. Galveston, etc., R. Co.*, 34 Tex. Civ. App. 145, 78 S. W. 45, affirmed in 98 Tex. 637, no op.

In an action by a street car passenger against a street railway company and a steam railroad for injuries caused by leaping from the car to avoid a threatened collision at a crossing between the car and a locomotive, evidence examined, and held to warrant a finding that the servants in charge of the car were free from negligence. *Horton v. Houston & T. C. Ry. Co.*, 103 S. W. 467, 46 Tex. Civ. App. 639.

In an action by a passenger for injuries alleged to have been caused by the negligent starting of a train as he was about to alight therefrom because of fear of a collision with a freight train approaching from the rear, evidence considered, and held to justify submission to the jury of the issue as to plaintiff's contributory negligence. *Williams v. Galveston, H. & S. A. Ry. Co.*, 78 S. W. 45, 34 Tex. Civ. App. 145.

The court charged that if the circumstances caused plaintiff to believe that he was in danger, while exercising ordinary care for his own safety, in endeavoring to escape, he was thrown or ran against the facing of the door, and was injured, to find for plaintiff, and that if plaintiff was negligent, as defined, and it was the proximate cause of the injury, to find for defendant. Held, that the charge was as favorable as defendant was entitled to, and it was not error to refuse charges to the effect that, to warrant a recovery, the jury must find that, under the circumstances, a person of ordinary prudence would have become frightened and acted as plaintiff did. *Denison & S. Ry. Co. v. Freeman*, 85 S. W. 55, 38 Tex. Civ. App. 152.

"It is held that where a passenger is told to alight from a train by the conductor, and the passenger being suddenly put to his election whether he will be carried past his destination or alight from a car in motion, does alight and receives an injury, he is not necessarily guilty of contributory negligence." *International, etc., R. Co. v. Folliard*, 66 Tex. 603, 1 S. W. 624.

In an action against a railroad company by one who had accompanied a passenger onto the train at the company's invitation for injuries received in alighting from the moving train, the refusal of a charge that if plaintiff got off the train while it was in motion, and negligently held onto the rail of the steps, thereby contributing to his injuries, defendant should recover, was not error, since if plaintiff were placed in a position of danger by defendant's negligence in failing to hold the train a sufficient time to allow him to safely alight, defendant may not have been absolved from liability because he acted negligently in attempting to extricate himself from his dangerous position. *St. Louis Southwestern Ry. Co. of Texas v. Cunningham*, 106 S. W. 407, 48 Tex. Civ. App. 1.

Where a passenger moves from one car to another because the car in which he was was not heated and is injured by the lurching of the train while in the vestibule, the rule that an instinctive effort to escape peril, either real or apparent, brought about by negligence of the carrier is not contributory negligence, is not applicable as it was not a case of sudden emergency. *Sickles v. Missouri, K. & T. Ry. Co. of Texas*, 13 Tex. Civ. App. 434, 35 S. W. 493.

"Appellant requested the court to instruct the jury not to consider any injuries plaintiff's wife might have received from running against a post or other obstruction, which the court refused, but, at the request of appellee, instructed the jury, in substance, that if plaintiff's wife was by the negligent

act of appellant, placed in a situation of danger, and in order to save herself from the danger acted wildly and negligently, such act on her part would not prevent a recovery by plaintiff. There was no error in refusing the charge requested by appellant, nor in giving that asked by appellee. (*International, etc., R. Co. v. Neff*, 87 Tex. 363, 28 S. W. 283, reversing 26 S. W. 784; *Texas, etc., R. Co. v. Watkins*, 88 Tex. 20, 26, 29 S. W. 232.)" *Gulf, etc., R. Co. v. Tullis*, 41 Tex. Civ. App. 219, 91 S. W. 317.

In an action for injuries received in leaping from a derailed train, an instruction requiring plaintiff to have believed himself in imminent peril of his life is erroneous; well-grounded fear of serious bodily injury being sufficient cause for his action. *La Prelle v. Fordyce*, 4 Tex. Civ. App. 391, 23 S. W. 453.

The instruction did not authorize the jury to find that, on account of plaintiff's age and physical condition and his inexperience in getting on and off moving trains, he was not negligent. *St. Louis Southwestern Ry. Co. of Texas v. Cunningham*, 106 S. W. 407, 48 Tex. Civ. App. 1.

In suit by a passenger against a carrier for injuries sustained while jumping from a moving train which was partially off the track and approaching a bridge, a charge restricting plaintiff's right to leap from the car only when he believed his life to be in imminent peril was error. *La Prelle v. Fordyce*, 4 Tex. Civ. App. 391, 394, 23 S. W. 453.

The mere fact that one injured by jumping from a train that was derailed through the negligence of defendant would not have been injured if he had remained therein will not relieve defendant from liability for such injury. *Houston, E. & W. T. Ry. Co. v. Norris* (Tex. Civ. App.), 41 S. W. 708.

That a passenger who was injured

by jumping from a train derailed through defendant's negligence would not have been injured if he had remained on the train will not relieve defendants. *Houston, etc., R. Co. v. Norris* (Civ. App.), 41 S. W. 708.

In an action by a passenger for injuries alleged to have been caused by defendant's negligently allowing a train to approach from the rear of the train on which plaintiff was riding, so as to cause him to fear a collision and attempt to leave the train, an instruction that if, while the train on which plaintiff was a passenger was stopped, another train approached it from the rear, so as to make it reasonably appear to plaintiff that there was imminent danger of a collision, and that from all the circumstances plaintiff had reasonable grounds for believing, and did actually believe, that there was danger of a collision, and that, if he remained in the passenger train, he was in imminent danger of losing his life or receiving great bodily injury, and, so believing, left his seat, attempted to alight, and was injured, etc., he was entitled to recover, was not open to the objection that to justify plaintiff in attempting to escape from apparent danger, he should actually be in imminent danger of losing his life or receiving great bodily injury. *Williams v. Galveston, H. & S. A. Ry. Co.*, 78 S. W. 45, 34 Tex. Civ. App. 145.

In an action by a passenger for personal injuries produced by her leaping from defendant's train under a sudden apprehension of danger, evidence held insufficient to support a verdict against the company. *Gulf, Colorado & S. F. Ry. Co. v. Wallen*, 65 Tex. 568.

### 3. Duty of Carrier to Use Proper Care Notwithstanding Passenger's Negligence.

**General Rule.**—Notwithstanding the fact that a passenger may be guilty of negligence contributing to his injury, yet this will not relieve the carrier from liability for



failure to exercise proper care to avoid injuring such passenger. *Clairborne v. Missouri, etc., R. Co.*, 21 Tex. Civ. App. 648, 53 S. W. 837, 57 S. W. 336; *Houston, etc., R. Co. v. Clemmons*, 55 Tex. 88; *Missouri, etc., R. Co. v. Cook*, 12 Tex. Civ. App. 203, 213, 33 S. W. 669, affirmed in 93 Tex. 690, no op.; *Texas, etc., R. Co. v. Overall*, 82 Tex. 247, 248, 18 S. W. 142; *Gulf, etc., R. Co. v. Fox (Sup.)*, 6 S. W. 569.

"The fact that the plaintiff is guilty of negligence does not relieve the defendant from using all reasonable care to prevent an injury to him or his property, and if he inflicts a willful injury, or neglects to use reasonable care to prevent it, he can not set up the plaintiff's negligence as a bar to the recovery therefor." *Houston, etc., R. Co. v. Leslie*, 57 Tex. 83, quoting 6 *Wait's Actions and Defenses*, p. 583.

"The negligence or trespass of a person does not place him beyond the protection of the law, and does not excuse another for the failure to exercise care to avoid injuring him; much less does it justify a willful injury. In such a case, although the negligence of the plaintiff, in one sense at least, contributes to the injury, the negligence of the defendant intervenes between the plaintiff's negligence and the result, and becomes the proximate cause of the injury. As some of the authorities put it, the plaintiff's negligence in such case becomes the condition and not the efficient cause of the accident." *Clairborne v. Missouri, etc., R. Co.*, 21 Tex. Civ. App. 648, 53 S. W. 837, 57 S. W. 336, quoting *McDonald v. International, etc., R. Co.*, 86 Tex. 1, 13, 22 S. W. 939, reversing 20 S. W. 847, 21 S. W. 774. See, also, *San Antonio, etc., R. Co. v. Jazo (Civ. App.)*, 25 S. W. 712, 714.

In *Northern Texas, etc., Co. v. Yates*, 39 Tex. Civ. App. 114, 88 S. W. 283, it was held that appellee's action being predicated solely upon the allegations

that he was in position of peril, and that appellant, its agents and servants discovered his perilous position in time to have prevented injury to him by the exercise of ordinary care, contributory negligence on the part of appellee was not involved or properly an issue in the case, and, therefore, can not be availed of by appellant as a defense.

**Illustrations.**—Plaintiff, alleging that he was injured by the sudden starting up of the car as he was getting on, may recover, notwithstanding any negligence of his in attempting to get on while it was moving, if those in charge of the car saw his situation, and thereafter started the car with the jerk. (*Tex. Civ. App. 1897*), *Christie v. Galveston City R. Co. (Tex. Civ. App.)*, 39 S. W. 638.

Where plaintiff's arm was injured while resting on a window sill, a charge that his want of ordinary care did not excuse defendant's negligence in leaving the car on the switch, is correct. *Gulf, etc., R. Co. v. Danshank*, 6 Tex. Civ. App. 385, 389, 390, 25 S. W. 295.

City ordinances required a street railroad to stop cars in the shortest time and space possible on the first appearance of danger to persons on or moving toward the track, and on the approach of danger to any person to give an alarm by blowing a whistle. Defendant's motorman on a car of extraordinary width saw plaintiff assume a position which was in fact dangerous, in view of the width of his car, and knew that persons signaling a car all stopped close to the track. His car was a special one, and had orders not to stop for ordinary passengers, and he proceeded without either stopping or checking the car, or giving the danger signal, until he struck and injured plaintiff. Held, that the jury were warranted in finding that the motorman saw plaintiff's danger and was guilty of negligence, although the motorman stated that he did not know

the dimensions of his car or the reach of the step which struck plaintiff. *Denison & S. Ry. Co. v. Craig*, 80 S. W. 865, 35 Tex. Civ. App. 548.

Where plaintiff was injured by being thrown from an engine where he had been directed to ride by a brakeman to whom he had paid a sum less than the fare for such privilege, and claimed that the engineer had invited him to climb over the tender into the cab, and that he was thrown by reason of the engineer's negligent act in causing a jerk of the engine, the engineer was bound, if he saw plaintiff, and knew his perilous position, to use ordinary care to avoid doing any act which would probably result in injury to plaintiff, though such act was usual in the proper operation of the train. *Claiborne v. Missouri, K. & T. Ry. Co. of Texas*, 57 S. W. 336, 21 Tex. Civ. App. 648.

**Duty to Exercise Care as Dependent on Knowledge or Opportunity to Know of Passenger's Danger.**—Railway company is liable to passenger riding in its freight car for personal injury occurring in a collision with another section of the train, where the conductor in the exercise of reasonable care, should have known of plaintiff's danger and could have warned him, though plaintiff was not exercising ordinary care in riding in car. *Missouri, etc., R. Co. v. Cook*, 12 Tex. Civ. App. 203, 213, 33 S. W. 669, affirmed in 93 Tex. 690, no op.

Where the employees did not know of plaintiff's peril in attempting to alight from a moving train, no duty was imposed on them to use every means consistent with the safety of other passengers, to avoid her injury, though they might have discovered her dangerous position by the exercise of ordinary care. *Harris v. Gulf, C. & S. F. Ry. Co.*, 80 S. W. 1023, 36 Tex. Civ. App. 94.

If brakeman sees a passenger's hand in a dangerous position, and closes the

door on it regardless of consequences, the passenger's negligence will not relieve the company from liability. *Texas, etc., Ry. v. Overall*, 82 Tex. 247, 248, 18 S. W. 142.

A passenger on a railroad train, which had stopped at a station, placed his hand on the jamb of the car door. It was injured by the company's brakeman entering the car and closing the door. Held, in an action for such injury, that where it was not the brakeman's duty to see that the passenger was taking proper care of himself, the fact that the brakeman could have discovered the passenger's danger was immaterial. *Texas & P. Ry. Co. v. Overall*, 82 Tex. 247, 18 S. W. 142.

A passenger on a railroad train, which had stopped at a station, placed his hand on the jamb of the car door. It was injured by the company's brakeman entering the car and closing the door. Held, in an action for such injury, that the burden was on plaintiff to show negligence on the part of such brakeman, and, failing to show this, the evidence would not support a verdict for him. *Texas & P. Ry. Co. v. Overall*, 82 Tex. 247, 18 S. W. 142.

A railway brakeman may presume that a passenger is conducting himself, with prudence, and it is not his duty to see that he does so. *Texas, etc., R. Co. v. Overall*, 82 Tex. 247, 248, 249, 18 S. W. 142.

In an action for injuries to an alighting passenger, a charge that it was the duty of defendant's employees to use ordinary care to keep from injuring plaintiff while he was attempting to alight was error, in that it omitted the question of notice of plaintiff's desire to alight. *Texas Southern R. Co. v. Long*, 80 S. W. 114, 35 Tex. Civ. App. 339.

In an action by a passenger for personal injuries, evidence examined, and held sufficient to show that defendant's employees did not know that

plaintiff would go upon the car platform before the train reached the station, and hence that no extraordinary duty devolved upon them with respect to his safety. *Houston & T. C. Ry. Co. v. Johnson* (Civ. App.), 103 S. W. 239.

**Evidence Authorizing Submission of Question of Plaintiff's Danger and Carrier's Knowledge Thereof.**—In an action by a passenger for injuries sustained while attempting to alight from a train, evidence held sufficient to warrant the submission to the jury of the question whether plaintiff was in danger, and whether it was known to defendant's agent. *Galveston, etc., R. Co. v. Thornsberry* (Sup.), 17 S. W. 521.

**Evidence Held Not to Raise Issue of Discovered Peril.**—In an action against a street railway for injuries to a passenger, caused by the sudden starting of the car before she had reached her seat, evidence that the conductor had been informed when she entered the car that she was unwell, and needed assistance, did not raise the issue of discovered peril. *Pelly v. Denison & S. Ry. Co.* (Civ. App.), 78 S. W. 542, affirmed in 98 Tex. 628, no op.

#### 4. Imputation of Negligence.

Under the Texas practice it would seem that in a suit brought for the benefit of an infant, the negligence of the parent can not be imputed to the child. *Allen v. Texas, etc., R. Co.* (Civ. App.), 27 S. W. 943; *Texas, etc., R. Co. v. Kingston*, 30 Tex. Civ. App. 24, 68 S. W. 518, affirmed in 95 Tex. 688, no op.; *G. H. & H. R. Co. v. Moore*, 59 Tex. 64; *Williams v. T. & P. R. R. Co.*, 60 Tex. 205; *Northern Tex., etc., Co. v. Royce*, 38 Tex. Civ. App. 601, 86 S. W. 621, affirmed in 101 Tex. 651, no op. See also, *Texas Cent. R. Co. v. Stuart*, 1 Tex. Civ. App. 642, 20 S. W. 962, affirmed in 93 Tex. 673, no op.

Where an infant, by next friend, sues for her own benefit for personal injuries received, the negligence of her

father will not be imputed to her so as to defeat the recovery. *Texas, etc., R. Co. v. Kingston*, 30 Tex. Civ. App. 24, 68 S. W. 518, affirmed in 95 Tex. 688, no op.

A passenger upon a street railroad car was injured in a collision caused by a train upon a crossing track backing into the car upon which was the passenger. In such case negligence of the employees of the street car company would not be imputed to such passenger; nor in the absence of some circumstance warning the passenger of approaching danger would the absence of testimony to the exercise of any care by the passenger to avoid danger require that the issue of contributory negligence be submitted to the jury. *Gulf, etc., Ry. Co. v. Pendry*, 87 Tex. 553, 29 S. W. 1038, reversing 27 S. W. 213.

A different rule would apply if the father was suing in his own behalf to recover damages for injury to a minor child. *Texas, etc., R. Co. v. Kingston*, 30 Tex. Civ. App. 24, 68 S. W. 518, affirmed in 95 Tex. 688, no op.

In an action for personal injuries to the wife, the negligence of the husband will be imputed to her, and in so far as it aggravated the damages, he can not recover. *Texas, etc., R. Co. v. Rea*, 27 Tex. Civ. App. 549, 65 S. W. 1115.

In an action by the husband for personal injuries to the wife, sustained as a passenger, arising from the crowded condition of the train, compelling her to stand, while she carried a child, the negligence of the husband, who was also a passenger, in permitting her to carry the child, is a question for the jury. *Texas & P. Ry. Co. v. Rea*, 65 S. W. 1115, 27 Tex. Civ. App. 549.

#### M. DUTIES AND LIABILITIES AS TO BAGGAGE.

##### 1. Duties of Carrier as to Receiving, Transporting and Delivering Baggage.

**Duty to Receive.**—When a passenger notifies the servants of a railway com-

pany of his wish that his baggage go with him, it is the duty of the company to take charge of it. *I. & G. N. Ry. Co. v. Folliard*, 66 Tex. 603, 1 S. W. 624.

**Statutory Provision as to Allowance of Baggage.**—Article 4258b, Sayles' Civ. Stat., after fixing the rate of passenger fare upon all railroads within the state, provides for "an allowance of baggage to each passenger not to exceed one hundred pounds in weight." *Andrews v. Ft. Worth, etc., R. Co.* (Civ. App.), 25 S. W. 1040.

**Statutory Provision Not Intended to Allow Carrying of Another Person's Property as Baggage.**—This statutory allowance of baggage is a personal privilege extended to a passenger to enable him to carry his own baggage. *Andrews v. Ft. Worth, etc., R. Co.* (Civ. App.), 25 S. W. 1040.

It was not the purpose of the legislature in adopting art. 4258b, Sayles' Civ. Stats., to permit a passenger to take with him, as his own, baggage of another person, whether as a matter of accommodation, or for compensation paid; otherwise, passengers might engage in the business of baggage carrying, each to the extent of one hundred pounds of baggage. *Andrews v. Ft. Worth, etc., R. Co.* (Civ. App.), 25 S. W. 1040.

**Duty as to Transportation and Delivery.**—The obligation of a carrier as to baggage is to transport the same to its destination within a reasonable time after it has received and checked such baggage. *St. Louis, etc., R. Co. v. Ray*, 13 Tex. Civ. App. 628, 35 S. W. 951.

Carrier is bound to have passenger's baggage ready for delivery at usual place, until owner exercising due diligence can call for it; and if passenger does not call, carrier must place it in baggage room, thereby assuming only warehouseman's liability. *Galveston, etc., R. Co. v. Smith*, 81 Tex. 479, 485, 17 S. W. 133.

**Evidence Held Insufficient to Show Unreasonable Delay.**—In an action against a carrier for delay in the transportation of a trunk sent as baggage it appeared that plaintiff purchased a ticket from defendant to W., and there immediately purchased a ticket over another line to T., his place of destination; that, due to the fact that defendant's baggage car was crowded, it was unable to ship the trunk on the same train with plaintiff, but did ship it by the next train; that the trunk was received in W. by plaintiff's agent the following day; that the trunk was not received by plaintiff at his place of destination, but was returned to him two weeks afterwards. Held, that the evidence was insufficient to show that defendant did not transport the trunk within a reasonable time after its receipt. *St. Louis S. W. Ry. Co. v. Ray*, 13 Tex. Civ. App. 628, 35 S. W. 951.

## 2. Liability as Dependent on Nature of Articles.

### a. In General.

The implied undertaking of a carrier for the safe carriage of baggage of passengers is limited and not to be extended beyond such baggage as is usually carried with them by travelers for their personal convenience. *Jones v. Priester*, 1 App. Civ. Cases, § 613.

Whatever is baggage the carrier impliedly contracts to carry safely; what is not baggage is not within the implied contract. *Missouri, etc., R. Co. v. Meek*, 33 Tex. Civ. App. 47, 75 S. W. 317.

A carrier is not liable for loss or injury to personal effects carried by a passenger, even though the loss or injury occurs through its negligence as carrier or warehouseman, where the effects do not constitute baggage. *Mexican Cent. Ry. Co. v. De Rosear* (Civ. App.), 109 S. W. 949.

### b. What Constitutes Baggage.

#### (1) General Rule Stated and Applied.

**Definition and Test as to What Constitutes.**—As to the general definition

of the term "baggage" the authorities differ but little, though in the application of a definition to the facts of particular cases the results reached are varied and discordant. *Missouri, etc., R. Co. v. Meek*, 33 Tex. Civ. App. 47, 75 S. W. 317.

The term "baggage" within the rule determining the carrier's liability, is defined to include whatever the passenger takes with him for his own personal use and convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purposes of the journey. *Missouri, etc., R. Co. v. Meek*, 33 Tex. Civ. App. 47, 75 S. W. 317.

The question as to what is, or is not properly baggage, depends largely upon the circumstances of the individual case. The length or purpose of the journey, station in life or occupation of the traveler, the character of the country through which the journey is made, mode of conveyance, etc., may be considered in determining the question, the rule being that anything may be carried as baggage which the passenger carries for his personal use, comfort, instruction, or amusement. *Missouri, etc., R. Co. v. York*, 2 App. Civ. Cases, §§ 638, 639. See, also, *Texas, etc., R. Co. v. Ferguson*, 1 App. Civ. Cases, § 1253; *Texas, etc., R. Co. v. Russell* (Civ. App.), 97 S. W. 1090; *Texas, etc., R. Co. v. Capps*, 2 App. Civ. Cases, §§ 33, 35; *Pullman Co. v. Vanderhoeven*, 48 Tex. Civ. App. 414, 107 S. W. 147, affirmed, no op.; *Galveston, etc., R. Co. v. Fales*, 33 Tex. Civ. App. 457, 77 S. W. 234, affirmed in 98 Tex. 617, no op.; *Seawell v. Greenway, etc., Co.*, 22 Tex. 691; *Missouri, etc., R. Co. v. Meek*, 33 Tex. Civ. App. 47, 75 S. W. 317.

"What would be regarded as personal baggage for a person engaged in one line of business, or whose journey was for a particular purpose,

would not be for a person in an entirely different business, nor would what would be baggage of one whose journey was for a particular purpose be baggage of one whose journey was for an entirely different purpose. See *Texas, etc., R. Co. v. Lawrence*, 42 Tex. Civ. App. 318, 95 S. W. 663, and authorities cited." *Texas, etc., R. Co. v. Russell* (Civ. App.), 97 S. W. 1090.

To subject common carriers to damages for the loss of personal baggage of a passenger, it must be strictly baggage,—that is, such articles of necessity and personal convenience as are usually carried by travelers,—and a carrier is liable for money in a trunk, not exceeding an amount ordinarily carried for traveling expenses. *Missouri Pac. Ry. Co. v. York*, 2 Willson, Civ. Cas. Ct. App. § 639.

**Articles Included in Term "Baggage."**—Under the rule as before stated articles which may be included in the term "baggage" are not limited to those which are necessary for use during the journey, but may include articles appropriate or essential for the purposes and needs of the journey. Thus the easel of an artist on a sketching tour, the books of the student, the guns of the hunter, may come within the term. *Missouri, etc., R. Co. v. Meek*, 33 Tex. Civ. App. 47, 75 S. W. 317, citing *Hutch. on Carr.*, §§ 686, 687.

Upon the same principles the tools of an artisan have been included within the term "baggage." *Missouri, etc., R. Co. v. Meek*, 33 Tex. Civ. App. 47, 75 S. W. 317.

The term "baggage" may include jewelry and other articles necessary for comfort and convenience. *Mexican Nat. R. Co. v. Ware* (Civ. App.), 60 S. W. 343 (see 94 Tex. 706, no op.); *Galveston, etc., R. Co. v. Fales*, 33 Tex. Civ. App. 457, 77 S. W. 234, affirmed in 98 Tex. 617, no op.; *Pullman Co. v. Vanderhoeven*, 48 Tex. Civ. App. 414, 107 S. W. 147, affirmed, no op.

The term "baggage" in so far as a female passenger is concerned, includes whatever property or articles of paraphernalia she chooses to carry on her journey, necessary to her use, enjoyment, or pleasure in traveling, and is therefore sufficiently broad to cover a diamond ring worn as part of her wardrobe. *Pullman Co. v. Vanderhoeven*, 107 S. W. 147, 48 Tex. Civ. App. 414.

Manuscript music, used by a traveling company in its business, is baggage when in a trunk checked by the company while they are passengers on a train. *Texas & P. Ry. Co. v. Morrison's Faust Co.*, 48 S. W. 1103, 20 Tex. Civ. App. 144.

Sufficient money for the purposes of a passenger's journey is personal baggage for the loss of which in transit the carrier is liable. *Texas, etc., R. Co. v. Lawrence*, 42 Civ. App. 318, 95 S. W. 663; *International, etc., R. Co. v. McGown*, 2 App. Civ. Cases, § 712; *Missouri, etc., R. Co. v. York*, 2 App. Civ. Cases, §§ 638, 639; *Jones v. Priester*, 1 App. Civ. Cases, § 613.

The amount of money which a passenger may carry as baggage depends upon the length of the journey, the circumstances and condition of the passenger, and other questions which are to be determined by the jury. *International & G. N. R. Co. v. McCown*, 2 Willson, Civ. Cas. Ct. App. § 712.

The amount of money which a passenger may carry as baggage is not limited to what may be sufficient to defray the expenses of the journey but he may take enough money to meet any contingencies such as delays, etc. *International & G. N. R. Co. v. McCown*, 2 Willson, Civ. Cas. Ct. App. § 712.

A carrier engaged in transporting baggage from one traveling conveyance to another is not liable for the loss of money not reasonably necessary to meet actual or contingent expenses. *Jones v. Priester*, 1 White & W. Civ. Cas. Ct. App. § 613.

**Articles Not Properly Included in Term "Baggage."**—A carrier engaged in the business of transporting baggage from one traveling conveyance to another is not liable for the loss of articles carried as merchandise. *Jones v. Priester*, 1 White & W. Civ. Cas. Ct. App. § 613. See, also, *Texas, etc., R. Co. v. Capps*, 2 App. Civ. Cases, §§ 33, 35.

A passenger can not recover, as for lost baggage, for bedding, unless it was intended to be used on the trip, such not being personal baggage. *Texas & P. R. Co. v. Ferguson*, 1 White & W. Civ. Cas. Ct. App. § 1255.

Household articles carried by a passenger consisting of a drawnwork centerpiece, a tablecloth, doilies, a bed spread, and pillow shams, as well as a photographer's camera carried for sale as merchandise, do not constitute baggage, but a woman passenger's shawls, handkerchiefs, collars, dresses, and underskirts are baggage. *Mexican Cent. Ry. Co. v. De Rosear* (Civ. App.), 109 S. W. 949.

**Limitation as to Quantity and Value of Articles Properly Included in Term "Baggage."**—In the absence of legislative enactment, the law does not prescribe any definite limit to the value of baggage, beyond which a carrier is not liable. *Galveston, H. S. A. Ry. Co. v. Fales*, 77 S. W. 234, 33 Tex. Civ. App. 457.

As the law places no limit on the value of a woman's jewelry that she may carry as baggage, the court in an action against a sleeping car company for loss of a female passenger's diamond ring alleged to be worth \$1,450 properly refused the charge that the jury might find that the ring could not be considered as baggage on account of its value. *Pullman Co. v. Vanderhoeven*, 107 S. W. 147, 48 Tex. Civ. App. 414.

## (2) Province of Court and Jury.

**Whether Articles Properly Constitute Baggage.**—Whether lost articles

fall within the meaning of a passenger's personal baggage is a mixed question of law and fact to be determined by the jury under proper instructions from the court. *Texas & P. R. Co. v. Ferguson*, 1 White & W. Civ. Cas. Ct. App. § 1255. See, also, *Texas, etc., R. Co. v. Lawrence*, 42 Tex. Civ. App. 318, 95 S. W. 663.

The question whether certain classes of articles should be regarded as baggage is one of law, but the question as to the quantity of articles is one of fact. *Jones v. Priester*, 1 White & W. Civ. Cas. Ct. App. § 614.

In an action against a carrier for the contents of a trunk, carried as baggage, it was proper to submit to the jury whether the contents came under the head of merchandise and were carried for purposes of trade, or whether they were carried merely for the comfort and convenience of the traveler either on the journey or after arriving at his destination. *Jones v. Priester*, 1 White & W. Civ. Cas. Ct. App. § 614.

Plaintiff and his family were emigrants to Texas from Tennessee. He had baggage checks for three trunks from the latter to the former state. He received two of his trunks from defendant, but the other was never delivered. It contained bed quilts, coverlets, counterpanes, sheets, a handsaw, and \$400 in money. Held, that the question of whether said goods were legal "baggage" was one of fact to be determined by the court, passing upon the case as a jury, and that a finding of the trial court that the articles were baggage would not be disturbed, as many circumstances might have occurred on the trip which would have rendered the articles necessary for the convenience and comfort of plaintiff and his family. *Missouri Pac. Ry. Co. v. York*, 2 Willson, Civ. Cas. Ct. App. § 641.

In an action by a mechanic against a carrier for lost tools checked as

baggage, it was for the jury to determine whether the tools were reasonable in quantity, and of a character usually carried by mechanics like plaintiff for their personal use at their destinations, and hence such as could be regarded as baggage. *Missouri, K. & T. Ry. Co. of Texas v. Meek*, 75 S. W. 317, 33 Tex. Civ. App. 47.

In an action against a carrier for negligent delay in delivering a passenger's trunk, it appearing that the passenger was a carpenter on his way to a place where he expected to use tools contained in the trunk, the question whether the tools constituted baggage was one for the jury. *Texas & N. O. R. Co. v. Russell* (Civ. App.), 97 S. W. 1090.

It appearing that plaintiff had taken the journey in the summer time, and for a short distance only, it was error for the court to assume as matter of law that heavy winter clothing included among the lost articles would come within the definition of baggage. *Missouri, K. & T. Ry. Co. of Texas v. Meek*, 75 S. W. 317, 33 Tex. Civ. App. 47.

Certain articles claimed as baggage consisted of one liquid cooler, one beer faucet, one wrench, and one lemon squeezer, and were samples, being carried by plaintiff in his trunk, for the purpose of effecting sales. Held, that these articles were not baggage. *Texas & P. Ry. Co. v. Capps*, 2 Willson, Civ. Cas. Ct. App. § 33.

#### Questions as to Quantity and Value.

—It is ordinarily a question of fact for the jury to determine what is a reasonable quantity of baggage, for which a carrier should be held liable under the circumstances. *Texas, etc., R. Co. v. Lawrence*, 42 Tex. Civ. App. 318, 95 S. W. 663; *Galveston, etc., R. Co. v. Fales*, 33 Tex. Civ. App. 457, 77 S. W. 234, affirmed in 98 Tex. 617, no op.

Where a traveler sought to recover for \$100 in coin, and \$200 in currency, lost with his baggage, it was for the

jury, under all the circumstances, whether the sum was greater than necessary. *Jones v. Priester*, 1 White & W. Civ. Cas. Ct. App. § 615.

In an action by a passenger against a carrier for the loss of jewelry comprising part of plaintiff's baggage, the question whether the jewelry exceeded in value that usually taken by passengers of like station is for the jury. *Bonner v. Blum* (Civ. App.), 25 S. W. 60.

**c. Liability for Articles Other than Actual or Necessary Baggage.**

**(1) As Dependent on Carrier's Knowledge of Nature and Value.**

**In General.**—Where a railroad company, through its ticket or baggage agent, receives articles for transportation as baggage, knowing at the time that such articles are not properly baggage, the company will be responsible therefor, as a common carrier, and will be estopped from denying that the articles were baggage, at least to the extent that the agent had notice of the character of such articles. *Texas & P. Ry. Co. v. Capps*, 2 Willson, Civ. Cas. Ct. App. § 34.

In an action for the loss of valuable baggage by a railway passenger, where no inquiry was made as to its value or quantity and no evasion practiced by plaintiff, the company is liable for such loss unless the articles were in excess in quantity or value of those usually taken by like persons in making like trips. *Bonner v. Blum* (Civ. App.), 25 S. W. 60, 61, 62.

Where a carrier accepts a box offered as baggage knowing that it does not contain baggage proper but merchandise, it will be liable for injury thereto during transportation. *St. Louis, I. M. & S. Ry. Co. v. Green*, 97 S. W. 531, 44 Tex. Civ. App. 13.

A railroad company which receives as a passenger's baggage the trunk of a drummer, with notice that it contained his samples, can not escape lia-

bility for injury to the contents by showing that they were not in fact passenger's baggage. *Ft. Worth & R. G. Ry. Co. v. I. B. Rosenthal Millinery Co.* (Civ. App.), 29 S. W. 196.

**Notice or Knowledge of Carrier a Question for Jury.**—In an action against a carrier to recover for injury to certain china ware shipped as baggage, evidence considered, and held that it was a question for the jury whether the carrier's agent had notice of the true character of the goods. *St. Louis, I. M. & S. Ry. Co. v. Green*, 97 S. W. 531, 44 Tex. Civ. App. 13.

**(2) Liability in Absence of Inquiry.**

A railroad company receiving a heavy trunk as baggage, and receiving extra compensation therefor as baggage, at baggage rates, without inquiring as to the contents, is liable for a loss thereof, though the trunk contained such articles as are not ordinarily included in the term "baggage." *Missouri Pac. R. Co. v. Slater*, 3 Willson, Civ. Cas. Ct. App. § 8.

A common carrier is liable for baggage which it receives from a passenger for transportation, and which is never delivered, though the owner does not inform the carrier of the specific articles the baggage contains. *Galveston, H. & S. A. Ry. Co. v. Fales*, 77 S. W. 234, 33 Tex. Civ. App. 457.

"Carriers of passengers have the right to require of a passenger information as to the value of his baggage, and may demand, as a condition precedent, extra compensation for any excess beyond what the passenger may reasonably demand to be transported under the contract to carry the person; and if the passenger, by any artifice or device, evade inquiry as to the value of his baggage, and thereby impose upon the carrier a responsibility beyond what he is bound to assume in consideration of the ordinary fare charged for the transportation of the person, the carrier will be discharged



from liability for the full value of the baggage." *Bonner v. Blum* (Civ. App.), 25 S. W. 60.

In order to fix the liability upon a common carrier for the loss of its passengers' baggage, it is not necessary that the owner should have, when the baggage is delivered for transportation, informed the carrier of the specific articles constituting it. If it is in fact baggage, is received by the common carrier for transportation, and is never delivered to the passenger, the liability is fixed. *Galveston, etc., R. Co. v. Fales*, 33 Tex. Civ. App. 457, 77 S. W. 234, affirmed in 98 Tex. 617, no op.

### 3. Liability as Dependent on Custody of Property.

#### a. As to Baggage Generally.

When a passenger notifies the servants of a railway company of his wish that his baggage go with him, it is the duty of the company to take charge of it. The company is liable, as for a breach of that duty, if the passenger, having been directed by a servant of the company where to deposit his baggage, delivered it at the place designated, but, by mistake, to another than an employee of the company. *International, etc., R. Co. v. Folliard*, 66 Tex. 603, 1 S. W. 624.

#### Evidence as to Delivery to Carrier.

—In a suit against the master of a steamer for the value of a passenger's trunk, the only evidence was the deposition of one in whose care the plaintiff was at the time, that he caused the trunk to be placed on board the steamer, a short time before her departure. The court instructed the jury that they must be satisfied that the trunk was delivered to the defendant, or to some officer of the boat authorized to receive it on the part of the steamer. Held, that a judgment for plaintiff should not be reversed on the ground that there was no sufficient evidence that the trunk was placed in

the hands of the employee of the boat. *Forbes v. Davis*, 18 Tex. 268.

Where a passenger attempts to board a passenger car with a gun, and, on being directed to place the gun in the baggage car, delivers it to a person there, who demands and receives 25 cents for the service, the passenger may recover damages for the carriage of the gun beyond his destination, though the person to whom the gun was actually delivered might have been the agent of an express company. *International & G. N. R. Co. v. Folliard*, 66 Tex. 603, 1 S. W. 624.

Plaintiff contracted with a transfer company to deliver his trunk at a depot. The transfer company's servant placed the trunk in the entrance of the baggage room of the depot company unchecked, without calling it to the attention of any agent of such company, or advising any one to whom the trunk belonged. Thereafter another person mistook the trunk for his own and had it checked out. Held, that the mere placing of the trunk in the baggage room was not a delivery to the depot company, which did not occur until it was claimed, and that such company was therefore not liable for its loss. *Gregory v. Webb*, 40 Tex. Civ. App. 360, 89 S. W. 1109.

In an action against a railroad company for a lost trunk, there was evidence that, after the trunk was unloaded, at a union depot, from the car of another company, defendant's employee placed the trunk on the platform while acting as employee of the plaintiff or of the other company, and that the trunk was lost there. Held, that an instruction submitting the issue as to whether defendant, by its employees acting for it, received the trunk, was not objectionable as ignoring the issue whether said employee was acting within the course of his employment in handling the trunk. *Texas & P. Ry. Co. v. Morrison's Faust Co.*, 48 S. W. 1103, 20 Tex. Civ. App. 144.

In an action against a railroad company for the value of a valise containing merchandise, and its contents, delivered to defendant to be transported, the evidence showed that it was delivered to the porter at the depot, whose duty it was to receive baggage of passengers, and weigh the same; that it was deposited in the depot as baggage; and that the porter knew it was plaintiff's valise, and that he was a traveling merchant. Held, that a verdict for defendant was not sustained by the evidence. *Snaman v. Missouri, K. & T. Ry. Co.* (Civ. App.), 42 S. W. 1023.

In such case, testimony as to the character of customers to whom plaintiff sold the goods in the valise was not admissible. *Snaman v. Missouri, K. & T. Ry. Co.* (Civ. App.), 42 S. W. 1023.

**b. Liability for Hand Baggage and Other Articles Retained in Possession of Passenger.**

If a passenger retains the exclusive control of his baggage, the carrier is not responsible for its loss, unless such loss results from the carrier's negligence. *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120, 5 S. W. 814.

While a carrier of passengers is not liable as an insurer of money or other baggage retained in the possession and control of the passenger and lost in transit, it is bound to use proper care to prevent loss of or injury to such baggage, and where such baggage is lost through its negligence it is liable. *Boner v. Grumbach*, 2 Tex. Civ. App. 482, 21 S. W. 1010.

The liability of a carrier for loss of baggage retained in the possession and control of a passenger may exist without proof of gross negligence. *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 21 S. W. 1010.

The fact that a passenger on a train takes off his coat and places it on an unoccupied seat is not such contributory negligence as will prevent his

recovering for money therein contained, lost by the overturning of the coach into the water. *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 21 S. W. 1010.

Where a passenger who had placed his coat, containing money, in an unoccupied seat, just before the coach turned over, recovered his coat shortly after he had gotten out of the overturned coach, and immediately missed his money, his failure to notify the carrier of his loss, and of all effort on his part to find it, will preclude a recovery, since it was his duty to make such reasonable effort to regain his property as the situation allowed. *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 21 S. W. 1010.

Where a passenger, on arrival at his destination, hurriedly left the car, on the suggestion of an employee in charge of it that the train would soon start, and left a valise therein, known by the employee to contain certain valuables, which remained in the custody of the defendant's employees for several hours, after which it was returned, rifled of its contents, the company is liable, although the journey had been completed. *Bonner v. De Mendoza*, 4 Willson, Civ. Cas. Ct. App. § 234, 16 S. W. 976.

The fact that a passenger negligently leaves valuables in the car does not relieve the carrier from liability. *Bonner v. De Mendoza*, 4 Willson, Civ. Cas. Ct. App. § 234, 16 S. W. 976.

**4. Commencement, Duration and Termination of Liability of Carrier as Such.**

The liability of a common carrier for baggage, begins with the commencement of the journey and continues until reasonable time and opportunity has been afforded to the owner to take away the same. *Texas, etc., R. Co. v. Capps*, 2 App. Civ. Cases, § 33.

Under Rev. St. art. 281, providing that a carrier's liability for goods

shall continue until the goods are delivered to the consignee at the point of destination, the carrier's responsibility for baggage continues until the owner has had a reasonable time and opportunity to remove it. *Texas & P. Ry. Co. v. Capps*, 2 Willson, Civ. Cas. Ct. App. § 35.

Carrier's common-law liability attaches to baggage permitted by agent to remain in baggage room upon understanding that journey is to be renewed upon following day. *Texas, etc., R. Co. v. Capps*, 2 Tex. App. Civ. Cases, §§ 33, 36.

##### **5. Liability for Loss or Injury as Dependent on Negligence.**

**In General.**—A railroad company carrying a passenger and his baggage under a free pass is a gratuitous bailee of the baggage, and is liable for its loss only when caused by its negligence. *White v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.), 86 S. W. 962.

"There is no statute in this state fixing specifically the measure of responsibility of carriers for the loss of or damage to baggage. Their duties and liabilities are the same as at common law; and at common law a common carrier for hire is an insurer of the safety of baggage committed to its care for transportation, but when it is carried without compensation the carrier's liability is that of a gratuitous bailee, and it can be held for loss or damage to such baggage only in the event the same occurred through its negligence." *White v. St. Louis, etc., R. Co.* (Civ. App.), 86 S. W. 962.

Proof that officers of the law, in attempting to arrest a person accused of theft, shot at him, and shot into a trunk in a baggage car, damaging the goods therein, is not proof of negligence of the carrier, where its employees had no connection with the shooting or attempted arrest, nor any control of the officers. *White v. St.*

*Louis Southwestern Ry. Co. of Texas* (Civ. App.), 86 S. W. 962.

##### **Exercise of Proper Care in Protecting Baggage Question for Jury.**

Where defendant carrier agreed to carry plaintiff's trunk to a station, and, in his absence, left it on the platform, in the usual place for such deliveries, and it was stolen therefrom, but evidence whether plaintiff was to be there to receive it was conflicting, the question whether defendant exercised reasonable care in protecting it was for the jury. *Ft. Worth Transfer Co. v. Isaacs* (Civ. App.), 40 S. W. 39.

##### **Liability as Insurer for Baggage Detained on Account of Loss of Excess Check.**

Where a carrier refused to deliver a trunk to a passenger upon demand and tender of the sum due for excess baggage charges, for the reason that a C. O. D. excess check had become detached, and held the trunk until the correct amount of excess charges could be ascertained, it became an insurer against loss or injury in respect to the contents of the trunk during the entire time of the delay in so far as the articles comprised personal baggage. *Mexican Cent. Ry. Co. v. De Rosear* (Civ. App.), 109 S. W. 949.

##### **6. Liability as Dependent on Demand by Owner in Reasonable Time.**

**In General.**—It is the duty of a railway company in regard to baggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform at the usual place of delivery until the owner in the exercise of due diligence can call for and receive it; and it is the owner's duty to call for and remove it within a reasonable time. If he does not so call for and receive it, it is the company's duty to put it into their baggage room and keep it for him, being liable only as warehouseman and for failure to use ordinary care. The reasonable time within which the owner must call for it is directly upon

its arrival, making reasonable allowance for delay caused by the crowded state of the depot at the time; and the lateness of the hour makes no difference if the baggage be put upon the platform. *Galveston, etc., R. Co. v. Smith*, 81 Tex. 479, 17 S. W. 133; *Texas, etc., R. Co. v. Capps*, 2 App. Civ. Cases, §§ 33, 35; *St. Louis, etc., R. Co. v. Akers* (Civ. App.), 73 S. W. 848.

**Evidence as to Demand and Nondelivery.**—In an action against a railroad company for the loss of a trunk while being carried by defendant as baggage, plaintiff testified that, on arriving at Dallas, she gave her check for the trunk to one H., and directed him to get her trunk. H. went to the baggage room, and returned, saying he could not get the trunk that night, but would get it in the morning. Early the next morning he went for the trunk, and returned with a trunk which was not hers. She immediately went with H. to defendant's depot, and told the baggage master that the trunk sent was not hers, and she returned the trunk to him. He told her to look through the baggage room, and see if she could find her trunk. She looked, but failed to find it. After that she made frequent calls to the depot for her trunk, and was always answered that it had not come. Held, that this evidence sufficiently established the fact, not only that the check was presented, but that the baggage master had received it, and had delivered the wrong trunk, and that a proper demand for the trunk was established. *Texas & P. Ry. Co. v. Cook*, 2 Willson, Civ. Cas. Ct. App. § 660.

Defendant was engaged in the business of transporting baggage for hire. He took plaintiff's trunk, giving her a check therefor, agreeing to deliver it to her at a certain hotel. He delivered it to the hotel according to the customary manner of delivering baggage. Plaintiff never surrendered her check to anyone, nor was the trunk

ever delivered to her. Held, that defendant was liable therefor. *Trice v. Miller*, 3 Willson, Civ. Cas. Ct. App. § 440.

#### 7. Liability of Carrier as Warehouseman.

Where goods are not demanded by a consignee immediately after their arrival at their destination, the carrier is liable only as a warehouseman. *St. Louis, etc., R. Co. v. Akers* (Civ. App.), 73 S. W. 848.

A carrier's responsibility for baggage continues until the owner has had reasonable opportunity to take it away. After that, the responsibility as a carrier ceases, and the carrier becomes a mere warehouseman, and liable as such only. *Texas & P. Ry. Co. v. Capps*, 2 Willson, Civ. Cas. Ct. App. § 35.

Where a passenger's trunk is placed on the platform on the arrival of the train at 9 a. m., and, not being called for, is placed in the baggage room, whence it is stolen during the night—he not calling for it till late the next day—the carrier's liability is not that of a carrier but only of a warehouseman. *St. Louis & S. F. Ry. Co. v. Terrell* (Civ. App.), 72 S. W. 430.

On failure of the owner of baggage to remove same from a depot after a reasonable opportunity, the company acquires the capacity of a warehouseman, and is liable only for lack of ordinary care; and where a passenger, on arrival at her destination, left her trunk, for convenience and economy, at the station though with the agent's consent, but took a small portion of the contents thereof with her, the company's liability as carrier ceased, and that as warehouseman began. *Galveston, H. & S. A. Ry. Co. v. Smith*, 81 Tex. 479, 17 S. W. 133.

Where a railroad company safely transports the trunk of a passenger to his destination, and delivers the trunk to the passenger, who takes out some of its contents, the company's duty as carrier ceases, and the fact that its

station agent consents to the retention of the trunk at the station for the convenience of the passenger attaches to it only the liability of a warehouseman. *Galveston, H. & S. A. Ry. Co. v. Smith* (Civ. App.), 24 S. W. 668.

If a railroad company while acting as a warehouseman uses reasonable, ordinary care in caring for baggage, it is not liable for damages caused by fire. *Galveston, Harrisburg & San Antonio Ry. Co. v. Smith*, 81 Tex. 479, 17 S. W. 133.

Where, by reason of the passenger's delay in calling for the baggage the carrier's liability becomes that of a warehouseman only, it is not liable as such for a greater value or quantity of goods as baggage than it was liable for as carrier. *Missouri, etc., R. Co. v. Meek*, 33 Tex. Civ. App. 47, 75 S. W. 317.

A carrier's liability as bailee for the storage of unclaimed baggage extends only to such articles as come within the definition of baggage, and does not include articles improperly checked as baggage. *Missouri, K. & T. Ry. Co. v. Texas v. Meek*, 75 S. W. 317, 33 Civ. App. 47.

In an action against a common carrier, it appeared that a trunk and its contents were safely transported by defendant to the point of destination, and placed in the depot subject to the order of plaintiff; that plaintiff informed the agent in charge that he contemplated traveling on the defendant's road again in a day or two, whereupon the agent told him he could leave the trunk in the depot until he got ready to go on the train, and that he could retain the baggage check until then. The agent did not have any knowledge of the contents of the trunk. The articles in the trunk were not baggage. The trunk was there destroyed by fire. Held, that the liability of the defendant for the loss of the trunk was that of a warehouseman, although it would have been that of a

common carrier had the agent known the nature of its contents. *Texas & P. Ry. Co. v. Capps*, 2 Willson, Civ. Cas. Ct. App. § 34.

A carrier is not liable for the loss by fire of a trunk retained by it in its station at the request of the passenger, where everything was done by the carrier's servants that could have been done to save the property. *Galveston, H. & S. A. Ry. Co. v. Smith* (Civ. App.), 24 S. W. 668.

In a suit for value of a trunk and its contents destroyed by fire while in a railway depot the testimony showed that employees of the railway company in charge of the depot were engaged in saving the property during the fire, in the discharge of their duties. It was proper to refuse an instruction that the railway company would not as warehouseman be responsible for the negligence of its servants about matters not in line of their duty. *Galveston, etc., Ry. Co. v. Smith*, 81 Tex. 478, 17 S. W. 133.

### 8. Limitation of Liability.

**In General.**—Restriction of liability for loss of baggage to one hundred dollars is not binding, since carrier can not contract against liability for its negligence. *International, etc., R. Co. v. Foltz*, 3 Tex. Civ. App. 644, 649, 22 S. W. 541, affirmed in 93 Tex. 687, no op.

Sayles' Civ. St. art. 320, prohibiting common carriers from limiting or restricting their common-law liability, applies to an interstate shipment beginning in Texas, and hence a provision in a ticket for transportation to Mexico, limiting the liability of the company for lost wearing apparel, is invalid. *Mexican Nat. R. Co. v. Ware*, 60 S. W. 343.

"State statutes prohibiting common carriers from limiting their common-law liability by stipulations in the contracts of shipment are not in themselves regulations of interstate commerce, though they control in some

degree the conduct and liability of those engaged in such commerce; and so long as congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of commerce. *Railway Co. v. Solan*, 169 U. S. 133. Hence, it is held that a ticket limiting liability for loss of passenger's baggage to \$100 does not relieve the road receiving the baggage from its common law liability when the property is lost on its line. *International, etc., Co. v. Foltz*, 3 Tex. Civ. App. 644, 22 S. W. 541, affirmed in 93 Tex. 687, no op.; *Galveston, etc., R. Co. v. Schafermeyer*, 31 Tex. Civ. App. 586, 72 S. W. 1037." *Galveston, etc., R. Co. v. Fales*, 33 Tex. Civ. App. 457, 77 S. W. 234, affirmed in 98 Tex. 617, no op.

Where, in an action by a passenger for damages to his baggage, the court sustained plaintiff's demurrer to defendant's answer alleging a contract limiting its liability to \$100, defendant's assignment of error that the court on the evidence should have limited the recovery to \$100, as stipulated in the contract, can not be sustained, as such limitation to plaintiff's recovery was not supported by the pleadings. *Houston, E. & W. T. Ry. Co. v. Seale*, 67 S. W. 437, 28 Tex. Civ. App. 364.

**Province of Court and Jury.**—Where the petition in an action by a passenger for damages to his baggage alleges that defendant was negligent, and that the stipulation for limitation of its liability was unreasonable, the questions of negligence and unreasonableness are for the jury, but the right of the carrier to limit its liability is for the court. *Houston, E. & W. T. Ry. Co. v. Seale*, 67 S. W. 437, 28 Tex. Civ. App. 364.

#### **9. Measure and Elements of Damage for Delay, Loss or Injury.**

##### **Measure of Damages for Delay.**—

The measure of a passenger's damages for a carrier's delay in forwarding

her trunk is the value of the use of the property during the delay. *Gulf, C. & S. F. Ry. Co. v. Vancil*, 2 Tex. Civ. App. 427, 21 S. W. 303.

A carrier is not liable for depreciation in market value of baggage caused by delay in transportation, where the goods are not intended for sale at destination, the measure of damages in the absence of special circumstances being only for the use of property during the delay. *St. Louis, I. M. & S. Ry. Co. v. Hindsman*, 1 White & W. Civ. Cas. Ct. App. §§ 204, 206.

A passenger is entitled to recover, for a delay in the delivery of baggage, the value of the use of her property between its actual arrival and the time it should have arrived, and the cost of clothing for herself and child while she was waiting for its delivery is too remote. *Texas & P. Ry. Co. v. Douglas* (Civ. App.), 30 S. W. 487.

In an action against a railroad company for damages for delay in the transmission of plaintiff's baggage, by which he was delayed in his journey, the difference in value of the goods when they did arrive from what it would have been had they arrived on time is not the measure of the damage. *International & G. N. R. Co. v. Phillips*, 63 Tex. 590.

Instruction that the measure of damages for delay by a carrier in delivering goods is the difference between the price when they arrived and the price when they should have arrived, is erroneous where action is for damages consequential to delay in his journey by reason of detention of baggage, and not for damage to goods. *I. & G. N. Ry. Co. v. Philips*, 63 Tex. 590, 594.

Where the baggage of a woman who had been en route three days was detained by the carrier so that she could not obtain a change of clothing without buying it, but she had the necessary money to purchase what was

needed and did so, she was not entitled to substantial damages for her inconvenience and trouble. *Mexican Cent. Ry. Co. v. De Rosear* (Civ. App.), 109 S. W. 949.

Where a carrier was guilty of negligent delay in the delivery of plaintiff's trunk, containing wearing apparel of his wife and baby, the measure of damages was the value of the use of such of the articles as were necessary for their comfort during the period of delay, which could not exceed the cost of such articles; and the fact that the wife deprived herself of certain clothing in order to supply the child with such garments, however much her discomfort, afforded no basis for damages. *Texas & N. O. R. Co. v. Russell* (Civ. App.), 97 S. W. 1090.

In an action by a passenger against a railroad company for delay in the transportation of his baggage, plaintiff may show the damages sustained by him by being compelled to buy clothes to replace those with his baggage. *International & G. N. Ry. Co. v. Phillips*, 63 Tex. 590.

The measure of damages for delay in delivering baggage is the value of the use of the property to the owner during the delay, and a passenger is not entitled to recover, as damages for loss of his baggage, increased traveling expenses and loss of a situation, unless the carrier was informed, when it received the baggage for transportation, that such damages would probably result from such a loss. *Texas & P. Ry. Co. v. Taylor*, 3 Willson, Civ. Cas. Ct. App. §§ 192, 193.

A railroad company delaying the delivery of a trunk full of sample shoes, which it undertook to transport as baggage, is not liable for the profits which the owner, a traveling salesman, might have made, where it was not notified that he would suffer such damages by the delay. *Texas*

*Mexican Ry. Co. v. Willis*, 3 Willson, Civ. Cas. Ct. App. § 71.

**Measure of Damages for Loss or Injury.**—The measure of damages for lost baggage is its fair market value, but this does not include interest from time it should have reached its destination to the time of judgment. *Texas & P. R. Co. v. Ferguson*, 1 White & W. Civ. Cas. Ct. App. § 1254.

The measure of damages for the loss of a passenger's baggage is merely the actual value of articles destroyed, and the amount of damage to articles partially destroyed; and therefore allowing a passenger damages for the deprivation of the use of the articles, and for inconvenience and mental distress occasioned by the loss, was erroneous. *Houston, E. & W. T. Ry. Co. v. Seale*, 67 S. W. 437, 28 Tex. Civ. App. 364.

In an action by a passenger against a carrier for the loss of jewelry comprising part of plaintiff's baggage, the measure of damages is the value of the property, with interest from the date of its loss. *Bonner v. Blum* (Civ. App.), 25 S. W. 60.

The owner of lost baggage can not recover of the carrier for the expense incurred in searching for it. *St. Louis, I. M. & S. Ry. Co. v. Hindsmann*, 1 White & W. Civ. Cas. Ct. App. §§ 204, 207; *Texas & P. R. Co. v. Ferguson*, Id. § 1254.

In determining the value of baggage lost by a railroad company, the value of the wearing apparel and articles of daily use carried on the journey are not determinable by the market value of such articles. *Galveston, H. & S. A. Ry. Co. v. Fales*, 77 S. W. 234, 33 Tex. Civ. App. 457.

The measure of damage for the loss of baggage by the initial carrier is the value of the articles at their point of destination, and not at the point where the initial carrier's line connects with the terminal carrier's. *Gal-*

veston, H. & S. A. Ry. Co. *v.* Fales, 77 S. W. 234, 33 Tex. Civ. App. 457.

**Right to Vindictive Damages.**—See, generally, the title EXEMPLARY DAMAGES.

A passenger is not entitled to vindictive damages for the loss of baggage resulting from the alleged negligence of the carrier. *Gulf, C. & S. F. Ry. Co. v. Vancil*, 2 Tex. Civ. App. 427, 21 S. W. 303.

**Effect of Tender of Baggage in Reasonable Time after Arrival.**—In an action against a carrier for the value of a trunk and its contents, alleged to have been lost by defendant, when it appears by the evidence that the trunk and its contents were tendered by defendant to plaintiff within a reasonable time after the trunk arrived at its destination, it is reversible error to refuse to instruct the jury that, if they believe that such tender was made, plaintiff can only recover for such of the contents of the trunk as are shown to have been lost or damaged. *Gulf, C. & S. F. Ry. Co. v. Jackson*, 4 Willson, Civ. Cas. Ct. App. § 47, 15 S. W. 128.

**Evidence as to Nature and Value.**—In an action against a carrier for the loss of a passenger's trunk, it was proper to permit the passenger to testify as to the value of the articles; the strict rule of market value not being applicable. *Ft. Worth & R. G. Ry. Co. v. McCarty*, 94 S. W. 178, 42 Tex. Civ. App. 514.

In an action against a railroad for the loss of trunks, it was error to exclude testimony of an agent of the railroad, who knew the condition and contents of the trunks, to the effect that their contents consisted of articles of wearing apparel and family use, of little or no market value. *Texas & P. Ry. Co. v. Weatherby*, 92 S. W. 58, 41 Tex. Civ. App. 409.

Where wearing apparel of a woman passenger on a railway was delayed in delivery, her testimony regarding

the value of use, was admissible since the articles had no market value. *Gulf, etc., R. Co. v. Vancil*, 2 Tex. Civ. App. 427, 428, 21 S. W. 303.

**Separation of Damages Where Articles Not Delivered to Carrier in Good Condition.**—Where, in an action against a carrier for damages to baggage, the jury could not under the evidence separate any damage done thereto before its delivery to the carrier from that which might have occurred afterward, defendant was entitled to a verdict, if it appeared that the articles had not been delivered to it in good condition, and in such case it would not have been proper to give a charge which contemplated a separation of the damages. *Missouri, etc., R. Co. v. Wood*, 26 Tex. Civ. App. 500, 63 S. W. 654.

#### 10. Duties and Liabilities as to Checking Baggage.

The Texas statute requires that railroad companies shall check baggage, which is not a requirement of the common law. *Texas, etc., R. Co. v. Willis*, 3 App. Civ. Cases, § 71.

Stipulation in excess baggage check requiring such check to be surrendered with ordinary baggage checks given by railroad in order to get baggage, is valid. *Texas, etc., R. Co. v. Willis*, 3 App. Civ. Cases, § 71.

Where a passenger's trunks are in fact received by a railroad for transportation, and it undertakes to transfer them without giving any checks therefor, its failure to check the trunks is no defense to an action for the loss thereof. *Texas & P. Ry. Co. v. Weatherby*, 92 S. W. 58, 41 Tex. Civ. App. 409.

Where plaintiff's wife was a passenger on defendant's railroad and placed her two trunks and a package in the custody of the railroad company, with request that they be checked to her destination, and defendant's agent said he would not have time to check the package, but would send it by



express the next day, and the trunks were checked by defendant's agents, and the package, though not checked, was put on the car before the train left and was lost, the railroad company was liable. *Ft. Worth & R. G. Ry. Co. v. McCarty*, 94 S. W. 178, 42 Tex. Civ. App. 514.

## **VI. Duties and Liabilities of Sleeping Car Companies.**

### **A. DUTY TO EXERCISE CARE FOR PROTECTION OF PASSENGERS.**

A railway company and a sleeping car company both owe to a passenger the duty of exercising care in protecting him from injury. *Pullman Co. v. Norton* (Civ. App.), 91 S. W. 841, affirmed in 101 Tex. 653, no op.

Generally, as to the duty of carriers to exercise the highest degree of care for the protection of their passengers, see ante, "Care Required of Carrier," IV.

### **B. DUTIES AND LIABILITIES AS TO FURNISHING PROPER CARS AND KEEPING SAME IN REPAIR.**

**As between Sleeping Car Company and Railroad.**—A vestibule curtain on a sleeping car is a part of the car within a contract binding a sleeping car company to furnish cars to a railway company, and keep the same in repair. *Pullman Co. v. Norton* (Civ. App.), 91 S. W. 841, affirmed in 101 Tex. 653, no op.

In an action against a railway company and a sleeping car company for injuries to a passenger, the railway company in its pleading set forth a contract with the sleeping car company and alleged that the passenger's injuries were due to the negligence of the sleeping car company in failing to furnish cars of the quality stipulated for and keeping the same in repair and prayed for judgment

over against the sleeping car company for the damages recovered by the passenger. Held to sufficiently allege the sleeping car company's liability to the railway company, especially where the sleeping car company, in its pleading, pleaded the contract, and made a copy a part thereof. *Pullman Co. v. Norton* (Civ. App.), 91 S. W. 841, affirmed in 101 Tex. 653, no op.

**As between Sleeping Car Company and Passenger Injured by Defects in Car.**—A sleeping car company contracting with a railway company to furnish sleeping cars, and to keep the same in good repair, is liable to a passenger injured in consequence of its negligence in failing to keep a car in repair without reference to the question for whom it acted, and though it were but a servant of the railway company. *Pullman Co. v. Norton* (Civ. App.), 91 S. W. 841, affirmed in 101 Tex. 653, no op.

A contract between a sleeping car company and a railway company bound the sleeping car company to furnish sleeping cars and to maintain them in good repair at its own expense. A passenger was injured in consequence of a defect in a sleeping car. Held that, though the railway company and sleeping car company were both wrongdoers with reference to the passenger, the law would compel the sleeping car company to bear the burden arising from its negligence. *Pullman Co. v. Norton* (Civ. App.), 91 S. W. 841, affirmed in 101 Tex. 653, no op.

A railway company will not be allowed to evade its liability to passengers through a contract with a sleeping car company binding it to furnish sleeping cars and keep the same in repair, and so far as the passenger is concerned the employees of the sleeping car company will be regarded as the employees of the railway company. *Pullman Co. v. Norton* (Civ.

App.), 91 S. W. 841, affirmed in 101 Tex. 653, no op.

Where, in an action against a railway company and a sleeping car company for injuries to a passenger by a defect in a sleeping car, the railway company pleaded a contract with the sleeping car company which stipulated that the sleeping car company should have authority to furnish its own conductor, and that the railway conductor should not interfere with the business of the sleeping cars except for the purpose of collecting the tickets of passengers, the admission of the testimony of the railway conductor that he had nothing to do with the sleeping cars, and that that duty devolved on the conductor of those cars, was not erroneous. *Pullman Co. v. Norton* (Civ. App.), 91 S. W. 841, affirmed in 101 Tex. 653, no op.

### C. DUTIES AND LIABILITIES AS TO TRANSPORTATION.

**In General.**—In an action against a sleeping car company and a railway company by a passenger compelled to leave a sleeper, in which she had engaged a berth to her point of destination, and complete the journey in a chair car, the use of the term "transportation" in an instruction that it was the duty of the sleeping car company to furnish plaintiff transportation in the sleeper to the point of destination was not misleading; plaintiff's contract with the company being so conditioned, and there being no question raised that she was not transported to such destination. *Pullman Palace Car Co. v. Hocker*, 93 S. W. 1009, 41 Tex. Civ. App. 607.

**Liability for Compelling Passenger to Leave Car before Completion of Journey.**—Where plaintiff, who had engaged a berth in a sleeper, was compelled to leave the same before reaching her destination, and complete her journey in a chair car, the railway company was not relieved of

liability for the breach of plaintiff's contract for transportation in the sleeper by reason of the fact that the sleeper on one of defendant's trains running in the opposite direction had become disabled; that it was occupied by a large number of people, some of whom intended to make an all night trip, and some of whom were ill; and that the railway company desired for such passengers' accommodation the sleeper in which plaintiff was riding, and in which there was no one going beyond her place of destination. *Pullman Palace Car Co. v. Hocker*, 93 S. W. 1009, 41 Tex. Civ. App. 607.

Under the circumstances, it was not error to charge, in effect, that if defendant's north-bound train left plaintiff's place of destination without a sleeper, intending to get the south-bound sleeper in which plaintiff was riding, and leave the south-bound train without a sleeper, such facts would not justify either the railway company or the sleeping car company operating the sleeper in requiring plaintiff to transfer to the chair car. *Pullman Palace Car Co. v. Hocker*, 93 S. W. 1009, 41 Tex. Civ. App. 607.

Where defendant sleeping car company's employee aided the employees of a railway company, over whose tracks its cars were drawn, in forcing a passenger, who had engaged a berth in a sleeper, to leave the car and complete the journey in a chair car, the sleeping car company was not released from liability by the fact that its employees acted under orders from the train conductor. *Pullman Palace Car Co. v. Hocker*, 93 S. W. 1009, 41 Tex. Civ. App. 607.

In an action against a sleeping car company and a railway company by a passenger compelled, before reaching her destination, to leave the sleeper in which she had engaged a berth, and to complete the journey in a chair car, a charge that neither of defendants had the right to tender to pay

plaintiff back the amount paid by her for the privilege of being transported in the sleeping car, and then require her against her consent to transfer from the sleeper to the chair car, was not objectionable on the ground that there was no evidence that the sleeping car company ever tendered back the money; the evidence showing that such money was tendered back by the train conductor in the presence of the sleeping car conductor, and that the two conductors were acting in concert. *Pullman Palace Car Co. v. Hocker*, 93 S. W. 1009, 41 Tex. Civ. App. 607.

In an action against a sleeping car company and a railway company by a passenger compelled to leave a sleeping car before reaching her point of destination, and to complete the journey in a chair car, the railway company desiring to use the sleeper for the accommodation of passengers on one of its trains bound in the opposite direction, the court properly charged that if plaintiff left the sleeper voluntarily she could not recover; that if she left to avoid being carried back, it would not be a voluntary act of leaving; and that if she left it in order to accommodate an acquaintance and his family who desired a sleeper on such train, it was voluntary, and she could not recover. *Pullman Palace Car Co. v. Hocker*, 93 S. W. 1009, 41 Tex. Civ. App. 607.

**Joint Liability of Railroad and Sleeping Car Company for Breach of Contract.**—Where a sleeping car company agreed to furnish plaintiff with sleeping car accommodations to a certain point, but before arriving there the sleeper was cut off the train, and plaintiff was compelled to ride in a chair car for the balance of the distance, the sleeping car company's employees aiding the train employees in forcing plaintiff to leave the sleeper, both companies were liable jointly. *Pullman Palace Car Co.*

*v. Hocker*, 93 S. W. 1009, 41 Tex. Civ. App. 607.

A sleeping car company which sells a ticket on a certain sleeper, from one place to another, to one having a railroad ticket between such places, undertakes to furnish him a berth in that or another sleeper, if the railroad company haul it; so that it, equally with the railroad, is liable, he being excluded therefrom by the railroad company's employees without being furnished a like conveyance, though by its arrangement with the railroad company the latter had charge of the car, and the exclusive right to determine who should ride therein. *Pullman Palace Car Co. v. Cain* (Civ. App.), 40 S. W. 220, 15 Tex. Civ. App. 503.

**Acts of Railroad Company as Defense to Action for Breach of Contract.**—Where a sleeping car company sold a through ticket on a sleeper, it contracted to furnish the holder through passage in such sleeper, if railroad company hauled it, hence it was liable for failure to furnish berth, only part of distance if sleeper went through, though its failure was due to passenger's ejection by railroad company, which it could not prevent. *Pullman, etc., Co. v. Cain*, 15 Tex. Civ. App. 503, 505, 40 S. W. 220.

Where a sleeping car company, operating its cars under a contract with a railroad company contracted to furnish sleeping car accommodations to a passenger from one point to another, but breached its contract before the destination was reached, it was not absolved from liability by reason of the railroad company's failure to haul the sleeper further; such condition not being expressed in the contract of transportation with plaintiff, who had no knowledge of the contract between the railroad company and defendant. *Pullman Palace Car Co. v. Hocker*, 93 S. W. 1009, 41 Tex. Civ. App. 607.

#### D. DUTIES AND LIABILITIES AS TO RESERVATION AND USE OF BERTHS.

**Liability for Breach of Contract to Reserve Berth.**—A person who has contracted with a sleeping car company through its proper agent to reserve for him a berth in one of its cars, may recover damages resulting to him from such breach of contract. *Pullman, etc., Co. v. Nelson*, 22 Tex. Civ. App. 223, 54 S. W. 624.

It is no excuse for a sleeping car company's breach of contract to reserve a certain berth for plaintiff that another person demanded it before plaintiff presented herself to pay for and occupy it, and that there was no other unoccupied. *Pullman Palace Car Co. v. Booth* (Civ. App.), 28 S. W. 719.

Where a sleeping car company breaks its contract to reserve a berth for plaintiff, and the conductor excludes plaintiff from the car, there is a tort, as well as breach of contract, for which plaintiff can recover damages, whether in contemplation of the parties when the contract was made or not. *Pullman Palace Car Co. v. Booth* (Civ. App.), 28 S. W. 719.

**Evidence in Action for Breach of Contract.**—On the question of a railroad ticket agent's authority to reserve berths on behalf of a sleeping car company, evidence of prior reservations and their circumstances is admissible as against the sleeping car company's sworn plea of non est factum. *Pullman, etc., Co. v. Nelson*, 22 Tex. Civ. App. 223, 227, 228, 54 S. W. 624.

In an action against a sleeping car company which had contracted to furnish plaintiff a berth, her testimony that she left the car under the conductor's order, and finding no other seat took one in a negro car, is admissible. *Pullman, etc., Co. v. Booth* (Civ. App.), 28 S. W. 719, 721, affirmed in 93 Tex. 693, no op.

**Liability for Refusal to Allow Use of Berth as Such during Day.**—It seems that a person paying for a berth in a sleeping car has a right to use such berth as a bed during the daytime. *Pullman, etc., Co. v. Fowler*, 6 Tex. Civ. App. 755, 757, 763, 27 S. W. 268.

In an action against a sleeping car company for breach of contract to allow a passenger to use a berth as a bed during the daytime, the passenger can recover only such damages as naturally and directly flow from breach of contract. *Pullman, etc., Co. v. Fowler*, 6 Tex. Civ. App. 755, 762, 27 S. W. 268.

**Exclusion of Wife from Berth Occupied by Husband.**—Where a wife engaged one berth in a sleeping car and her husband engaged another she acquired no right to the occupancy of both berths, and had no right of action against the railroad company for being excluded from the one occupied by the husband. *Pullman Palace Car Co. v. Bales*, 80 Tex. 211, 15 S. W. 785.

The plaintiff engaged two berths in a sleeping car, telling the porter that he wanted them for himself and two ladies. He then went back to the passenger coach, and returned with his mother and his wife. When the conductor came through the car, the two ladies were seated together, and the wife paid for a berth. The plaintiff was then in the other berth, and when the conductor came to him he also paid for one. When she had put his mother to bed, the plaintiff's wife went over to the berth to which he had retired. She was partly undressed. The porter observed this, and pulled the curtain aside, saying that the company did not allow such proceedings. Being told that the lady was the plaintiff's wife, the porter called the conductor, and the two pulled the curtains aside, exposing to view the plaintiff and his wife.

undressed. They insisted that she leave the berth, which she did, returning to the other. Held that, the wife having made a contract for one berth and the husband for another, there was no breach of contract and that there was no liability, though the conductor and porter acted with great rudeness. *Pullman Palace Car Co. v. Bales* (Sup.), 14 S. W. 855.

#### **E. DUTY TO AWAKEN PASSENGERS WITHIN PROPER TIME BEFORE REACHING DESTINATION.**

While, as has been seen, it is ordinarily no part of the carrier's duty to see that passengers are awake when they reach their destination, yet the rule in case of sleeping car companies is different. In this character of conveyances the passenger is invited to go to sleep, and pays extra for the conveniences therefor, and the company is bound, under its contract for the berth, to awaken and notify the passenger in time for him to prepare to safely and comfortably leave the train at the point of his destination. *Pullman, etc., Co. v. Smith*, 79 Tex. 468, 472, 14 S. W. 993; *Missouri, etc., R. Co. v. Kendrick* (Civ. App.), 32 S. W. 42.

As to duty in case of carriers generally, see ante, "Duty to Awaken Sleeping Passengers," V, D, 10.

#### **F. LIABILITY FOR INJURIES TO PASSENGER PUT OFF CAR AT IMPROPER PLACE.**

While a carrier is liable for an injury to a passenger resulting from being put off a sleeper at an improper place, a sleeping car company having control of cars is liable if the injury results from the negligence of its servants. *Pullman, etc., Co. v. Smith*, 79 Tex. 468, 472, 14 S. W. 993.

Plaintiff and his wife occupied berths in a sleeping car. At 5 o'clock a. m. the train stopped at a water

tank a half mile from their destination. The porter and conductor of the sleeping car awoke them suddenly, and told them they were at the depot. They were hurried off, partly dressed, and the train left them before they discovered where they were. The exposure resulted in injury to the wife's health. Held that, the sleeping car company having offered no evidence of the duties of its servants and the usages and rules in force on its cars, it will be presumed that the conductor and porter were acting within the scope of their employment, and that the company was liable. *Pullman Palace Car Co. v. Smith*, 79 Tex. 468, 14 S. W. 993; 23 Am. St. Rep. 356, 13 L. R. A. 215.

In a suit against a sleeping car company for the servant's neglect to put husband and wife off at proper station, in which injury to health was alleged as an item of damages, it is competent for the wife to testify that she knew nothing else than the exposure to which she was subjected which could have caused the illness. *Pullman, etc., Co. v. Smith*, 79 Tex. 468, 471, 14 S. W. 993.

#### **G. LIABILITY FOR MISCONDUCT OF EMPLOYEES.**

Rudeness of sleeping car servants in discharging duty, unaccompanied by violence, is not, of itself, ground for recovery of damages. *Pullman, etc., Co. v. Bales*, 80 Tex. 211, 215, 15 S. W. 785.

Generally as to liability of carriers for torts or negligence of employees, see ante, "Duty of Carrier as to Employment of Proper Servants and Liability for Their Acts or Omissions," V, E.

#### **H. LIABILITY FOR LOSS OR THEFT OF PROPERTY BELONGING TO PASSENGER.**

**Liability as Dependent on Negligence of Sleeping Car Company.**—A sleeping car company is liable for

property lost by occupants of the car only when it is shown to have been negligent, or that its servant in charge purloined the property. *Pullman Sleeping Car Co. v. Hatch*, 70 S. W. 771, 30 Tex. Civ. App. 303.

The fact of a loss of baggage from a sleeper does not of itself make the sleeping car company liable or raise any presumption of negligence, and to authorize a recovery therefor it must appear that the loss was due to some negligence of the company's servants. *Pullman, etc., Co. v. Arents*, 28 Tex. Civ. App. 71, 66 S. W. 329.

**Degree of Care Required as to Property of Passenger.**—While sleeping car companies are not under the onerous liability of common carriers or innkeepers, still they must employ ordinary care for the security of passenger's valuables; failing to do so they are guilty of negligence and liable for loss. *Stevenson v. Pullman, etc., Co.* (Civ. App.), 26 S. W. 112; *Dargan v. Pullman, etc., Co.*, 2 App. Civ. Cases, § 691; *Belden v. Pullman, etc., Co.* (Civ. App.), 43 S. W. 22; *Pullman, etc., Co. v. Pollock*, 69 Tex. 121, 5 S. W. 814; *Pullman, etc., Co. v. Matthews*, 74 Tex. 654, 12 S. W. 744.

**Burden of Proof as to Negligence.**

—A passenger's right to recover against a sleeping car company for a valise and its contents, consisting of baggage, stolen from the sleeping car in the night time, while the passenger was asleep, depends on the want of ordinary care by the company, to protect the valise and its contents against loss, and it devolves upon the passenger to prove such want of care. *Dargan v. Pullman Palace Car Co.*, 2 Willson, Civ. Cas. Ct. App. § 691.

**Liability for Theft of Passengers' Property.**—A sleeping car company is liable for the theft of money from a passenger by its servants. *Pullman, etc., Co. v. Matthews*, 74 Tex. 656, 12 S. W. 744.

A sleeping car company is bound to use reasonable care to guard a passenger on its cars from theft; and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable. *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120, 5 S. W. 814.

The duty of a sleeping car company to its passengers is only to use reasonable care in guarding the latter's property from thieves, and the high degree of care applicable to carriers generally does not apply. *Belden v. Pullman Palace Car Co.* (Civ. App.), 43 S. W. 22.

A sleeping car company must use reasonable care to guard the effects of its passengers from thieves. (1894) *Stevenson v. Pullman Palace Car Co.* (Civ. App.), 26 S. W. 112; (1895) *Id.*, 32 S. W. 335.

"The rule is well settled in the several states of the Union that sleeping car companies are not held to the responsibility of common carriers or innkeepers, but that in order to recover for lost or stolen property it must appear that reasonable care was not exercised by the company in guarding the property of passengers on the cars. The rule is thus formulated in a leading Massachusetts case: 'While it is not liable as a common carrier or as an innkeeper, yet it is its duty to use reasonable care to guard the passengers from theft; and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it.' *Lewis v. Car Co.*, 143 Mass. 267. The rule enunciated has been, so far as we know, followed in every state where the question has arisen." *Pullman, etc., Co. v. Hatch*, 30 Tex. Civ. App. 303, 70 S. W. 771.

The liability of a sleeping car company for property stolen from a passenger is not affected by the fact that

the railway company, to whose train the sleeping car is attached, may receive the greater part of the money paid by the passenger for his transportation, the sleeping car company being still a carrier of passengers, and liable as such. *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120, 5 S. W. 814.

A passenger who had paid for a berth in the sleeping car left his valise on the floor in the smoking room, and went out at a station, leaving the conductor and porter in the car. On his return the valise was missing. Held, that the sleeping car company was liable to the extent of the personal effects that a passenger may reasonably carry with him. *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120, 5 S. W. 814.

**Liability Not Affected by Stipulations on Ticket or Notices in Cars.**—The duty of sleeping car companies to protect their passengers from thieves can not be evaded by words printed upon the passenger's ticket, or notices posted in the car, as such a stipulation is unreasonable. *Stevenson v. Pullman Palace Car Co.* (Civ. App.), 26 S. W. 112.

It will not be presumed that the laws of any foreign state permit a sleeping car company to contract against its own negligence. *Stevenson v. Pullman Palace Car Co.* (Civ. App.), 32 S. W. 335.

**Negligence of Passenger as Defense.**—A sleeping car company is not released from liability for money stolen from passengers by its servants because the servants were tempted to steal, through the negligence of passenger in leaving his money exposed. *Pullman, etc., Co. v. Matthews*, 74 Tex. 654, 656, 12 S. W. 744.

Where a sleeping car company's porter was charged with misappropriating a passenger's diamond ring, which it was claimed he found in the berth, it was no defense to the sleep-

ing car company's liability therefor that the passenger was negligent in losing it. *Pullman Co. v. Vanderhoeven*, 107 S. W. 147, 48 Tex. Civ. App. 414.

Contributory negligence of a passenger in a sleeping car in losing a diamond ring sued for was not available as a defense to the sleeping car company's liability, where it was not pleaded. *Pullman Co. v. Vanderhoeven*, 107 S. W. 147, 48 Tex. Civ. App. 414.

**Question of Theft One for Jury.**—In an action against a sleeping car company for the loss of a passenger's handbag containing jewelry, evidence examined, and whether the handbag was purloined by defendant's servants held a question for the jury. *Hatch v. Pullman Sleeping Car Co.* (Civ. App.), 84 S. W. 246.

**Evidence in Actions for Loss or Theft—Admissibility.**—Where plaintiff claimed that defendant's sleeping car porter while searching for a ring lost by plaintiff's wife discovered it in the pillow box and appropriated it, plaintiff, having testified that he stated to the porter when he was making up the berth that they had lost something during the night and heard it drop into the pillow box, was entitled to state that he saw the porter in making up the berth stoop over and pick up something, and put it in his pocket. *Pullman Co. v. Vanderhoeven*, 107 S. W. 147, 48 Tex. Civ. App. 414.

Where plaintiff claimed that his wife's ring fell from defendant's sleeping car berth, which they had been occupying, into the pillow box, and that the porter found it there when searching for it at the wife's request, and appropriated it, evidence that the pillow box was so constructed at the time the wife examined it that a thing the size and shape of a ring could fall from the berth into the box, was admissible. *Pullman Co. v. Vander-*

hoeven, 107 S. W. 147, 48 Tex. Civ. App. 414.

In an action against a sleeping car company for loss of a passenger's ring alleged to have been found and misappropriated by the porter, the purpose for which she was carrying the ring on her journey was immaterial, so that the court did not err in permitting her to testify that she took the ring to wear at a dinner, or such other use as she might have for it. *Pullman Co. v. Vanderhoeven*, 107 S. W. 147, 48 Tex. Civ. App. 414.

**Degree of Proof Required as to Theft.**—In an action against a sleeping car company for loss of a diamond ring alleged to have been found and misappropriated by the porter, plaintiff was not bound to prove such misappropriation beyond a reasonable doubt, but was only required to prove facts and circumstances reasonably tending to show that defendant's porter in the discharge of his duties found the ring and appropriated it. *Pullman Co. v. Vanderhoeven*, 107 S. W. 147, 48 Tex. Civ. App. 414.

**Evidence Insufficient to Impose Liability on Company.**—In an action against a sleeping car company to recover the value of property lost by a passenger, the evidence showed that the porter had faithfully watched over the occupants of the car. No passenger entered or left the car from the time the property was last seen until after the loss was discovered. The property was in a valise next to the aisle, on the end of the seat. The window was open at her request and the valise was stolen while she was asleep. The porter, earlier in the evening, had seen her take money out of a similar valise, and, after the loss was discovered, he was twice sent for the conductor, but the porter reported that he was dressing, and he did not come. The porter established a good character for honesty. Held insufficient to show that the porter took

the property, so as to render the company liable. *Pullman Sleeping Car Co. v. Hatch*, 70 S. W. 771, 30 Tex. Civ. App. 303.

Plaintiff went upon a sleeping car between 12 and 1 o'clock at night. He did not leave his valise in charge of any servant or employee of the company, nor did he call the attention of the conductor or porter to the fact that he had a valise. He placed his valise in the aisle near the smoking room and immediately returned to his berth. In the morning the valise was gone. Held, that no negligence was shown on the part of the sleeping car company, and hence no cause of action against it was established. *Dargan v. Pullman Palace-Car Co.*, 2 Willson, Civ. Cas. Ct. App. § 692.

In an action against a sleeping car company for the value of a valise left by plaintiff, when he retired, by the side of his berth in the aisle, the evidence was that the car had two servants, whose duty it was to sit by turns at the end of the aisle to wait on passengers and see that nothing was stolen, and that during the first part of the night one of these kept watch; that when this one left the car to wake the other, the valise was in its place; that during the latter part of the night, while the second servant was on watch, several persons came into the car; that the servant woke the passengers for A., and they got off, taking their valises; that the servant could not identify particular valises where there were a number of passengers each having one; that no passengers got off that night except at A. Held, that a finding that the valise was taken at A., and that its loss was not caused by the negligence of defendant's servants, was sustained by the evidence. *Belden v. Pullman Palace Car Co.* (Civ. App.), 43 S. W. 22.

**Evidence Held to Show Negligence on Part of Company.**—While plaintiff



was a passenger on a sleeping car, his valise was stolen from the car at a station in Mexico. The rules of the company required the rear door and windows of the car to be closed while at such stations. The conductor and porter testified that they were so closed just before entering the station, and that while there they stood on the platform near the car. Plaintiff stepped out of the car, leaving the valise near an open window at which two passengers sat. They moved away while he was gone, without closing the window, and soon after the train started the loss was discovered. Held, that findings that the company's employees were negligent in not keeping the window closed, or in failing to see and prevent the theft, and that plaintiff was not negligent, were justified. *Pullman Palace Car Co. v. Arents*, 66 S. W. 329, 28 Tex. Civ. App. 71.

A passenger on defendant's sleeping car, being told that he would have to change cars on account of a wreck, started forward with all the other passengers, but, upon missing his pocket book, returned to his berth, where he had left it. No one was in the car after the passenger left, except the conductor, porter, and a train brakeman who passed through without stopping. The conductor, porter, and passengers were searched, but the pocket book could not be found. Held, that a verdict against the sleeping car company would not be disturbed. *Pullman Palace-Car Co. v. Matthews*, 74 Tex. 654, 12 S. W. 744, 15 Am. St. Rep. 873.

#### **I. LIABILITY FOR EJECTION OF PERSONS FROM CARS.**

Where a passenger left a sleeping car under protest upon orders from one in charge of the train, the refusal of an instruction based on his voluntary leaving was not error. *Pullman, etc., Co. v. Cain*, 15 Tex. Civ. App. 503, 506, 507, 40 S. W. 220.

In an action for ejection from sleeping car, under passenger's protest, held not improper to ask a person who ordered the passenger to leave, if he intended, to make him leave if he had not obeyed the order. *Pullman, etc., Co. v. Cain*, 15 Tex. Civ. App. 503, 506, 40 S. W. 220.

Under the allegations of a complaint that plaintiff was wrongfully, willfully, maliciously, and in violation of her contract rights, ejected from a sleeping car by the conductor, evidence of the conductor's rudeness in ordering her out of the car is admissible. *Pullman Palace-Car Co. v. Booth* (Civ. App.), 28 S. W. 719.

Plaintiff in an action for ejection from a sleeping car, having left, under protest, when the trainmaster in charge of the train directed him to, may show by the trainmaster that he intended to make plaintiff leave the car, if he had not gone. *Pullman Palace-Car Co. v. Cain*, 40 S. W. 220, 15 Tex. Civ. App. 503.

#### **J. SALE OF TICKETS TO NEGROES FROM POINT WITHOUT STATE AS VIOLATION OF LAW AS TO SEPARATE ACCOMMODATIONS.**

A contract to carry a negro in a sleeping car from a point outside of, to a point in, Texas, is not in violation of the Texas statute prohibiting the carrying of white and negro passengers in the same car, so as to prevent recovery for his being put out of that sleeper, on arrival at the state line, without being furnished a berth in another sleeper; he having a right to assume that at the state line he would be furnished like accommodations in a car separate from white passengers. *Pullman Palace-Car Co. v. Cain*, 40 S. W. 220, 15 Tex. Civ. App. 503.

#### **K. ACTIONS.**

As to actions against sleeping car companies, nature and form of such

action, venue, limitation of action, pleading, etc., see post, "Actions against Carriers," VII.

## VII. Actions against Carriers.

### A. FORM OF ACTION.

A passenger, injured by the derailment of a car, may bring action for a tort or for a breach of contract. *Sawyer v. El Paso & N. E. Ry. Co.*, 108 S. W. 718, 49 Tex. Civ. App. 106.

An action for damages, actual and exemplary, by a passenger against a railway company for carrying him beyond his point of destination and wrongfully putting him off the train, is in tort, although the petition alleged the purchase by plaintiff of a ticket from the railway company. *Galveston, etc., R. Co. v. Roemer*, 1 Tex. Civ. App. 191, 20 S. W. 843.

Where a company has contracted to furnish plaintiff a sleeping car berth, her exclusion from the car gives her a right of action sounding in contract and in tort. *Pullman, etc., Co. v. Booth* (Civ. App.), 28 S. W. 719, 721, affirmed in 93 Tex. 693, no op.

A delay of a train for three hours, without reasonable excuse and without notice to a passenger, under such conditions as resulted in her injury, was not a breach of the contract of carriage, but negligence amounting to a tort. *Gulf, C. & S. F. Ry. Co. v. Redeker*, 100 S. W. 362, 45 Tex. Civ. App. 312.

### B. JURISDICTION AND VENUE.

**Right to Maintain Action for Injuries or Breach of Contract Occurring in Another Jurisdiction.**—Suit for personal injuries sustained by being ejected from train in Mexico is suit for injury to the person, and is maintainable in Texas without allegation that suit was authorized by laws of Mexico. *Mexican Cent. R. Co. v. Goodman*, 20 Tex. Civ. App. 109, 110, 48 S. W. 778 (see 93 Tex. 714, no op.).

A passenger, entering a sleeping car at a station in Texas to go to a point in Mexico, may sue for violation of the contract in a county in Texas in which the car company has an agent, though the fare was not collected until the train entered Mexico, and neither plaintiff nor defendant resides in such state. *Pullman Palace Car Co. v. Arents*, 28 Tex. Civ. App. 71, 66 S. W. 329.

A statute of the territory of New Mexico, passed in 1903 (Laws 1903, p. 51, c. 33), provides that there shall be no civil liability in case of injury or death in the territory, unless an affidavit shall be made and served by the person claiming damages, within 90 days thereafter, upon the person or corporation inflicting the injury, stating certain specific facts, and an action is begun, within one year thereafter, in the territorial district court in the county in which the injury occurred or the one in which the corporation had its principal place of business. Held, that the statute does not prevent the bringing of an action in Texas, on a contract between a carrier and a passenger made in Pennsylvania, for a breach occurring in New Mexico. *Sawyer v. El Paso & N. E. Ry. Co.*, 108 S. W. 718, 49 Tex. Civ. App. 106.

**Venue.**—As to statutory provisions as to venue in actions against common carriers, see the title CARRIERS, ante, p. 304.

In a suit against a carrier for damaged baggage, plea of privilege that it did not operate its road in the county where sued and had no office or agent therein is good though it checked the baggage through to a point in such county. *Gulf, etc., R. Co. v. Jackson*, 4 App. Civ. Cases, § 47, 15 S. W. 128.

### C. LIMITATION OF ACTION.

An action for damages by a passenger against a railway company for carrying him beyond his destination

and putting him off the train at a distance from the station at which he should have been allowed to leave, is barred by limitation of one year. *Galveston, etc., R. Co. v. Roemer*, 1 Tex. Civ. App. 191, 20 S. W. 843.

Where the petition contained no express allegation as to damages caused to clothing of the plaintiff, but the claim for damages was based upon mental and bodily injuries received by the plaintiff, and the action appears to have been brought eighteen months after the injury, exceptions that the cause of action is barred by limitation of one year should have been sustained. General allegations as to injury to the clothing would not save the action from the effect of the statute of limitations of one year. *Galveston, etc., R. Co. v. Roemer*, 1 Tex. Civ. App. 191, 20 S. W. 843.

#### D. PARTIES.

See, generally, the title PARTIES.

**Right of Drummer's Employer to Sue on Contract for Carriage of Sample Trunk.**—A contract by a drummer with a railroad company to carry the trunk containing his samples inures to the benefit of the drummer's employer, and the latter may bring action for loss of the trunk. *Ft. Worth & R. G. Ry. Co. v. I. B. Rosenthal Millinery Co.* (Civ. App.), 29 S. W. 196.

**Joinder of Railroad Company and Pullman Company as Parties Defendant.**—A railroad company and the Pullman Palace-Car Company, being joint tort feors, may be joined in a suit for mental suffering to a passenger in a palace car attached to the railroad's train, caused by the language of drunken persons permitted to enter and remain in the car. *Houston, E. & W. T. Ry. Co. v. Perkins*, 52 S. W. 124, 21 Tex. Civ. App. 508.

**Joinder of Railroad Company and Conductor as Parties Defendant—Dismissal.**—A passenger injured in

alighting from the train sued the railway company and its conductor. The plaintiff and the conductor were both examined as witnesses, and the interest of each was discussed in the argument to the jury. Upon the jury retiring the plaintiff dismissed as to the conductor. This was not known to counsel for the railway company. There was nothing tending to show that the conductor was made a party for the purpose of affecting his standing as a witness. Held, that the railway company could not complain of such dismissal, and it was no ground for a new trial. *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264.

"It was the right of plaintiff to make the conductor a party, and to dismiss as to him at any time before the jury retired. The facts do not show that he was made a defendant for the purpose of weakening the effect of his evidence should he be offered as a witness for the defendant." *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264.

#### E. PLEADING.

##### 1. In Actions for Personal Injuries.

##### a. Petition or Complaint.

##### (1) Allegations as to Corporate Capacity of Defendant.

In a suit by a passenger against a railroad company, defendant's corporate capacity should be alleged. *Galveston, etc., Ry. v. Smith*, 81 Tex. 479, 482, 17 S. W. 133.

The almost universal practice in suits against a railway company is to allege the corporate capacity of the defendant. It would seem that if the provision of the statutes on the subject does not positively require such allegation it contemplates such mode of procedure. *Galveston, etc., R. Co. v. Smith*, 81 Tex. 479, 17 S. W. 133.

##### (2) Allegations as to Relation of Carrier and Passenger and Rights of Latter under Contract of Transportation.

**Allegations as to Relation.**—A com-

plaint against a railroad company which alleges the defendant is a common carrier, and that, while plaintiff was on defendant's cattle car, the car was backed so violently against another car that plaintiff was thrown down and injured, but which fails to show what relation plaintiff bore to defendant, is demurrable. *Gulf, C. & S. F. Ry. Co. v. Gorman*, 6 Tex. Civ. App. 230, 25 S. W. 992.

In a suit against a carrier for injuries to plaintiff, while passenger on freight train, allegation that plaintiff was permitted to ride on freight train by terms of written live stock shipment contract, was good against general demurrer. *International, etc., Ry. Co. v. Downing*, 16 Tex. Civ. App. 643, 647, 41 S. W. 190, affirmed in 93 Tex. 643, no op.

**Allegations as to Right of Plaintiff Traveling on Live Stock Contract to Alight at Intermediate Station.**—Averment that plaintiff was traveling on a live stock contract, and alighted from the train at an intermediate station to attend to his stock, "which it was his right and duty to do under the terms of his contract," and was injured in so doing, sufficiently alleges his right to alight at intermediate stations, as against a general demurrer, though the provisions of the contract conferring such right should have been set forth. *International & G. N. R. Co. v. Downing*, 41 S. W. 190, 16 Tex. Civ. App. 643.

**(3) Allegations as to Negligence of Defendant Causing Injury to Plaintiff.**

**(a) Sufficiency of Allegations in General Terms.**

**aa. General Rule.**

It may be stated as a general rule that in an action against a carrier for negligence to a passenger it is sufficient for the petition or complaint to allege negligence in general terms. *Gulf, etc., R. Co. v. Smith*, 74 Tex. 276, 11 S. W. 1104; *Missouri Pac. R.*

*Co. v. Hennessey*, 75 Tex. 155, 12 S. W. 608; *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280; *Missouri, etc., R. Co. v. Williams*, 91 Tex. 255, 258, 42 S. W. 855, reversing 40 S. W. 350; *Foreman v. Missouri Pac. R. Co.*, 4 Tex. Civ. App. 54, 56, 23 S. W. 422; *San Antonio, etc., R. Co. v. Adams*, 6 Tex. Civ. App. 102, 107, 24 S. W. 839 (see 93 Tex. 694, no op.); *Galveston, etc., R. Co. v. Parsley*, 6 Tex. Civ. App. 150, 25 S. W. 64, affirmed in 93 Tex. 707, no op.; *San Antonio, etc., R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752; *Ft. Worth, etc., R. Co. v. Ferguson*, 9 Tex. Civ. App. 610, 617, 29 S. W. 61, affirmed in 93 Tex. 660, no op.; *Gulf, etc., R. Co. v. Brown*, 16 Tex. Civ. App. 93, 99, 40 S. W. 608, (see 93 Tex. 684, no op.); *International, etc., R. Co. v. Downing*, 16 Tex. Civ. App. 643, 41 S. W. 190, affirmed in 93 Tex. 643, no op.; *Missouri, etc., R. Co. v. Overfield*, 19 Tex. Civ. App. 440, 441, 47 S. W. 684, affirmed in 93 Tex. 715, no op.; *International, etc., R. Co. v. Williams*, 20 Tex. Civ. App. 587, 589, 50 S. W. 732, affirmed in 93 Tex. 644, no op.; *International, etc., R. Co. v. Anthony*, 24 Tex. Civ. App. 9, 57 S. W. 897; *Johnson v. Galveston, etc., R. Co.*, 27 Tex. Civ. App. 618, 66 S. W. 906, affirmed in 95 Tex. 680, no op.; *Galveston, etc., R. Co. v. Contreras*, 31 Tex. Civ. App. 489, 72 S. W. 1051; *San Antonio, etc., R. Co. v. Williams*, 34 Tex. Civ. App. 372, 78 S. W. 977, affirmed in 98 Tex. 631, no op.; *Houston, etc., R. Co. v. Summers* (Civ. App.), 49 S. W. 1106, affirmed in 51 S. W. 324, 92 Tex. 621.

Where, in an action against a railway company for personal injuries sustained by a passenger, the petition charges that the injuries were occasioned by the negligence of defendant's servants, setting forth the acts complained of, and thus by unmistakable intendment charging them to be negligence, it is not necessary that they should be expressly averred to

constitute negligence. *Missouri, etc., R. Co. v. Overfield*, 19 Tex. Civ. App. 440, 47 S. W. 684, affirmed in 93 Tex. 715, no op.

Where the petition states the act or omission complained of, and avers that it was negligence, or that it was negligently done it is sufficient, unless such act or omission can be declared, as a matter of law, not to constitute negligence. *International, etc., R. Co. v. Downing*, 16 Tex. Civ. App. 643, 41 S. W. 190, affirmed in 93 Tex. 643, no op.

In an action against a street railway company for injuries to a passenger, it is not necessary to aver with great particularity any specific acts of negligence which caused the injury. *San Antonio St. Ry. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752.

It is not incumbent on plaintiff in an action against a railroad for damages for the death of passenger, after showing accident which implies negligence, to go further and show what the particular negligence was, when from circumstances it is not in his power to do so. *Galveston, etc., R. Co. v. Parsley*, 6 Tex. Civ. App. 150, 155, 25 S. W. 64, affirmed in 93 Tex. 707, no op.

In an action for injuries to passenger not resulting in death, it is not necessary to allege that injury was caused by defendant's gross negligence. *Avey v. Galveston, etc., R. Co.*, 81 Tex. 243, 245, 246, 16 S. W. 1015.

**Effect of Knowledge of Particular Act of Negligence.**—In an action for injuries to a passenger, the fact that he has knowledge of the particular act of negligence which caused the injury does not require him to allege such act specifically, nor deprive him of the benefit of the rule that in such action a petition alleging negligence in general terms is sufficient. *San Antonio Traction Co. v. Williams*, 78 S. W. 977, 34 Tex. Civ. App. 372.

**bb. Allegations as to Negligence and Injuries Resulting Therefrom Held Sufficient.**

Allegations that while plaintiff was lawfully riding on defendant's passenger train, which was in the exclusive charge of its agents and servants, the car was derailed and overturned "by the gross negligence, carelessness, and default of the defendant company, its agents, servants, and employees," are sufficient, without alleging any particular acts of negligence. *Gulf, C. & S. F. Ry. Co. v. Smith*, 74 Tex. 276, 11 S. W. 1104.

It is a sufficient allegation of negligence in an action for injury to a passenger to allege that the train on which he was a passenger was derailed. *Galveston, H. & S. A. Ry. Co. v. Gracia*, 100 S. W. 198, 45 Tex. Civ. App. 229.

In an action for injuries sustained in a railroad accident, an averment that the car in which plaintiff was riding was derailed through the negligence of the railway company and its servants, whereby the plaintiff was injured, is sufficiently specific. *Gulf, C. & S. F. Ry. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 23 Am. St. Rep. 345, 11 L. R. A. 486.

Allegations that plaintiff's father was killed while a passenger on defendant's train, by reason of the derailment of the train, caused by the negligence of the servants and agents of defendant in charge thereof is sufficiently specific. *Galveston, H. & S. A. Ry. Co. v. Contreras*, 72 S. W. 1051, 31 Tex. Civ. App. 489.

Allegations, in an action against a carrier for injuries, that while plaintiff was lawfully riding on defendant's passenger train, which was in the exclusive charge of its agents and servants, the car was derailed and overturned "by the gross negligence, carelessness, and default of the defendant company's servants and employees," are sufficient to admit evidence that the accident resulted

from the spreading of the track caused by defective ties. *Gulf, C. & S. F. Ry. Co. v. Smith*, 74 Tex. 276, 11 S. W. 1104.

Where a passenger, by reason of the overcrowding of the cars, was obliged to stand on the platform, from which he was pushed by the jostling of other passengers, his petition to recover for the injuries need not allege the acts of the other passengers to render evidence thereof admissible. *International & G. N. R. Co. v. Williams*, 50 S. W. 732, 20 Tex. Civ. App. 587.

Petition for damages setting forth that plaintiff, having boarded baggage car of a moving train, a passenger, was compelled to jump therefrom to escape hot water turned upon him by engineer or fireman, and was injured, is sufficient, when not excepted to, to raise issue of defendant's liability for injury to trespasser. *Missouri, etc., R. Co. v. Williams*, 91 Tex. 255, 258, 42 S. W. 855, reversing 40 S. W. 350.

A complaint by a passenger alleged that his train was stopped on the main track, and was run into by a following freight train; that the employees in charge of the passenger train carelessly failed to give the proper signals; that the employees in charge of the freight train failed to check the train as they might have done; "wherefore plaintiff further alleges that the defendant's employees and servants were guilty of negligence." Held to warrant a general instruction that, if plaintiff was injured by defendant's negligence, he was entitled to recover. *Gulf, C. & S. F. Ry. Co. v. Brown*, 40 S. W. 608, 16 Tex. Civ. App. 93.

Such complaint was held sufficient to admit proof of negligence on the part of employees on both trains. *Gulf, C. & S. F. Ry. Co. v. Brown*, 40 S. W. 608, 16 Tex. Civ. App. 93.

In an action by a passenger to recover of a carrier for damages occasioned by the falling of a seat, an instruction allowing a recovery if de-

fendant was negligent in leaving open the seat for occupancy, and the injury was the proximate result of such negligence, is not error because such act of negligence was not pleaded, where there was a general allegation of negligence. *International & G. N. R. Co. v. Anthony*, 57 S. W. 897, 24 Tex. Civ. App. 9.

An averment that in the night time, on approaching, but before reaching, a station, the porter announced it, and opened the door for passengers to alight; that the train had not in fact reached the station, but was on a trestle, through which plaintiff fell into the water in alighting; and that the conductor would not allow him a stop-over, and in continuing his journey he caught cold, resulting in sickness and disability,—sufficiently alleges that the injury occurred through the carrier's negligence. *Missouri, K. & T. Ry. Co. of Texas v. Overfield*, 47 S. W. 684, 19 Tex. Civ. App. 440.

Petition in a personal injury suit by passenger against carrier which alleged that plaintiff left the train at a station on assurance of the conductor that the train would stop long enough to allow him to cross the street and return, and that the train started almost immediately after he alighted, and that he was injured while trying to board the moving train and alleging conductor's negligence, was good against general demurrer. *Foreman v. Missouri Pac. R. Co.*, 4 Tex. Civ. App. 54, 55, 57, 23 S. W. 422.

Petition charging that the car on which plaintiff's injured wife was a passenger, as well as that of another company, was so carelessly run that a collision resulted, giving the time, place, and, in part, the circumstances, though not the details of the accident, was good on general demurrer and as against a specific exception on the ground that the acts of negligence were not sufficiently specified. *Ft. Worth St. R. Co. v. Ferguson*, 9 Tex. Civ.

App. 610, 617, 29 S. W. 61, affirmed in 93 Tex. 660, no op.

A petition by a passenger traveling under a live stock contract, authorizing him to alight at intermediate stations to look over his stock, alleged that the train stopped at night; that the conductor, who was on the caboose with plaintiff, told him that it was at a certain station; that plaintiff, relying on such information, attempted to alight, when the train suddenly started, throwing him from the train, which was not at a station, but over a trestle, and injuring him; and that the negligence of the conductor was the proximate cause of the injury. Held, that it could not be said, as a matter of law, that the conductor should not have anticipated that plaintiff would attempt to alight in reliance on his statement, and hence negligence of the conductor proximately causing the injury was alleged. *International & G. N. R. Co. v. Downing*, 41 S. W. 190, 16 Tex. Civ. App. 643.

Under the rule that, as against a general demurrer, every reasonable intendment must be indulged in favor of the pleading, an allegation that, before plaintiff could ascend the steps of defendant's passenger car and enter it, the engineer was signaled to go ahead and plaintiff was injured by the starting of the train, will be construed to mean that plaintiff was ascending the steps at the time the train started, and not that it was moving when he started to board it. *Galveston, H. & S. A. Ry. Co. v. Fink*, 99 S. W. 204, 44 Tex. Civ. App. 544.

A petition alleging that an accident to plaintiff occurred on or about the 6th day of February, 1903, while on one of defendant's trains as a passenger, and that by reason of the carelessness of defendant's employees, engaged in handling the train, in stopping so suddenly, or jerking the car on which plaintiff was a passenger, he was violently thrown down and sus-

tained permanent injury, etc., is sufficient as against a general exception. *Missouri, K. & T. Ry. Co. of Texas v. Moody*, 79 S. W. 856, 35 Tex. Civ. App. 46.

A petition in an action for injuries to plaintiff's wife is sufficiently definite where it alleges a collision of defendant's cars, and that plaintiff's wife suffered a miscarriage as a result of "the jolt, jar, and shock" by such collision. (Civ. App. 1904) *Rapid Transit Ry. Co. v. Smith*, 82 S. W. 788, judgment reversed (1905) 86 S. W. 322, 98 Tex. 553, reversed on another point.

A petition alleging derailment of defendant's car on which plaintiff was a passenger, and that the proximate cause of his injury was the defective construction of the track, in the failure to provide ditches to carry off the water which 'flooded it, states a cause of action. *Galveston, etc., R. Co. v. Waldo* (Civ. App.), 26 S. W. 1004, 1005.

Where plaintiff alleged that while riding on defendant's street car he rang the bell, giving thereby the usual signal to stop, and that, though he did this repeatedly, the motorman negligently failed and refused to stop, whereupon plaintiff attempted to alight while the car was in motion, and was injured, the pleading was sufficient to raise the issue of negligence on the part of the motorman in failing to use ordinary care to hear the bell if it was rung. *Fuller v. Denison & S. Ry. Co.*, 74 S. W. 940, 32 Tex. Civ. App. 399.

In an action against a street railroad company for injuries to a passenger, an allegation that defendant negligently left a banana peeling on the floor of a car, that plaintiff did not see it, and stepped on it, and sustained an injury, were sufficient; it not being necessary to allege that it remained there any certain length of time, although such an allegation would have been necessary if the banana peeling

had been left there by some one other than the carrier's agents. *Dallas Consol. Electric St. Ry. Co. v. Black*, 89 S. W. 1087, 40 Tex. Civ. App. 416.

In an action against a railroad by a passenger for injuries, a petition charging that defendant neglected to provide proper lights and accommodations for passengers at its freight depot, and that plaintiff's injuries were occasioned by such neglect, was sufficient on general demurrer. *Stewart v. I. & G. N. R. R. Co.*, 53 Tex. 289.

In an action by a passenger for injuries sustained in alighting from a train, a petition alleging that defendant frequently moved its trains at such station while passengers were alighting to get the engine in position to take water, which custom was unknown to plaintiff; that the distance from the step to the ground, which was rocky and uneven, was 25 or 30 inches and that defendant neglected to have a stool in position; that the conductor saw plaintiff descending, knew that she needed assistance, that no stool was in position on which she could alight, and neglected to give her assistance, and that by reason of either or all the acts of negligence of defendants, its agents and servants, as alleged plaintiff sustained the injuries complained of, was sufficient as against a demurrer. *St. Louis Southwestern Ry. Co. of Texas v. Kennedy* (Civ. App.), 96 S. W. 653.

A petition in an action against a railroad company for injuries to a passenger received while disembarking, owing to the distance from the step of the car to the ground below, held good as against a general demurrer. (Civ. App. 1902) *International & G. N. R. Co. v. Clark*, 71 S. W. 587, judgment reversed on another point. (Sup. 1903), 72 S. W. 584, 96 Tex. 349.

The petition was not insufficient because the facts alleged were immaterial and irrelevant, and no facts were

stated showing any failure of the conductor to plaintiff, or showing any liability of defendant to plaintiff on account of any failure of duty by the conductor. *St. Louis Southwestern Ry. Co. of Texas v. Kennedy* (Civ. App.), 96 S. W. 653, affirmed in 101 Tex. 656, no op.

**As to allegations of neglect of duty in heating and lighting stations, etc.,** see ante, "As to Stational Facilities," V, A.

**Allegations as to Defective Condition of Track, etc.**—See ante, "Duties as to Construction, Maintenance, and Repair," V, D, 6, b, (1).

**Pleadings in Action for Failure to Allow Reasonable Opportunity to Alight.**—See ante, "Duty to Afford Reasonable Opportunity to Alight," V, D, 14, a, (2).

**Allegations as to Negligence in Failure to Assist Alighting Passengers.**—See ante, "Duty to Assist Passengers," V, D, 14, a, (5).

**Pleading in Actions for Failure to Have Ticket Offices Open as Required by Statute.**—See ante, "Statute Requiring Ticket Offices to Be Open for Half an Hour Prior to Departure of Train," III, B, 2, c.

**cc. Effect of Special Allegations as to Negligence as Superseding General Allegations.**

In actions against a carrier for negligent injuries the general and well-established rule applies that when one having a right to rely upon general allegations for the admission of his proof chooses to plead specially the facts upon which he relies for recovery, he must confine his proof to the facts alleged and can recover upon no other ground. *Johnson v. Galveston, etc., R. Co.*, 27 Tex. Civ. App. 616, 66 S. W. 906, affirmed in 95 Tex. 680, no op., citing *Missouri Pac. R. Co. v. Hennessey*, 75 Tex. 155, 12 S. W. 608; *Galveston, etc., R. Co. v. Herring* (Civ. App.), 36 S. W. 129; *Missouri, etc.,*



*R. Co. v. Vance* (Civ. App.), 41 S. W. 167; *Gulf, etc., R. Co. v. Scott* (Civ. App.), 27 S. W. 827; *Gulf, etc., R. Co. v. Younger*, 10 Tex. Civ. App. 141, 29 S. W. 948.

In a complaint against a carrier for injuries to a passenger, a general allegation of negligence is superseded by allegations of particular acts of negligence. (Civ. App.), *Houston, E. & W. T. Ry. Co. v. Summers*, 49 S. W. 1106, affirmed 51 S. W. 324, 92 Tex. 621.

Where, in an action against a railroad for death by reason of the derailment of a train, plaintiffs plead specially the causes of the derailment and the specific negligence on which they rely for recovery, they will be confined in their proof to such specific allegations, and can recover on no other grounds. *Johnson v. Galveston, H. & N. Ry. Co.*, 66 S. W. 906, 27 Tex. Civ. App. 616.

Though a complaint against two railroad companies for injuries to a passenger by a collision between their trains avers generally negligence in the operation of the trains, specific allegations of negligence in certain particulars confine the issue to such particular acts. *Missouri, K. & T. Ry. Co. v. Vance* (Civ. App.), 41 S. W. 167.

In an action by a passenger against railroad for damages for personal injuries sustained through the derailment of train, defendant was entitled to an instruction confining the acts of negligence to those alleged in the petition. *Fordyce v. Moore* (Civ. App.), 22 S. W. 235.

Where plaintiff in his petition in an action against a railroad for damages for personal injuries while a passenger on defendant's train limits his allegation of negligence to the running of the train and to the time of the accident, no other issue of negligence should be submitted to the jury. *International, etc., Ry. Co. v. Bibolet*, 24 Tex.

Civ. App. 4, 7, 57 S. W. 974, affirmed in 94 Tex. 691, no op.

Where petition in an action against a railroad for damages for personal injuries while passenger on defendant's train specifically alleged injuries received by plaintiff, the jury should be confined in estimating damages to the injury so alleged. *International, etc., R. Co. v. Bibolet*, 24 Tex. Civ. App. 4, 8, 57 S. W. 974, affirmed in 94 Tex. 691, no op.

Where, in an action against a railway company for personal injury causing death and resulting from the derailment of a train, plaintiffs plead specially the cause of the derailment and the specific matters constituting negligence in relation thereto upon which they rely for recovery, they can not recover upon a ground of negligence and cause of derailment, such as a broken axle, which they have not alleged. *Johnson v. Galveston, etc., R. Co.*, 27 Tex. Civ. App. 616, 66 S. W. 906, affirmed in 95 Tex. 680, no op.

#### (4) Negation of Contributory Negligence.

**In General.**—In a suit for damages against a railway company on account of the alleged negligence of its agents, it is not necessary that the petition should negative, either by facts stated or by direct averment, the existence of contributive negligence on the part of plaintiff; an exception to this rule exists when the petition, from its averments, would establish, if unexplained, a prima facie case of negligence of the party injured. *Texas, etc., R. Co. v. Murphy*, 46 Tex. 356.

**Allegation Held Proper as Explaining Plaintiff's Act.**—Where the petition, in an action for injuries sustained by plaintiff while traveling in charge of cattle, alleges that, when the train stopped to take water, plaintiff, as was customary, left the caboose to look after his cattle; that the train started without giving him time to re-enter the caboose, and he was compelled to

climb upon the train, or be left behind; that, on the invitation of the conductor, he started towards the caboose; and that, as he was in the act of entering it from the top of the car, he was struck by a water pipe attached to a tank, and injured,—exceptions to so much of it as alleges why plaintiff went on the top of the train rather than the caboose, and that he entered the caboose from the top of the car at the request of the conductor, are properly overruled. *Missouri Pac. Ry. Co. v. Callahan* (Sup.), 12 S. W. 833.

**(5) Allegations as to Known Facts of Injury and Their Consequences.**

In an action against a railroad for damages for personal injuries, the actual known facts of injury and their consequences should be alleged to admit their proof. *San Antonio, etc., R. Co. v. Adams*, 6 Tex. Civ. App. 102, 107, 24 S. W. 839 (see 93 Tex. 694, no op.).

Where petition in an action against a railroad for damages for injuries to express messenger alleged injuries generally, and was excepted to on ground that it was not sufficiently definite in stating injuries, it is error to admit evidence of particular injuries sustained. *San Antonio, etc., R. Co. v. Adams*, 6 Tex. Civ. App. 102, 107, 24 S. W. 839 (see 93 Tex. 694, no op.).

**(6) Allegations as to Place Where Accident Occurred.**

In an action against a railroad company for injuries to a passenger, the petition, which shows that plaintiff was injured while being transported by defendant under its agreement, is sufficient, though it fails to allege that the accident occurred at a place between the point of departure and his destination. *International & G. N. R. Co. v. Underwood*, 67 Tex. 589, 4 S. W. 216.

**(7) Allegations in Different Counts of Different Causes of Injury.**

In *Gulf, etc., R. Co. v. Buford*, 2 Tex. Civ. App. 115, 21 S. W. 272 (see

85 Tex. 430), which was a suit against a railway company for personal injuries, it was held that plaintiff's petition was not duplicitous because it alleged in one count that plaintiff was thrown from the car without fault on his part, and in another that he was injured by voluntarily attempting to leave the train.

**(8) Allegations as to Plaintiff's Age, Employment, etc.**

In an action against a railroad company for personal injuries sustained by a passenger in attempting to alight from a train, an allegation as to plaintiff's age is not necessary in the complaint. *Galveston, H. & S. A. Ry. Co. v. Thornsberry* (Sup.), 17 S. W. 521.

In an action against a railroad for injuries to plaintiff as passenger, petition alleging nature of his business, his customary earnings and effect of injury on earning capacity, need not state by whom he was employed nor more specifically the character of employment. *Campbell v. Fisher* (Civ. App.), 24 S. W. 661, 663, affirmed in 93 Tex. 701, no op.

**(9) Designation of Employees.**

In an action for injuries to a passenger, an allegation of the petition that plaintiff, before entering the train, asked the employees of defendant in charge of and operating the train if it would stop at B., was a sufficient designation of the employees. *International & G. N. R. Co. v. Hessler* (Civ. App.), 95 S. W. 40.

**(10) Allegations as to Plaintiff's Danger and Defendant's Knowledge Thereof.**

It is not necessary to allege in the complaint that plaintiff was in danger, and that it was known to defendant, if facts are averred from which this conclusion may be drawn. *Galveston, H. & S. A. Ry. Co. v. Thornsberry* (Sup.), 17 S. W. 521.

**(11) Amendment of Petition or Complaint.**

Amendment to complaint in an ac-

tion for injuries to passenger held not to state a new cause of action. *Missouri Pac. R. Co. v. Foreman* (Civ. App.), 46 S. W. 834, affirmed in 93 Tex. 647, no op.

Where it was alleged that plaintiff was injured through a wreck caused by defendant's negligence in running its train, and that the train was wrecked by the giving way of a bridge, an amended petition which makes no change in the allegations except that the defect was in the approach to the bridge, instead of the bridge itself, does not state a new cause of action. *Mexican Cent. Ry. Co. v. Mitten*, 13 Tex. Civ. App. 653, 36 S. W. 282.

In an amended petition pleading negligence generally plaintiff may prove the particular acts of negligence alleged in the original petition; such amendment is not subject to demurrer on the ground that it introduces a new cause of action, barred by limitation, since it can not be assumed, in advance, that evidence will be introduced of negligence not originally alleged. *San Antonio, etc., Co. v. Williams*, 34 Tex. Civ. App. 372, 78 S. W. 977, affirmed in 98 Tex. 631, no op.

#### **b. Answer.**

##### **(1) Necessity for Pleading Contributory Negligence of Passenger.**

In an action for damages for injury to a passenger by the negligence of a railroad company, the usual rule applies that in an action for damages for injury caused by the negligence of the defendant, if contributory negligence be relied on as a defense it must be pleaded, unless it appears from the pleading of the plaintiff. *Missouri Pac. R. Co. v. Watson*, 72 Tex. 631, 10 S. W. 731.

The defense of contributory negligence not having been pleaded by defendant, and not being developed by plaintiff's case, is not available. *St. Louis, etc., R. Co. v. Gammage* (Civ. App.), 96 S. W. 645, affirmed in 101 Tex. 655, no op.

In an action for injuries to a passenger, a charge requested by defendant, under which it was relieved from liability by contributory negligence of the passenger, was properly refused where contributory negligence on the part of the passenger was not pleaded. *Missouri, etc., R. Co. v. Foster* (Civ. App.), 87 S. W. 879, affirmed in 101 Tex. 649, no op.

##### **(2) Answer Held Sufficient to Raise Issue of Contributory Negligence.**

In an action against a railroad for injuries to a passenger, an answer alleging that, if the passenger was injured in attempting to alight from defendant's train, such injuries were received in consequence of his own negligent act on leaving a moving train, and that his negligence was the proximate cause of his injuries, for which defendant was not responsible, raised the issue of contributory negligence on the part of the passenger in leaving the train while in motion, either before or after its arrival at the usual place for stopping. *Galveston, H. & S. A. Ry. Co. v. De Castillo* (Civ. App.), 83 S. W. 25.

##### **(3) Allegations as to Promulgation of Rules of Carrier.**

In an action for injuries to plaintiff while traveling on a stock pass, defendants alleged that at the time of the injury they had promulgated a rule prohibiting passengers from riding on their engines; that plaintiff disregarded the rule, and negligently and against defendants' consent went on the top of the cars, and in and upon the engine of the train on which he was riding, and was thereby injured. Held, that the allegation that defendant companies "promulgated a rule" should be construed as alleging that the rule was in force at the time of the accident, and was therefore sufficient to raise an issue as to whether the rule was then existing under Rev. St. 1895,

art. 1193, declaring that plaintiff need not deny any special matter of defense pleaded, but that the same shall be regarded as denied unless expressly admitted. Judgment (Civ. App.), 91 S. W. 877, 41 Tex. Civ. App. 72, affirmed. *Missouri, K. & T. Ry. Co. of Texas v. Avis*, 100 Tex. 33, 93 S. W. 424.

## **2. In Actions for Assault or Offensive Language.**

In an action by a passenger against a carrier for permitting other passengers to insult plaintiff with offensive language, it was sufficient to allege that the language used was profane, vulgar, obscene, and indecent, without setting out the specific language used. *St. Louis Southwestern Ry. Co. of Texas v. Wright*, 75 S. W. 565, 33 Tex. Civ. App. 80.

In an action by a passenger against a carrier for permitting other passengers to insult plaintiff with offensive language, plaintiff has the burden of showing as nearly as possible the language used; and that is not done by a mere statement that the passengers complained of cursed and used vulgar and obscene language and sang vulgar songs. *St. Louis Southwestern Ry. Co. of Texas v. Wright*, 75 S. W. 565, 33 Tex. Civ. App. 80.

A passenger, in an action for damages for an assault by the conductor, need not plead the insulting language of the conductor towards him, as matters going merely in aggravation or extenuation, and having effect to enhance or diminish the damages, need not be pleaded. *Houston & T. C. R. Co. v. Batchler*, 37 Tex. Civ. App. 116, 83 S. W. 902.

In an action against a railroad company brought by a nine year old girl, who, though having a first-class ticket, was negligently compelled to ride in a second-class car, where the complaint alleged that the passengers used profane and indecent language in plaintiff's hearing and presence, and

that she was damaged thereby, it was proper to receive evidence of the profanity of one of the passengers. *Texas & P. Ry. Co. v. Kingston*, 68 S. W. 518, 30 Tex. Civ. App. 24.

## **3. In Actions for Breach of Contract.**

Where, in an action for breach of a contract of carriage, plaintiff claimed special damage on the ground that because of his failure to reach a certain town at the time he would have reached it, had defendant performed its duty, he had failed to consummate a deal by which he would have realized a large profit, failure to name the parties with whom the deal was to be made rendered the petition defective. *Townsend v. Texas & N. O. Ry. Co.*, 88 S. W. 302, 40 Tex. Civ. App. 71.

**Allegation of Willingness to Pay Fare in Action for Refusal to Carry.**—See ante, "Duty to Receive and Carry," V, D, 2.

## **4. In Actions for Ejection.**

**Allegation That Person Ejecting Plaintiff Was Agent of Carrier.**—In an action by a passenger against the company to recover for her being wantonly put off a train by the acting conductor, a failure of her petition to state that he was an agent or servant of the company is not a fatal defect. *Texas & P. R. Co. v. Casey*, 52 Tex. 112.

**Facts Showing Waiver of Condition by Agent.**—Where a husband signed his own name to his wife's railroad ticket, which provided that it must be signed by the person intending to use it, on being told by the agent that he could sign it, he must plead such facts in an action by him for damages sustained by his wife from the company's refusal to accept the ticket. *Mexican Cent. Ry. Co. v. Goodman* (Civ. App.), 43 S. W. 580.

**Allegations as to Damages Sustained by Ejection.**—In an action for ejection from a railway train, and for assault and battery, the usual rule applies that in case of damages not necessarily resulting from the act complained of,

and which are consequently not implied by law, the petition must state the particular damage sustained by the plaintiff in order to authorize the introduction of testimony in regard thereto. *Gulf, etc., R. Co. v. Adams*, 3 App. Civ. Cases, § 422, citing *T. & P. R. Co. v. Curry*, 64 Tex. 85.

In an action for assault and battery, and ejection from defendant's cars, plaintiff can not recover damages for an arrest and imprisonment, made subsequent to such ejection, at the instance of the conductor, where he did not allege the arrest and imprisonment as a ground of damages. *Gulf, C. & S. F. Ry. Co. v. Adams*, 3 Willson, Civ. Cas. Ct. App. § 422.

An allegation in a complaint that plaintiff was expelled from defendant's train, that he experienced great fatigue and distress in finding his way back, and that by reason thereof and the ejection from the train he suffered great pain of mind and body, will not admit proof of the sickness of plaintiff's child, to which he was going, and plaintiff's consequent mental suffering, but such fact must be distinctly pleaded. *Gulf, C. & S. F. R. Co. v. Hurley*, 74 Tex. 593, 12 S. W. 226.

### 5. In Actions for Loss, Injury or Delay of Baggage.

#### a. Petition or Complaint.

**Allegations as to Contract of Carriage.**—A petition alleging that plaintiff was traveling on one of the trains of a railroad company, having bought and paid for tickets recognized by its employees, sufficiently alleges a contract with the company for carriage of himself and baggage. *Bonner v. DeMendoza*, 4 Willson, Civ. Cas. Ct. App. § 234, 16 S. W. 976.

**Allegations as to Loss.**—In suit by passenger against a carrier to recover money lost in travel, where the petition alleged that plaintiff's coat, containing money, was laying on a seat, and the car was overturned by negligence of defendant and the coat thrown

out, and when found, the money was gone, it was good against general demurrer. *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 484, 21 S. W. 1010.

#### **Allegation That Damage Was Caused by Defendant's Negligence.**—

In an action by a passenger for damages to his baggage, where the petition does not allege that the damages were caused by defendant's negligence, the question of the validity of a stipulation limiting the company's liability for loss due to its negligence does not arise. *Houston, E. & W. T. Ry. Co. v. Seale*, 67 S. W. 437, 28 Tex. Civ. App. 364.

It sufficiently appears, in an action to recover for valuables stolen from a passenger, that the acts complained of were committed by employees of the receivers, where the complaint alleges that defendants are receivers of and operate the railroad, and that one of the employees of the railroad company had exclusive control of plaintiff's baggage left in the car, the contents of which were stolen by him, and that plaintiff notified the officials and employees of the valuable character of the contents, then in defendants' exclusive control, and demanded return thereof from defendants, which they failed to do. *Bonner v. DeMendoza*, 4 Willson, Civ. Cas. Ct. App. § 234, 16 S. W. 976.

#### **Necessity for Itemizing Articles.**—

In an action by a passenger against the carrier to recover for negligent delay in delivering plaintiff's trunk, containing the clothing of his wife and child, the value of the use of the same being alleged as of a certain sum, the petition was not insufficient for failing to itemize the articles of wearing apparel alleged to have been delayed. *Texas & N. O. R. Co. v. Russell* (Civ. App.), 97 S. W. 1090.

A petition, in an action by a passenger for damages to his baggage, which alleges that "the articles totally destroyed consisted of three dresses,

worth \$300; that the articles injured consisted of shirt waists, collars, cuffs, and ladies' undergarments,"—is not sufficiently specific, an itemized list of the clothing destroyed or damaged, with the value of each, and the extent of the damage to each article injured, being essential. *Houston, E. & W. T. Ry. Co. v. Seale*, 67 S. W. 437, 28 Tex. Civ. App. 364.

**b. Necessity for Pleading Contributory Negligence.**

Where certain articles were missing from a passenger's trunk when it was delivered to him by the carrier, in an action for damages, there being no plea of contributory negligence on the part of plaintiff in regard to the way he packed the trunk, and the trunk having been received by defendant without objection, with full knowledge of the way it was packed, defendant was precluded from making the defense of contributory negligence. *Texas & N. O. R. Co. v. Russell* (Civ. App.), 97 S. W. 1090.

**F. ISSUES, PROOF AND VARIANCE.**

**1. Necessity for Proof of All Facts Alleged.**

Where the plaintiff in an action against a railway company for personal injuries sustained by a traveller as a passenger, sets up several distinct acts of negligence, anyone of which, if proved, would entitle him to recover, he is not required to prove them all, and a charge instructing that each and all of them must be, is error. *Davis v. Missouri, etc., R. Co.*, 17 Tex. Civ. App. 199, 43 S. W. 44.

In a suit for damages against a railway company for personal injuries caused by the negligence of the company, and resulting from its car being thrown from the track by a rail broken several days before the injury, and a part of which was missing, it is not necessary that both defects should be proved to authorize a recovery.

The substance of the issue being, was the track of the appellant's road unsound and unsafe by reason of the defective rail? It was sufficient to prove the substance of the issue. *Texas, etc., R. Co. v. Kirk*, 62 Tex. 227.

In an action against a street railway for injuries to a passenger, alleged to have been caused by a sudden acceleration of the speed of the car when plaintiff was alighting, the substance of the issue which plaintiff was required to prove was merely whether she was injured by the negligence of defendant in accelerating the speed of the car when she was preparing to get off, in consequence of which she was thrown from the car, and not whether the car had passed beyond the street where plaintiff desired to alight, which was immaterial. *El Paso Electric Ry. Co. v. Harry*, 37 Tex. Civ. App. 90, 83 S. W. 735.

In an action for injuries to a passenger plaintiff alleged that as he was about to make his exit from the door of the car defendant's servants negligently raised a water hose that had been placed across and into the door in such a manner that it caught plaintiff's foot as he was making a step, whereby he was thrown against the side of the door, and at the same time defendant's employees caused the car to move suddenly with a jerk whereby plaintiff was violently thrown on the vestibule platform floor, etc. Held, that the petition did not charge several acts of negligence conjunctively, but that both acts of negligence jointly were the proximate cause of the injury, and hence proof of both was required in order to entitle plaintiff to recover. *Ratteree v. Galveston, H. & S. A. Ry. Co.*, 81 S. W. 566, 36 Tex. Civ. App. 197.

The petition in an action by a passenger against a railroad company for personal injuries alleged that while the train on which plaintiff was rid-

ing was standing still defendant negligently permitted another train to approach it from the rear, so as to make it appear to plaintiff that there was imminent danger of a collision, in consequence of which he attempted to leave the train, and that while so doing the train was negligently started so as to throw him to the ground. Held not to state several and distinct acts of negligence, proof of either of which would entitle plaintiff to recover, but that, to justify a recovery, plaintiff was required to prove both the acts of negligence alleged. *Williams v. Galveston, H. & S. A. Ry. Co.*, 78 S. W. 45, 34 Tex. Civ. App. 145.

As to variance between allegations and proof, see post, "Variance," VII, F, 5.

## **2. Presumptions and Burden of Proof.**

### **a. As to Relation of Carrier and Passenger.**

For a full discussion of the presumption as to the relation of carrier and passenger, admissibility and sufficiency of evidence to prove such relation, etc., see ante, "Presumptions and Proof as to Existence of Relation," 1, A, 2.

### **b. In Actions for Personal Injuries.**

#### **(1) As to Defendant's Negligence Causing Injury.**

##### **(a) General Rule.**

In an action by a passenger for personal injuries the burden is on him to prove defendant's negligence, and that such negligence caused the injury. *Gulf, etc., R. Co. v. Williams*, 70 Tex. 159, 8 S. W. 78; *St. Louis, etc., R. Co. v. Burns*, 71 Tex. 479, 481, 9 S. W. 467; *Mexican Cent. R. Co. v. Lauricella*, 87 Tex. 277, 279, 28 S. W. 277, affirming 26 S. W. 301; *St. Louis, etc., R. Co. v. Parks*, 97 Tex. 131, 76 S. W. 740, reversing 73 S. W. 439; *Texas, etc., R. Co. v. Buckelew*, 3 Tex. Civ. App. 272, 275, 22 S. W. 994; *Missouri, etc., R. Co. v. Wright*, 19 Tex. Civ. App. 47, 47 S. W. 56, affirmed in 93 Tex. 735,

no op.; *Johnson v. Gulf, etc., R. Co.*, 36 Tex. Civ. App. 487, 81 S. W. 1197; *McCabe v. San Antonio, etc., Co.*, 39 Tex. Civ. App. 614, 88 S. W. 387, affirmed in 101 Tex. 647, no op.; *South-erland v. Texas, etc., R. Co.* (Civ. App.), 40 S. W. 193, affirmed in 93 Tex. 739, no op.; *Domenico v. El Paso Elec. R. Co.* (Civ. App.), 90 S. W. 60; *El Paso Elec. R. Co. v. Kitt* (Civ. App.), 99 S. W. 587; *Dumas v. Missouri, etc., R. Co.* (Civ. App.), 43 S. W. 908; *Gulf, etc., R. Co. v. Head*, 4 App. Civ. Cases, § 209, 15 S. W. 504.

"Upon the primary question of the defendant's negligence, in the absence of a statute which makes the act or omission complained of negligence per se, the burden never shifts, but is upon the plaintiff throughout the case." *St. Louis, etc., R. Co. v. Parks*, 97 Tex. 131, 134, 76 S. W. 740, reversing 73 S. W. 439, citing *Clark v. Hills*, 67 Tex. 141, 2 S. W. 356.

Where damages are claimed for injuries to a passenger resulting from the negligence of railroad company, it devolves upon plaintiff to show that the injury was caused by defendant. *St. Louis, etc., R. Co. v. Burns*, 71 Tex. 479, 481, 9 S. W. 467.

Because a passenger is injured without his fault, it will not be presumed that injury resulted from carrier's negligence, nor is the burden on carrier to show that it did not. *Texas Pac. R. Co. v. Buckelew*, 3 Tex. Civ. App. 272, 275, 22 S. W. 994.

In an action against a railroad for wrongful death, the petition alleged negligence of defendant's employees in failing to stop the train at the station to which decedent was destined, the other two grounds of negligence charged being subsidiary and merely incidental to the first-named act of negligence, which was treated by counsel on both sides as the gravamen of plaintiffs' action, and was so construed by the court and jury. The court charged that if the jury believed

that the employees in charge of the train were negligent, in failing to bring the train to a stop at decedent's station, and that such negligence was the direct cause of decedent's death, etc., the verdict should be for plaintiffs. Held, that a special charge given for defendant that plaintiffs, in order to recover, must show by a preponderance of the evidence that the accident resulting in the death of deceased was directly caused by "the negligence of the defendant in the manner charged in their petition," was not erroneous as imposing on plaintiffs the duty of proving by a preponderance of the evidence each of the three acts of negligence charged in their petition, when the proof of either of them would entitle them to a verdict; the words "negligence of defendant in the manner charged in their petition," evidently referring to the first-named allegation of negligence. *De Castillo v. Galveston, H. & S. A. Ry. Co.*, 42 Tex. Civ. App. 108, 95 S. W. 547.

In an action against a railroad company by a passenger on a freight train for personal injuries, a charge to find for defendant if the jury believe from a preponderance of evidence that the train was not run at a dangerous rate of speed, that the cars were not negligently loaded, and that the employees did not fail to keep a proper lookout, places the burden of proof on defendant, and is erroneous. *Mexican Cent. Ry. Co. v. Lauricella*, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103.

In *Jones v. Ft. Worth, etc., R. Co.*, 47 Tex. Civ. App. 596, 105 S. W. 1007, it was held that negligence could not be inferred from a mere fact of injury to a trespasser on a railroad train. Citing *Gulf, etc., R. Co. v. Shieder*, 88 Tex. 152, 30 S. W. 902.

In an action for the death of one killed in a collision while riding on defendant's train, the general burden of making out her case as alleged is on plaintiff. *Southerland v. Texas & P. Ry. Co.* (Civ. App.), 40 S. W. 193.

Plaintiff's wife having been carried by the depot, and put off 500 yards beyond, which is alleged to have caused her sickness, plaintiff has the burden of proving that the sickness resulted from the act of the carrier. *Gulf, C. & S. F. Ry. Co. v. Head*, 4 Willson, Civ. Cas. Ct. App. § 209, 15 S. W. 504.

Evidence in an action for injuries caused by being required to alight from a train elsewhere than at the depot held insufficient to support a judgment for plaintiff. *St. Louis Southwestern Ry. Co. of Texas v. Black* (Civ. App.), 93 S. W. 1071.

Plaintiff, who was 70 years old, failed to leave defendant's train on which she was a passenger at the station, and was put off a few hundred yards beyond, between 8 and 9 o'clock at night, in the rain. At the trial she was suffering from a bronchial affection, but the evidence was conflicting as to whether it resulted from exposure or other causes. Held, that to charge that if her sickness was not the result of her being put off, and that it was reasonably certain to have resulted from other causes, defendant is not liable, was erroneous, as throwing the burden of showing that the sickness was not the result of the exposure on defendant, and requiring proof beyond reasonable doubt. *St. Louis, A. & T. Ry. Co. v. Burns*, 71 Tex. 479, 9 S. W. 467.

Where, in an action for injuries on a mixed train, plaintiff pleaded that the injury was caused by an unnecessary jolting, an instruction to find for defendant unless the preponderance of evidence shows that such jolting was the direct cause of the injury was proper. *Runnels v. Houston, E. & W. T. Ry. Co.* (Civ. App.), 50 S. W. 172.

In a suit by passenger against a carrier for personal injuries received in collision, when the charge that the burden of proof was on the plaintiff had been given, a further charge that plaintiff could not recover if he was not injured while transported on de-



defendant's car, or if his injuries were simulated, is not objectionable as placing the burden of proof on defendant. *Missouri, etc., R. Co. v. Wright*, 19 Tex. Civ. App. 47, 51, 47 S. W. 56, affirmed in 93 Tex. 735, no op.

**(b) Happening of Accident as Raising Presumption of Negligence.**

**In General.**—According to a number of decisions in the Texas courts the law obtaining in some states, that the happening of an accident to a passenger makes out a prima facie case, raises a presumption of negligence, and casts upon the defendant the burden of rebutting this presumption, does not prevail in Texas. *San Antonio, etc., R. Co. v. Robinson*, 73 Tex. 277, 285, 11 S. W. 327; *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. 766; *Gulf, etc., R. Co. v. Smith*, 74 Tex. 276, 11 S. W. 1104; *Texas, etc., R. Co. v. Burnett*, 80 Tex. 536, 538, 16 S. W. 220.

While an injury to a passenger on a railroad resulting from the derailment of a train or the abnormal operation of machinery raises an inference of negligence on the part of the carrier which may authorize the jury to so find, where the railroad company has introduced evidence to show that it used all proper care to avoid such accident, a charge that the fact of the injuries is prima facie evidence of negligence, which defendant is called on to rebut, shifts the burden of proof and is a charge on the weight of the evidence. *St. Louis Southwestern Ry. Co. v. Parks*, 97 Tex. 131, 76 S. W. 740.

In an action against a railroad company for personal injuries caused by the wrecking of a train, an instruction that if the train was wrecked, and this was the proximate cause of the injuries, plaintiff was entitled to recover, was erroneous, because giving conclusive effect to the mere fact that the train was wrecked. *Galveston, H. & S. A. Ry. Co. v. Fales*, 77 S. W. 234, 33 Tex. Civ. App. 457.

It being charged in the petition that the railroad was new, and in bad condition; that the train had not the necessary brakes, and was run carelessly and rapidly, so that it was wrecked,—a charge that where a railroad train, containing passengers, is thrown from the track, and passengers are injured, the presumption is that the accident resulted either from the fact that the track was out of order, or that the train was badly managed, or both, and that the burden was on defendant to show that it was not negligent in any of these respects, was error, as in effect deciding the question of negligence for the jury. *San Antonio & A. P. Ry. Co. v. Robinson*, 73 Tex. 277, 11 S. W. 327.

Notwithstanding this general statement of the rule it has often been held in actions against carriers for negligent injuries that the happening of the accident resulting in the injury to a passenger raises an inference of negligence on the part of the carrier. *St. Louis, etc., R. Co. v. Parks*, 97 Tex. 131, 76 S. W. 740, reversing 73 S. W. 439; *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 485, 21 S. W. 1010.

While the mere happening of an accident to a passenger train is not necessarily negligence in a carrier, it is evidence to be considered in determining whether negligence existed. *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 485, 21 S. W. 1010.

**Derailment as Raising Presumption of Negligence.**—Thus it has been often held that when, by the derailment of a train, a passenger is injured, a prima facie case of negligence is made out which entitles a passenger to recover unless it is rebutted. *Gulf, etc., R. Co. v. Smith*, 74 Tex. 276, 11 S. W. 1104; *Mexican Cent. R. Co. v. Lauricella*, 87 Tex. 277, 28 S. W. 277, affirming 26 S. W. 301; *St. Louis, etc., R. Co. v. Parks*, 97 Tex. 131, 76 S. W. 740, reversing 73 S. W. 439; *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 20

S. W. 766; *Texas Pac. R. Co. v. Buckelew*, 3 Tex. Civ. App. 272, 22 S. W. 994; *Houston, etc., R. Co. v. Richards*, 20 Tex. Civ. App. 203, 49 S. W. 687; *Galveston, etc., R. Co. v. Fales*, 33 Tex. Civ. App. 457, 77 S. W. 234, affirmed in 98 Tex. 617, no op.; *International, etc., R. Co. v. Thompson*, 34 Tex. Civ. App. 67, 77 S. W. 439, affirmed in 98 Tex. 622, no op.; *Houston Elec. R. Co. v. Nelson*, 34 Tex. Civ. App. 72, 77 S. W. 978; *St. Louis, etc., R. Co. v. Harkey*, 39 Tex. Civ. App. 523, 88 S. W. 506; *Galveston, etc., R. Co. v. Garcia*, 45 Tex. Civ. App. 229, 100 S. W. 198, affirmed in 102 Tex. 583, no op.; *Galveston, etc., R. Co. v. Crier*, 45 Tex. Civ. App. 434, 100 S. W. 1177, affirmed in 102 Tex. 583, no op.; *Davis v. Galveston, etc., R. Co.*, 42 Tex. Civ. App. 55, 93 S. W. 222; *Houston, etc., R. Co. v. Lindsey* (Civ. App.), 110 S. W. 995.

In the absence of any explanation of the cause of the derailment of a train, the law presumes, in an action for injuries to a passenger, that it was caused by the negligence of the carrier. *Galveston, etc., R. Co. v. Green* (Civ. App.), 91 S. W. 380, affirmed in 101 Tex. 637, no op.

Where a passenger train is derailed at a time when the track and train are under the control of the carrier, it is incumbent on the carrier, in an action against it for an injury to a passenger resulting from the wreck, to show that the accident could not have been avoided by the exercise of the utmost care and foresight reasonably compatible with the prosecution of its business. *St. Louis Southwestern Ry. Co. of Texas v. Harkey*, 88 S. W. 506, 39 Tex. Civ. App. 523.

In an action for injuries from the derailment of the car in which plaintiff was a passenger, evidence of persons who examined the railroad track and car after the derailment that the track was all right, and that they could see nothing the matter with the car,

was insufficient to rebut the presumption of the railroad company's negligence, arising from the derailment itself, especially where the persons making the examination were not shown to have been competent inspectors. *Houston & T. C. R. Co. v. Lindsey* (Civ. App.), 110 S. W. 995.

The fact that a car, within a short distance, was twice derailed, shows prima facie negligence. *Texas & St. L. Ry. Co. v. Suggs*, 62 Tex. 323.

Where a railroad passenger is injured by the derailment of a train at a place where the track and train are entirely under the control of the company, a presumption of negligence arises, and the company must show that at the time of the accident it was exercising the utmost care and foresight reasonably compatible with the prosecution of its business, in order to escape liability. *Mexican Cent. Ry. Co. v. Lauricella*, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103.

"When the derailment of a train or car results in the injury to a passenger, the burden is on the carrier to show that the accident was not caused by defective cars or road bed or by the negligence of an employee." *Galveston, etc., R. Co. v. Fales*, 33 Tex. Civ. App. 457, 77 S. W. 234, affirmed in 98 Tex. 617, no op.

The jury is authorized to find that the inference of negligence from derailment of a train is rebutted by evidence that the train had run 200 miles without anything to indicate any defect or weakness in any of its equipment, that the track at the place of the accident was in good condition, that the engine, the mail car, and the front trucks of the baggage car passed over the place in safety, and that the train was going only six or eight miles an hour; and this, though it is not shown what caused the accident. *Davis v. Galveston, H. & S. A. Ry. Co.*, 42 Tex. Civ. App. 55, 93 S. W. 222.

It was not error to refuse a charge

that defendants should recover if the evidence showed that the cars ran off the track and were overturned, but failed to disclose any defect in the machinery connected with the train, in the roadbed, rails, or ties, or any mismanagement on the part of those operating the train, since the derailment of a car is *prima facie* evidence of negligence, and such a charge would be upon the weight of evidence. *For-dyce v. Withers*, 1 Tex. Civ. App. 540, 28 S. W. 766.

While the derailment of a train may raise a presumption of negligence, yet it does not throw upon the railroad company, in an action by passenger injured, the duty of showing by a preponderance of evidence that the accident was not a result of its negligence. It is entitled to verdict if evidence upon issues balances. *Mexican Cent. R. Co. v. Lauricella*, 87 Tex. 277, 279, 28 S. W. 277, affirming 26 S. W. 301.

Where, in an action for injuries to a passenger by the derailment of a train, it was shown that the derailment was caused by a cyclone, the presumption of negligence arising therefrom did not obtain, and the burden was on plaintiff to prove defendant's negligence. *Galveston, H. & S. A. Ry. Co. v. Crier*, 45 Tex. Civ. App. 434, 100 S. W. 1177.

**Presumption That Collision Was Caused by Negligence.**—Proof of injury to a passenger by collision of trains, with no evidence to acquit the carrier of responsibility therefor, authorizes the court to assume, in its charge, the existence of negligence of defendant. *International, etc., R. Co. v. Shuford*, 36 Tex. Civ. App. 251, 81 S. W. 1189, affirmed in 98 Tex. 621, no op.

In an action for injuries occasioned by a railway collision, a charge that an injury which was occasioned by an unusual occurrence is presumed to have been caused by negligence unless by further proof the contrary is

shown, is erroneous as commenting on the weight of evidence. *Texas Cent. R. Co. v. Burnett*, 80 Tex. 536, 16 S. W. 320.

In an action for injuries to plaintiff's wife, a passenger on a street car, alleged to be due to negligence in colliding with a water cart, wherein the evidence was conflicting both on the issue of negligence and the effect of the accident on her, the court, after defining generally the degree of care required, submitted the facts on the single charge that, if the jury "believe from the evidence that the plaintiff's wife was injured by a car colliding with a water cart, as charged in his petition, and in the manner as charged in the petition, then you will find for plaintiff such damages, if any, as the plaintiff has received," etc., and that, "if the jury do not believe that the plaintiff's wife was injured as charged in plaintiff's petition, and in the manner therein charged, they will find for defendant." Held that, though a slight collision was undisputed, and the charge, when read in the light of the petition, might be correct in the abstract, it was clearly misleading on its face, as warranting a construction that, if the collision and the consequent injury were shown, liability was established, irrespective of other proof. *Houston Electric Co. v. Nelson*, 77 S. W. 978, 34 Tex. Civ. App. 72.

**Breaking of Coupling as Raising Presumption of Negligence.**—The fact of the uncoupling of a car and a collision having been shown, negligence is presumed, and it devolves upon the railway to show that it was the result of an unavoidable accident, to be relieved from liability. *Missouri Pac. R. Co. v. Hennessey*, 75 Tex. 155, 12 S. W. 608; *Galveston, etc., R. Co. v. Parsley*, 6 Tex. Civ. App. 150, 25 S. W. 64, affirmed in 93 Tex. 707, no op.

A passenger showing the breaking of a coupling in the train, and the parting thereof and his consequent injury

proves a *prima facie* case, requiring the railroad in order to be relieved from liability, to show the exercise of the highest degree of care to secure the safety of the passengers. *Galveston, H. & S. A. Ry. Co. v. Young*, 100 S. W. 993, 45 T.x. Civ. App. 430.

The engine of defendant's train on which plaintiff's intestate was riding became detached from the cars on account of a defective coupling, and, the air brakes failing to work properly, a collision occurred between the car on which intestate was riding and the engine, and intestate was killed. Shortly before, the train had parted from the engine, but an accident was prevented by use of the air brakes. No precaution was taken, to prevent a recurrence of the mishap. Held, that a judgment for plaintiffs was justified. *Galveston, H. & S. A. Ry. Co. v. Parsley*, 6 Tex. Civ. App. 150, 25 S. W. 64.

**Condition of Railroad Switch as Calling for Application of Rule of "Res Ipsa Loquitur."**—In Texas, etc., *R. Co. v. Clippenger*, 47 Tex. Civ. App. 510, 106 S. W. 155, affirmed, no op., the court held that the facts of the case bearing upon the condition of a railroad switch called for the application of the rule of *res ipsa loquitur*.

**Overturning of Train as Authorizing Inference of Negligence.**—Proof that while the train was on a bridge the coach on which plaintiff was a passenger was overturned into the water by some cause unknown to him is sufficient to authorize an inference of negligence on the part of the carrier. *Bonner v. Grumbath*, 2 Tex. Civ. App. 482, 21 S. W. 1010.

**Injuries from Sparks Escaping from Engine as Raising Inference of Negligence.**—Where it was shown that the injury to plaintiff, a passenger on defendant's train, was caused by a spark escaping from the engine, it was not error to charge that the burden of proof was on the defendant to show that such injury was not occasioned by its negligence. (1901) Texas Mid-

land R. Co. *v. Jumper*, 60 S. W. 797, 24 Tex. Civ. App. 671; (1903) *St. Louis S. W. Ry. Co. v. Parks* (Civ. App.), 73 S. W. 439.

In an action against a railroad for injuries to a passenger caused by cinders escaping from the engine and getting into the passenger's eyes, evidence that sparks and cinders from the size of a pin head to that of a pea escaped from the engine and injured plaintiff, who was riding in the tenth car from the engine, made a *prima facie* case of negligence against defendant, either in not furnishing and maintaining sufficient spark arresters or in the manner of handling the engine. *St. Louis Southwestern Ry. Co. of Texas v. Parks*, 90 S. W. 343, 40 Tex. Civ. App. 480.

Proof that a passenger was injured by cinders flying into his eye from the engine, "from the size of a pea to that of a bird shot" did not authorize the court to charge the rule of *res ipsa loquitur* where defendant offered evidence that its engine was equipped with the most approved spark arrester, that it was in good order and properly handled. *St. Louis Southwestern Ry. Co. v. Parks*, 97 Tex. 131, 76 S. W. 740.

**Giving Way of Temporary Foot Rest on Hand Car as Showing Negligence.**—Evidence that, while the hand car was running unusually fast, a temporary foot rest, improvised for the occasion, gave way, causing plaintiff, who was a passenger on the car, to fall from the car, and be injured, is sufficient to justify a finding that the accident was caused by the failure of the company's servants to use ordinary care. *International & G. N. R. Co. v. Prince*, 77 Tex. 560, 14 S. W. 171, 19 Am. St. Rep. 795; *Same v. Cock* (Sup.), 14 S. W. 242.

**Injuries in Alighting from Car as Authorizing Application of Doctrine of Res Ipsa Loquitur.**—The doctrine of *res ipsa loquitur* does not apply, so

as to authorize a recovery by a passenger for injuries sustained while alighting from a car, the step of which was not more than 18 inches from the platform, where none of the attending circumstances tended to show negligence on the part of the carrier. *Texas Midland Ry. Co. v. Frey*, 61 S. W. 442, 25 Tex. Civ. App. 286.

**Proof of Broken Rail as Showing Defective Track.**—Proof of a broken rail is sufficient to prove issue of defective character of the track causing injury to passenger. *Texas, etc., R. v. Kirk*, 62 Tex. 227, 232.

**Shock to Passenger Boarding Electric Car as Raising Presumption of Negligence.**—Where plaintiff was shocked by electricity as he took hold of the handhold of an electric car for the purpose of boarding it at a point where it had stopped to take on passengers, and he was badly injured, the circumstances surrounding the injury were sufficient to raise a presumption of negligence on the part of the company. *Dallas Consol. Electric St. Ry. Co. v. Broadhurst*, 68 S. W. 315, 28 Tex. Civ. App. 630.

#### (2) As to Contributory Negligence of Plaintiff.

##### General Rule Stated and Applied.

In an action by a passenger against a carrier for personal injuries, the burden is on the carrier to show that the passenger was guilty of contributory negligence, where there is nothing in the evidence of the injuries and negligence of the carrier that will justify an implication that the passenger was guilty of contributory negligence. *Dallas, etc., R. Co. v. Spicker*, 61 Tex. 427; *Texas Pac. R. Co. v. Davidson*, 68 Tex. 370, 4 S. W. 636; *Missouri Pac. R. Co. v. Foreman*, 73 Tex. 311, 11 S. W. 326; *Gulf, etc., R. Co. v. Pendry*, 87 Tex. 553, 556, 29 S. W. 1038, reversing 27 S. W. 213; *Gulf, etc., R. Co. v. Shieder*, 88 Tex. 152, 30 S. W. 902; *St. Louis, etc., R. Co. v. Parks*,

97 Tex. 131, 76 S. W. 740, reversing 73 S. W. 439; *Texas Cent. R. Co. v. Stuart*, 1 Tex. Civ. App. 642, 20 S. W. 962, affirmed in 93 Tex. 673, no op.; *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 21 S. W. 1010; *Texas, etc., R. Co. v. Mayfield*, 23 Tex. Civ. App. 415, 56 S. W. 942, affirmed, no op.; *St. Louis, etc., R. Co. v. Martin*, 26 Tex. Civ. App. 231, 63 S. W. 1089; *San Antonio, etc., Co. v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015, affirmed in 97 Tex. 646, no op.; *Chicago, etc., R. Co. v. Buie*, 31 Tex. Civ. App. 654, 73 S. W. 853, affirmed in 97 Tex. 628, no op.; *Missouri, etc., R. Co. v. Gist*, 31 Tex. Civ. App. 662, 73 S. W. 857, affirmed in 97 Tex. 641, no op.; *Lewis v. Houston Elec. Co.*, 39 Tex. Civ. App. 625, 88 S. W. 489, 112 S. W. 593; *Texas, etc., R. Co. v. Porter (Civ. App.)*, 41 S. W. 88; *Pares v. St. Louis, etc., R. Co. (Civ. App.)*, 57 S. W. 301; *Gillum v. New York, etc., Co. (Civ. App.)*, 76 S. W. 232; *St. John v. Gulf, etc., R. Co. (Civ. App.)*, 80 S. W. 235; *El Paso Elec. R. Co. v. Kitt (Civ. App.)*, 90 S. W. 678; *Gulf, etc., R. Co. v. Booth (Civ. App.)*, 97 S. W. 128; *Selman v. Gulf, etc., R. Co. (Civ. App.)*, 101 S. W. 1030; *Herring v. Galveston, etc., R. Co. (Civ. App.)*, 108 S. W. 977; *Galveston, etc., R. Co. v. Herring*, 102 Tex. 100, 113 S. W. 521.

When the averments of the petition do not show prima facie that plaintiff was negligent, the burden is not on him to prove that his own negligence was not the cause of his injury. (*Tex. 1888*) *Gulf, C. & S. F. Ry. Co. v. Williams*, 70 Tex. 159, 7 S. W. 88.

**Applications of Rule.**—Where plaintiff sued a railroad company for injuries caused by the negligence of the defendant in allowing a train to start while she was trying to get on, the burden of proof as to contributory negligence on the part of the plaintiff is on the defendant, and does not shift to the plaintiff when it is shown that she had gone close to the train, to be ready to board it, and, when no-

tified by a brakeman to get on, and that she would have plenty of time, attempted to do so. *Texas Pac. Ry. Co. v. Davidson*, 68 Tex. 370, 4 S. W. 636.

Burden of proof as to contributory negligence of passenger injured in boarding train is on the railroad company. *Missouri Pac. R. Co. v. Foreman* (Civ. App.), 46 S. W. 834, affirmed in 93 Tex. 647, no op.

Where plaintiff sued for injuries sustained in alighting from defendant's train, which did not stop a reasonable time to let off passengers, the burden of proof was on defendant to show contributory negligence, and not on plaintiff to show his want thereof, notwithstanding his petition alleged he exercised ordinary care and diligence in alighting. *Pares v. St. Louis S. W. Ry. Co. of Texas* (Civ. App.), 57 S. W. 301.

A carrier in a suit for injuries to a passenger carried beyond her station has the burden of showing facts raising the issue of contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Morgan*, 108 S. W. 724, 49 Tex. Civ. App. 212.

Where a train was crowded, and a passenger fell from the platform, where he had stopped while passing from one car to another in search of a seat, the burden of showing contributory negligence was on the railway company. *Galveston, etc., R. Co. v. Morris* (Civ. App.), 60 S. W. 813, affirmed in 94 Tex. 505.

In an action by a passenger for injuries resulting from a sudden forward movement of the train while he was on a step of the car in the act of boarding it at a station, the burden of proof is on the defendant to show contributory negligence. *St. John v. Gulf, C. & S. F. Ry. Co.* (Civ. App.), 80 S. W. 235.

**Exceptions to Rule.**—Where the plaintiff's own case exposes him to the suspicion of negligence on his part, he

must clear away such suspicion before he will be permitted to recover. *Missouri Pac. R. Co. v. Foreman*, 73 Tex. 311, 11 S. W. 326; *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 21 S. W. 1010.

Where the legal effect of the facts stated in the petition is such as to establish prima facie negligence on the part of the plaintiff as a matter of law, then he must plead and prove such facts as will rebut such legal presumption. *Gillum v. New York, etc., Co.* (Civ. App.), 76 S. W. 232; *Gulf, etc., R. Co. v. Booth* (Civ. App.), 97 S. W. 128; *Selman v. Gulf, etc., R. Co.* (Civ. App.), 101 S. W. 1030.

So also, where the undisputed evidence adduced on the trial establishes prima facie, as a matter of law, contributory negligence on the part of plaintiff, then the burden of proof is upon him to show facts from, which the jury, upon the whole case, may find him free from negligence. *Gillum v. New York, etc., Co.* (Civ. App.), 76 S. W. 232; *Gulf, etc., R. Co. v. Booth* (Civ. App.), 97 S. W. 128. See, also, *Gulf, etc., R. Co. v. Shieder*, 88 Tex. 152, 163, 30 S. W. 902; *Lee v. International, etc., R. Co.*, 89 Tex. 583, 587, 36 S. W. 63, reversing 34 S. W. 160; *Lewis v. Houston, Elec. Co.*, 39 Tex. Civ. App. 625, 629, 88 S. W. 489, 112 S. W. 593; *St. John v. Gulf, etc., R. Co.* (Civ. App.), 80 S. W. 235; *Selman v. Gulf, etc., R. Co.* (Civ. App.), 101 S. W. 1030; *Herring v. Galveston, etc., R. Co.* (Civ. App.), 108 S. W. 977; *Galveston, etc., R. Co. v. Herring*, 102 Tex. 100, 113 S. W. 521.

Plaintiff's wife, who was in feeble health, was injured in getting off one of defendant's trains at a place about 150 feet from the station. The complaint in an action for such injuries alleged that the place was dangerous for one to attempt to get off at. Defendant pleaded contributory negligence in failing to get off at the station, and introduced no testimony as

to the passenger's negligence in getting off at the place in question. Held, that the pleadings and evidence placed the burden of proving the want of contributory negligence on the plaintiff. *St. Louis S. W. Ry. Co. v. Martin*, 63 S. W. 1089, 26 Tex. Civ. App. 231.

**Violation of Rules of Carrier as Shifting Burden of Proof.**—Where a rule established by certain carriers prohibited persons riding on stock passes from riding in other parts of the train than in the caboose, and declared that a failure to comply with the rule should be *prima facie* evidence of negligence on the part of the passenger if injured, a violation of the rule did not necessarily preclude a recovery, but only shifted the burden of proof on the question of plaintiff's contributory negligence. Judgment 41 Tex. Civ. App. 72, 91 S. W. 877, affirmed. *Missouri, K. & T. Ry. Co. of Texas v. Avis*, 100 Tex. 33, 93 S. W. 424.

**Instructions as to Burden of Proof Held Correct.**—Plaintiff's evidence not showing *prima facie* that his injuries were the result of his own contributory negligence, it was not error for the court to charge that the burden of proving contributory negligence was on the defendant, and such charge was not objectionable as not making it clear that plaintiff's evidence was to be considered on this point where from other paragraphs on the same issue the jury must have understood that they were to consider all the evidence. *Missouri, etc., R. Co. v. Gist*, 31 Tex. Civ. App. 662, 73 S. W. 857, affirmed in 97 Tex. 641, no op.

Where plaintiff alleged that defendant negligently failed to provide him with a seat in its railway car, and while in search of one it became necessary for him to cross the platform from one car to another, and that in doing so he stopped for a short while on the platform, and was thrown by a sudden jerk of the train, the basis of the action was that he was rightfully

on the platform, and that his presence there was the result of defendant's negligence, and therefore it was not error to place the burden of proof on defendant to establish contributory negligence. (Civ. App.) *Galveston, H. & S. A. Ry. Co. v. Morris*, 60 S. W. 813, judgment affirmed (Sup.), 61 S. W. 709, 94 Tex. 505.

In an action by a passenger for injuries, an instruction that, to warrant a verdict for plaintiff, the jury must believe not only that defendant railroad company's servants in charge of the train failed to stop a reasonable length of time at the station to allow plaintiff to board it, and that while he was on the lower step of a coach, attempting to get thereon, the train was started with a jerk, resulting in his injuries as alleged but that in attempting to take passage on the train plaintiff exercised reasonable haste and dispatch, and used that high care which a person of ordinary prudence would have used under the same circumstances to avoid injury, and was not guilty of contributory negligence, is erroneous, as casting the burden of disproving contributory negligence on the plaintiff. *St. John v. Gulf, C. & S. F. Ry. Co.* (Civ. App.), 80 S. W. 235.

In an action against a street car company for injuries to plaintiff's son, defendant alleged that he was injured by his own negligence in that he negligently hung his foot down from the running board whereupon it was caught by the wheel of the car, or that he recklessly and negligently jumped from the running board and back to the running board while the car was in motion, and in so jumping threw his foot in front of the wheel and in some manner it was injured. Held, that an instruction that, if the boy's negligence caused or contributed so directly and proximately to the accident as alleged by defendant in its answer, and that but for his own negligence he would not have been in-

jured, defendant was not liable, etc., was not objectionable as imposing too great a burden on defendant. *El Paso Electric Ry. Co. v. Kitt* (Civ. App.), 99 S. W. 587.

**Instructions Held Erroneous.**—In a personal injury action against a carrier, an instruction which requires the jury to believe that plaintiff was not guilty of contributory negligence in order to find for her places the burden of proving the absence of contributory negligence on her, and is reversible error. *Selman v. Gulf, C. & S. F. Ry. Co.* (Civ. App.), 101 S. W. 1030.

A charge that if, while plaintiff was a passenger on a caboose of a freight train, the same was struck by an engine with unusual force and violence and by reason thereof plaintiff was thrown down and injured, and it was negligence to permit the caboose to be so struck, and if plaintiff was not guilty of any contributory negligence, and did not assume the risk, then plaintiff was entitled to recover, was erroneous, as requiring plaintiff, in addition to proving defendant's negligence, to prove that he had not been guilty of contributory negligence, and had not assumed the risk, and its vice was intensified by a succeeding paragraph that the burden of proof was on plaintiff to establish his case by a preponderance of the testimony. (Civ. App.) *Herring v. Galveston, H. & S. A. Ry. Co.*, 108 S. W. 977, writ of error dismissed. *Galveston, H. & S. A. R. Co. v. Herring*, 102 Tex. 100, 113 S. W. 521.

**Pleading Held Not to Show Contributory Negligence as Matter of Law.**—Where the petition alleged that plaintiff had been aboard the train in order to seat his wife and children, and that he jumped from the train while it was moving rapidly, in the dark, but that the train was still at the station where passengers got on and off, and that he believed it was moving slowly, and that no lights were placed whereby he could estimate the

speed, the petition did not show contributory negligence as a matter of law. *Texas & P. Ry. Co. v. Crockett*, 66 S. W. 114, 27 Tex. Civ. App. 463.

In an action against a railroad for injury to a boy 10 years old, the petition alleged that the boy made a contract with the company to carry him to a certain flag station, where he lived; that on the train's approach to the station it was signaled to stop; that the company negligently disregarded the signal, and did not stop the train; that the boy being frightened and confused by being so carried past the station, jumped from the train and was injured. Held, that the petition did not show on its face that the boy was guilty of contributory negligence, since whether the mind of a boy of that age is mature enough to make him responsible is a question for the jury. *Avey v. Galveston, H. & S. A. Ry. Co.*, 81 Tex. 243, 16 S. W. 1015, 26 Am. St. Rep. 809.

Plaintiff alleged that his wife, while a passenger on defendant's train, prepared to alight as the train neared her destination, and that immediately after the train stopped, and without delay, she proceeded to alight, and while leaving the train, and without any warning, it moved suddenly forward, throwing her to the depot platform, by the negligence of defendant and its employees, etc. Held, that the petition was not demurrable, though alleging that the train was in motion when plaintiff's wife attempted to alight. *San Antonio & A. P. Ry. Co. v. Jackson*, 38 Tex. Civ. App. 201, 85 S. W. 445.

In an action for injuries to plaintiff while alighting from defendant's train, a petition alleging that with the consent of defendant and its conductor plaintiff was riding in a caboose, ingress to and egress from which was much more difficult than from a regular caboose, which fact, as well as the fact that plaintiff was to alight therefrom in the night time at a cer-



tain station, was known to those in charge of the train; that plaintiff was assured by the conductor that the train would stop at the station long enough for him to alight; that when the train stopped, and while plaintiff was undertaking in a prompt and prudent manner to alight, with the knowledge of the conductor, but before he had time to do so in safety, the train was carelessly and recklessly started in wanton disregard of plaintiff's safety, which caused plaintiff to fall, in doing which his foot was run over by the wheels of the caboose, etc.,—did not show contributory negligence as against a general demurrer. *Gulf, C. & S. F. Ry. Co. v. Walters*, 49 Tex. Civ. App. 71, 107 S. W. 369.

In action against a railroad for damages sustained through passenger alighting from a moving train, a petition alleging that plaintiff was inexperienced in alighting from moving trains, that owing to darkness he was unable to judge the speed of the train, and that he relied on the directions of the conductor in attempting to alight, is not demurrable as disclosing contributory negligence. *International, etc., Ry. Co. v. Rhoades*, 21 Tex. Civ. App. 460, 52 S. W. 979.

**Evidence Held Not to Raise Question of Contributory Negligence.**—Evidence of plaintiff in an action for injuries due to a caboose on which he was a passenger being struck by an engine held not to raise the question of contributory negligence so as to impose on him the duty to remove the suspicion of his own negligence. *Herring v. Galveston, H. & S. A. Ry. Co.*, 108 S. W. 977, writ of error dismissed *Galveston, H. & S. A. R. Co. v. Herring*, 102 Tex. 100, 113 S. W. 521.

In an action for personal injuries sustained in being thrown from a seat of a passenger coach because of the derailment of the train, evidence examined, and held not to show contributory negligence. *Ft. Worth & D.*

*C. Ry. Co. v. Walker*, 48 Tex. Civ. App. 86, 106 S. W. 400.

**(3) Burden of Proof Where Defense Is That Train Was Maliciously Wrecked.**

In an action against a railroad for injuries to a passenger by a wreck, a defense that the wreck was caused by malicious persons, who tampered with the track, casts upon defendant the burden of proving, not only that the track was so tampered with, but that due care had been used in inspecting the track so as to discover the defects. *Norton v. Galveston, H. & S. A. Ry. Co. (Civ. App.)*, 108 S. W. 1044.

In an action against a railroad for injuries to a passenger in a wreck, the evidence showed that the track had been repaired two days before the wreck, and been "lined up" on the evening before the wreck, when the section foreman left his tools and a push car weighing about 800 pounds on the side of the track where the wreck occurred. The push car was found next morning down a dump near the track about 600 or 700 feet from where it had been left, and it required from two to four men to put it back. It did not appear that the tools had been molested. There were two locomotives attached to the wrecked train, and the engineer on the front engine testified that the track just before the derailment "was in an elbow shape" and two or three feet out of line. The two engines were not derailed. Held, that the evidence raised merely a suspicion that wreckers might have caused the derailment, and did not warrant submitting the issue to the jury. *Norton v. Galveston, H. & S. A. Ry. Co. (Civ. App.)*, 108 S. W. 1044.

Plaintiff's evidence tended to show that the train was derailed while running at a high rate of speed, that the ties were rotten and the roadbed in an unsafe condition at the point where the accident occurred, and defendant's evidence as to the appearance of the

nuts, bolts, and bars used in connecting the rails and the appearance of the rails tended to show that they had been removed by some malicious person, but no evidence was given as to who removed them, or that any person was seen about the place. Held, that a judgment for plaintiff will not be set aside as against the weight of evidence. *Houston & T. C. Ry. Co. v. Lee*, 69 Tex. 556, 7 S. W. 324.

#### **c. In Actions for Breach of Contract.**

Where, in an action by a passenger for damages resulting from the breach of a carrier's implied contract to transport her to destination without unreasonable delay, defendant alleged that the delay was caused by a wreck on one of its branch lines, the burden was on defendant to show that it was in no way responsible for the wreck, or that it used due diligence to repair the damage and resume operation of its trains. *International & G. N. R. Co. v. Harder*, 81 S. W. 356, 36 Tex. Civ. App. 151.

#### **d. In Actions for Ejection.**

In an action for ejection of a passenger, an instruction that the burden was on plaintiff to prove by a preponderance of the evidence the truth of the facts alleged, and that the jury should decide the issues submitted on a preponderance of the evidence, was proper. *El Paso Electric Ry. Co. v. Alderete*, 81 S. W. 1246, 36 Tex. Civ. App. 142.

### **E. IN ACTIONS FOR LOSS OR INJURY TO BAGGAGE.**

In a suit by passenger against a carrier for money lost on trip, by overturning of coach, if the petition shows facts which expose the plaintiff to suspicion that he negligently contributed to the loss, he must clear away such suspicion before he can recover. *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 485, 21 S. W. 1010.

### **3. Admissibility of Evidence.**

#### **a. In Actions for Personal Injuries.**

##### **(1) As to Negligence of Defendant.**

##### **(a) General Rule as to Evidence Admissible under General Allegation of Negligence Causing Injury.**

Under petition in an action against a railroad for damages for personal injuries to passenger, charging generally that the injury was caused by the gross negligence of the defendant, any character of negligence on the part of the defendant's employees which directly contributed to the injury alleged is an issue in the case. *International, etc., R. Co. v. Anthony*, 24 Tex. Civ. App. 9, 11, 57 S. W. 897, affirmed in 94 Tex. 691, no op.

In an action against a railroad company for injuries received near a station, the facts that defendant advertised an excursion, and that the train was late, and a crowd had assembled at the depot, were material on the question of the amount of care and diligence required of defendant, and hence their admission was not error. *International & G. N. R. Co. v. Foster*, 63 S. W. 952, 26 Tex. Civ. App. 497.

##### **(b) Evidence as to Injury to Other Passengers.**

In an action for injuries to a passenger testimony of other passengers that they received injuries at the same time, and owing to the negligence complained of is admissible. *Ft. Worth & D. C. R. Co. v. Stingle*, 2 Willson, Civ. Cas. Ct. App. § 704.

A train was wrecked, but the rear coach, in which plaintiff was a passenger, was not derailed or overturned. Plaintiff claimed his injuries had been caused by the shock. Defendant pleaded a general denial. Held, that evidence was admissible that persons riding in the other coaches were injured, and that the engineer was killed. *Missouri, K. & T. Ry. Co. of Texas v. Wright*, 47 S. W. 56, 19 Tex. Civ. App. 47.

In an action against a railroad com-

pany for injuries to plaintiff, a passenger, caused by a car jumping the track, where the issue is whether plaintiff was injured at all, and the physicians disagree, evidence that the conductor of the train, who was in a seat near plaintiff at the time of the accident, was not injured, is admissible. *Levy v. Campbell* (Sup.), 20 S. W. 196, reversing (Sup. 1892) 19 S. W. 438.

**(c) Evidence as to Settlement with Other Persons Injured by Same Accident.**

In an action by a passenger for personal injuries caused by a collision, evidence that defendant had settled with another person injured by the same collision is inadmissible. *Missouri, K. & T. Ry. Co. v. Vance* (Tex. Civ. App.), 41 S. W. 167.

**(d) Evidence as to Rules of Carrier.**

In an action against a railroad company for injuries to a passenger, the defendant should not be allowed to prove the existence of rule requiring train crews to report such accidents, when the effect is to afford counsel an opportunity in argument to discredit plaintiff's claim regarding the accident, though it was not attempted to show that no report was made. *Hardin v. Ft. Worth & D. C. Ry. Co.*, 108 S. W. 490, 49 Tex. Civ. App. 184.

It being alleged by plaintiff that the rule of defendant forbidding the carrying of passengers on its freight train was habitually violated, and the evidence showing that the rule was promulgated several years before plaintiff's husband was killed while so riding, evidence of persons having so ridden at times varying from six months to three years previous to the accident is admissible. *San Antonio & A. P. Ry. Co. v. Lynch* (Tex. Civ. App.), 40 S. W. 631.

So, too, violation of the rule subsequent to the accident is admissible. *San Antonio & A. P. Ry. Co. v. Lynch* (Tex. Civ. App.), 40 S. W. 631.

**(e) Evidence as to Matters Not Due to Carrier's Neglect of Duty Inadmissible.**

In an action against a railroad company for injuries caused by the exposure resulting from its failure to open its depot, evidence that plaintiff was insulted while waiting for the depot to be opened is inadmissible. *Texas & P. Ry. Co. v. Pierce*, 10 Tex. Civ. App. 429, 30 S. W. 1122.

**(f) Admissibility of Evidence in Particular Instances.**

As to the admissibility of evidence to show defendant's negligence in particular instances, see the appropriate sections in this title. Thus, for instance, as to the admissibility of evidence to show negligence of defendant in the construction and maintenance of its track, roadbed, etc., see ante, "Duties as to Track, Roadbed, etc.," V, D, 6, b.

**(2) As to Contributory Negligence of Plaintiff.**

Where plaintiff claimed that as he was getting on a car, when it was nearly stopped, it was started up suddenly, throwing him off; and defendant, relying on contributory negligence, gave evidence that plaintiff was injured by following the car, holding on to it, and trying to get on after its speed had increased so as to endanger him,—plaintiff's testimony, "When I sung out, 'My leg is broken!' I found my hand was fastened in the handhold of the car, and I could not let go, and was dragged some distance by the moving car," is admissible. *Christie v. Galveston City R. Co.* (Tex. Civ. App.), 39 S. W. 638.

On the issue whether plaintiff exercised proper care in hiring a conveyance and driving to his destination after the carrier had failed to stop its train to permit him to board it, evidence that plaintiff was in the habit of driving was admissible. (Civ. App.) *International & G. N. R. Co. v. Addison*, 93 S. W. 1081, judgment reversed

(Sup.), 97 S. W. 1037, 100 Tex. 241.

Where, in an action by a passenger, the evidence was conflicting as to whether he was intoxicated when injured, he testifying that he had not been drunk for two years prior thereto, testimony was admissible that plaintiff had been intoxicated many times previous to the injury. *Rehearing*, 88 S. W. 489, denied. *Lewis v. Houston Electric Co.*, 112 S. W. 593, 39 Tex. Civ. App. 625.

**(3) Evidence Admissible under General Denial.**

In an action against a railroad for injuries caused by a wreck, evidence tending to show that the wreck was caused by the acts of malicious persons not connected with the railroad company is admissible under a general denial. *Norton v. Galveston, H. & S. A. Ry. Co.* (Civ. App.), 108 S. W. 1044.

**b. In Actions for Ejection.**

When the petition alleged that plaintiff's expulsion from a moving car was caused by a servant of defendant, evidence in regard to what employees were authorized to eject persons from trains is relevant. *Gulf, C. & S. F. R. Co. v. Kirkbride*, 79 Tex. 457, 15 S. W. 495.

**c. In Actions for Injury to Baggage.**

In an action against a railroad company for damages in "breaking a trunk," and in delay of "goods checked," evidence of damage to any articles such as a passenger might carry as baggage and have checked, is admissible. *International & G. N. Ry. Co. v. Phillips*, 63 Tex. 590.

**4. Weight and Sufficiency.**

**a. As to Negligence of Defendant.**

**(1) General Rule as to Degree of Proof Required.**

**Rule Stated.**—In an action by a passenger for injuries, he must make out his case by a preponderance of the evidence. *Domenico v. El Paso Electric Ry. Co.* (Civ. App.), 90 S. W. 60.

See, also, *Missouri, etc., R. Co. v. Wright*, 19 Tex. Civ. App. 47, 47 S. W. 56, affirmed in 93 Tex. 735, no op.

**Instruction Erroneous as Requiring too High Degree of Proof.**—An instruction that the jury must find, with a "reasonable degree of certainty," that decedent's death was the proximate result of the injury received while a passenger on defendant's railroad, was properly refused, as it required a higher degree of evidence than is furnished by a preponderance of evidence. *St. Louis Southwestern Ry. Co. v. Burke*, 81 S. W. 774, 36 Tex. Civ. App. 222.

A requested instruction which required that the jury should be "satisfied" that the apprehended results would flow from the injury, was properly refused. It exacted too high a degree of proof for a civil case. *Fordyce v. Chancey*, 2 Tex. Civ. App. 24, 21 S. W. 181.

**Sufficiency of Plaintiff's Testimony Corroborated by Two Witnesses.**—

Where a plaintiff's testimony that he was thrown from a car platform by a jerk, by reason of which his foot was run over by the train, was corroborated by two witnesses, a verdict for plaintiff will not be disturbed on the ground of insufficiency of the evidence. *San Antonio & A. P. Ry. Co. v. Choate*, 56 S. W. 214, 22 Tex. Civ. App. 618.

**Instance in Which Verdict Held against Weight of Evidence.**—

In an action for injury to a passenger, alleged to have been caused by the train suddenly starting while he was alighting from it, 11 witnesses, many of them disinterested, testified that the train stopped long enough to allow passengers to alight safely; and their testimony was only contradicted by that of plaintiff and two boys. Two disinterested witnesses testified that plaintiff had left the car, and was standing on the ground leaning against a car, when the train started. Several witnesses testified that the usual signals

were given before the train started. Held, that a verdict for plaintiff was clearly against the weight of evidence. *Gulf, C. & S. F. Ry. Co. v. Williams*, 70 Tex. 159, 7 S. W. 88.

## (2) Applications of Rule.

As to the weight and sufficiency of evidence to show negligence on the part of the carrier in particular instances, see the appropriate sections in this title.

### b. As to Contributory Negligence of Plaintiff.

#### (1) General Rule as to Degree of Proof Required.

Upon a plea of contributory negligence the burden is upon the defendant to establish such special plea by a preponderance of the evidence. *St. Louis, etc., R. Co. v. Parks*, 97 Tex. 131, 76 S. W. 740, reversing 73 S. W. 439. And see *St. Louis, etc., R. Co. v. Martin*, 26 Tex. Civ. App. 231, 63 S. W. 1089.

In an action for personal injuries, contributory negligence need be proven only by a preponderance of the evidence, and not "by a preponderance of the evidence: to the satisfaction of the jury." *El Paso Elec. R. Co. v. Kitt* (Civ. App.), 90 S. W. 678.

A charge of court to the effect that the burden of proof was on the defendant to "satisfy" a jury of alleged contributory negligence on the part of plaintiff, held, not correct. The burden of proof required no more than a preponderance of evidence on that point. *Texas Cent. R. Co. v. Stuart*, 1 Tex. Civ. App. 642, 20 S. W. 962, affirmed in 93 Tex. 673, no op.

Where contributory negligence on the part of plaintiff in failing to properly treat her injuries is pleaded in defense of an action for damages therefor, and the evidence raises the issue, a charge requiring the defendant to prove such want of care "to the satisfaction of the jury," was reversible error, it exacting too high a degree of

proof. *Gulf, etc., R. Co. v. Condra*, 36 Tex. Civ. App. 556, 82 S. W. 528.

## (2) Applications of Rule.

As to the sufficiency or insufficiency of evidence to show contributory negligence in particular instances, see ante, "Liability of Carrier as Affected by Contributory Negligence of Passenger," V, L.

## 5. Variance.

### a. In Actions for Personal Injuries.

**Material Variances.**—A petition alleged that plaintiff's wife was a passenger on defendant's train, having a ticket, and that she was negligently and willfully ejected therefrom by defendant's agents, though they knew she had such ticket, against her protest, whereby she suffered great humiliation and shame. The evidence showed that plaintiff's wife had procured a ticket requiring her to change cars at a certain place; that before she reached such place the conductor promised that she should be notified when the change was necessary; that, at a station halfway to the place at which she should have changed, the brakeman and another employee took off her basket and her child; that she asked the brakeman if it was time to get off, to which he made no reply; that she made no protest; and that the station was one at which she should not have alighted. Held, that the variance between the allegations and the proof was so great as to justify directing a verdict for defendant. *Allin v. Gulf, C. & S. F. Ry. Co.*, 62 S. W. 1079, 26 Tex. Civ. App. 43.

The character of an action is fixed by the allegations in the pleadings, and not by facts subsequently disclosed by the evidence; and hence, where plaintiff, in an action against a railroad for injuries, seeks to recover on the ground that the rails had not been properly spiked to the ties and the ground properly tamped, he can not recover on other grounds. *Norton v. Galveston, H. & S. A. Ry. Co.* (Civ. App.), 108 S. W. 1044.

Allegations in plaintiff's petition to the effect that his damages resulted from the negligent crushing of his foot by defendant's cars will not warrant the admission of evidence to show that an attending physician in the employ of the defendant company improperly administered an enema which caused a permanent stricture of the bowels. *Galveston, etc., R. Co. v. Scott*, 18 Tex. Civ. App. 321, 44 S. W. 589.

In an action for injuries to a passenger, where the plaintiff predicated his case on the negligence of a porter in removing a stool for passengers to alight on, just as he was stepping from the car, and the answer contained a general denial, the defendant was entitled to a verdict, if the moving of the stool was not the cause of the accident. *St. Louis Southwestern Ry. Co. of Texas v. Johnson*, 97 S. W. 1039, 100 Tex. 237.

Where the petition, in an action against a railway company for injury to a passenger who was induced by an employee to alight at an intermediate station under belief that he had arrived at his destination, and was injured while attempting to reboard the train on discovering the mistake, did not allege that he was induced to alight through the company's negligence, he could not recover on the theory of such negligence, no matter what the proof showed. *Missouri, K. & T. Ry. Co. of Texas v. Redus*, 107 S. W. 63, 48 Tex. Civ. App. 322.

Under an allegation in a petition in an action against a railroad for damages for personal injuries that plaintiff's back was sprained, evidence of injuries to his bladder and kidneys is inadmissible. *Ft. Worth, etc., R. Co. v. Rogers*, 21 Tex. Civ. App. 605, 606, 53 S. W. 366.

Plaintiff, under an allegation of negligence in that the car was suddenly started as he was attempting to get on, can not recover because of any negligence in not stopping it there-

after. *Christie v. Galveston City R. Co.* (Tex. Civ. App.), 39 S. W. 638.

An allegation that the wreck of defendant's train was caused by defective roadbed, will not permit proof by plaintiff, that the wreck was caused by a broken axle. *Tex. & P. Ry. Co. v. Buckelew*, 3 Tex. Civ. App. 272, 22 S. W. 994.

**Immaterial Variances.**—Though plaintiff must recover upon the negligence alleged in his pleading even if unnecessarily specified therein, it is sufficient that the substance be proved and he is not held to every unnecessary and immaterial detail. *Hicks v. Galveston, etc., Co.*, 96 Tex. 355, 72 S. W. 835, reversing 71 S. W. 322.

Variance between the allegation of a complaint, for negligent starting of a car, that plaintiff received his injuries by being thrown against the side of the car, and evidence that part of them were received by being thrown against the ground, is immaterial. *Christie v. Galveston City R. Co.* (Tex. Civ. App.), 39 S. W. 638.

Under a petition alleging that the employees in charge of the train negligently jerked and jolted the car in which deceased was a passenger, causing it to lurch back and forward with such violence as to throw him backward against and across the arm of a seat, evidence that the lurch of the car was sidewise does not prevent recovery; the substance of the issue being whether the employees' negligent operation of the train caused the car to lurch, thereby inflicting the injury, and the direction of the motion being immaterial. Judgment (Civ. App. 1902) 71 S. W. 322, reversed. *Hicks v. Galveston, H. & S. A. Ry. Co.*, 72 S. W. 835, 96 Tex. 355.

When the complaint alleges that plaintiff passenger was injured by the negligence of defendant, which consisted in the violent jerking of defendant's cars, caused by the sudden stopping of the train, throwing plain-

tiff from the platform, it is sufficient to prove the jerking, and it is immaterial whether it was done by starting or stopping the train, as alleged. *Houston, etc., R. Co. v. Rowell* (Civ. App.), 45 S. W. 763, affirmed in 92 Tex. 147.

In an action against a railroad for damages for injuries sustained through negligence of employees in starting train which plaintiff was boarding, time is not material and it is sufficient to prove injury about the time alleged. *St. Louis, etc., Ry. v. Edwards*, 3 App. Civ. Cases, § 342.

In an action against a carrier for injuries to a passenger, there was no substantial variance between an allegation that when plaintiff struck the ground he was shocked and shaken out of his right mind, and became senseless, and evidence that after falling he spoke a few words to persons who came to his assistance, and then became unconscious. *International & G. N. R. Co. v. Hugen*, 100 S. W. 1000, 45 Tex. Civ. App. 326.

The variance is immaterial where the complaint charges that the derailment of the train causing the injury sued for was caused by one rail joint being  $1\frac{1}{2}$  inches higher than the other, and the proof shows that it was higher by only  $\frac{3}{8}$  of an inch. (Civ. App.) *Houston, E. & W. T. Ry. Co. v. Summers*, 49 S. W. 1106, affirmed 51 S. W. 324, 92 Tex. 621.

Under an allegation that a train was derailed through a dilapidated switch, evidence that the slide rail of the switch was  $\frac{3}{8}$  of an inch out of line with the main rail of the road, thereby making a lip on the rail of about  $\frac{3}{8}$  of an inch, is admissible. (Civ. App.) *Houston, E. & W. T. Ry. Co. v. Summers*, 49 S. W. 1106, affirmed 51 S. W. 324, 92 Tex. 621.

Where a complaint alleges that a track and switch at the place of an accident were in bad condition, that the straps holding the rails together were

not properly bolted, that the ties were old, and that the stationary rail meeting the rail at the switch was about  $1\frac{1}{2}$  inches higher than the rail that it met, it authorizes admission of evidence that the slide rail was three-eighths of an inch out of line with the rail of the main line, causing a lateral projection of one rail beyond the other. Judgment (Civ. App. 1899) 49 S. W. 1106, affirmed. *Houston, E. & W. T. Ry. Co. v. Summers*, 51 S. W. 324, 92 Tex. 621.

Under a petition for personal injuries by passenger, alleging general dilapidation of track "that straps holding said rails together were loose and not properly bolted," evidence is admissible that as result rails got out of line. *Houston, etc., R. Co. v. Summers*, 92 Tex. 621, 622, 623, 51 S. W. 324, affirming 49 S. W. 1106.

In an action against a street railway for injuries to a passenger while preparing to alight, where the petition alleged that plaintiff was thrown from the car by reason of an electric shock, and the particular ground of negligence relied on was that defendant permitted the car to become overcharged with electricity, the fact appearing in evidence that plaintiff had one foot on the ground at the time he was thrown did not constitute a variance. *Denison & S. Ry. Co. v. Johnson*, 81 S. W. 780, 36 Tex. Civ. App. 115.

In a personal injury suit against a railway company, evidence of the spreading of the track is admissible under an allegation of derailment. *Gulf, etc., R. Co. v. Smith*, 74 Tex. 276, 278, 11 S. W. 1104.

A petition, in an action against a carrier for personal injuries to a passenger by being thrown by the sudden jerking of the train, alleged that "just as soon as the train came to a full stop" the passenger got on, and before she could reach her seat it was started with a violent jerk. The evidence showed that the train did not

come to a full stop, but the conductor jumped off and assisted the passenger to get aboard. Held, that there was no material variance. *Feagin v. Gulf, C. & S. F. Ry. Co.*, 100 S. W. 346, 45 Tex. Civ. App. 251.

Where, in an action against a carrier, the ground of negligence alleged was the shoving and pushing of plaintiff off the platform of defendant's car by the porter, plaintiff would not be confined in his proof as to the effects of his injuries to the precise language of his petition. *International & G. N. R. Co. v. Hugen*, 100 S. W. 1000, 45 Tex. Civ. App. 326.

Plaintiff alleged that while he was standing near the front of the car the door was opened by the conductor, and that sparks escaping from the engine struck him in the eyes. Held, that the allegation that the door was opened by the conductor was not one of substance, but merely a matter of inducement, and that it was not necessary to establish such fact, or submit it as an issue to the jury. *St. Louis S. W. Ry. Co. v. Parks* (Civ. App.), 73 S. W. 439, reversed in 97 Tex. 131.

Where the complaint in an action for injuries to a passenger while alighting from a car alleged that the car stopped at the east side of the street crossing, and that while plaintiff was stepping down the car was negligently started, causing the injury, it was immaterial to plaintiff's right of recovery whether the evidence showed that the car stopped on the east or west side of the crossing. *Paris Transit Co. v. Alexander* (Civ. App.), 90 S. W. 1119.

#### **b. In Actions for Breach of Contract.**

Where complaint alleges that plaintiff's wife, being a white woman, was refused permission to ride in the car for white people, and forced to ride in the negro coach, evidence that when plaintiff placed his wife and children in the negro coach, and found they were in the wrong coach, he had no time to change them, and his wife requested

the conductor to find them seats in another car, he failed to do so, whereby she was compelled to remain in the negro coach, did not constitute a variance, as such compulsion amounted to a refusal to allow her to ride in the car for white people. *Missouri, K. & T. Ry. Co. of Texas v. Ball*, 61 S. W. 327, 25 Tex. Civ. App. 500.

An allegation that plaintiff signaled at a flag station in such a manner that it could be seen on the approaching train for a mile, and that the signal was seen by defendant's employees, who willfully and negligently failed to stop the train, is sufficient to raise an issue as to negligence in failing to see the signal. *San Antonio & A. P. Ry. Co. v. Safford* (Civ. App.), 48 S. W. 1105.

### **G. INSTRUCTIONS.**

#### **1. Application of General Rules as to Instructions.**

**Duty to Instruct on All Issues Raised by Evidence.**—In an action against a railroad for injuries to plaintiff while alighting from defendant's train, defendant was entitled to charges presenting its theory of the time and place at and the manner in which the accident occurred, such theory being supported by substantially all of the testimony except that of plaintiff himself. *Gulf, C. & S. F. Ry. Co. v. Walters*, 107 S. W. 369, 49 Tex. Civ. App. 71.

Where it was uncertain from the evidence what was the exact cause of the accident in which plaintiff was injured, it was proper to charge as to the rules by which the carrier's whole duty to its passengers was measured, in order that the jury might determine whether there had been neglect to perform it in any particular. *Fordyce v. Chancey*, 2 Tex. Civ. App. 24, 21 S. W. 181.

Where, in an action for injuries to a passenger in consequence of the derailment of the train, the proof showed that the wreck occurred and that the



passenger was injured thereby, and the evidence did not disclose the particular cause of the injury, the court must charge on the whole duty owed by a carrier to its passengers in order that the jury may determine whether there was a neglect to perform its duty in any particular. *Sproule v. St. Louis & S. F. Ry. Co.* (Civ. App.), 91 S. W. 657.

In an action against a street railway company for injuries to a passenger, a charge requiring a verdict for defendant unless its agents or servants did or failed to do something which would not have been done or left undone by a very cautious and careful person under the circumstances, was too general, where the pleadings and evidence raised certain distinct issues as a cause of action and as a defense thereto. *El Paso Electric Ry. Co. v. Harry*, 37 Tex. Civ. App. 90, 83 S. W. 735.

In an action against a carrier for breach of a contract for the transportation of plaintiff as a passenger, it is the duty of the court to give an instruction setting forth in full the rule as to damages in such cases. *Gulf, C. & S. F. Ry. Co. v. Halbrook*, 12 Tex. Civ. App. 475, 33 S. W. 1028.

**Instructions Must Be Relevant to Issues.**—In an action for injury occasioned by starting a train before plaintiff, who had assisted his sister aboard, could get off, an instruction that the company was not liable for any statement made by the brakeman as inducing him to get off the train in motion is properly refused, as irrelevant to the issues. *International & G. N. R. Co. v. Satterwhite*, 47 S. W. 41, 19 Tex. Civ. App. 170.

Where petition in an action for personal injuries to plaintiff while a passenger on defendant's train alleges that defendant's servants negligently ran the train into a car on the siding and caused the collision resulting in plaintiff's injuries, a charge that the failure of any employee of defendant charged

with the management of defendant's trains or the care of its tracks to exercise requisite care is negligence on the part of the defendant, is error as being unsupported by pleadings. *International, etc., R. Co. v. Bibolet*, 24 Tex. Civ. App. 4, 6, 7, 57 S. W. 974, affirmed in 94 Tex. 691, no op.

Where, in an action against an electric railroad to recover for personal injuries, the petition alleged that plaintiff was injured by the negligence of defendant's servants in operating the trolley pole, a charge authorizing the jury to consider the failure of defendant to provide an additional employee to look after the trolley pole was not justified by the pleadings. *Denison & S. Ry. Co. v. Freeman*, 85 S. W. 55, 38 Tex. Civ. App. 152.

Under the petition in an action against a railway company for injuries to a passenger, a certain instruction held to have been improperly given. *St. Louis, etc., R. Co. v. Cannon*, 31 Tex. Civ. App. 437, 71 S. W. 992.

It was undisputed that at and near the point where the axle broke, and up to where the last car stood after the accident (some 60 feet), the rails retained their alignment and position notwithstanding the tremendous strain resulting from the broken axle, and there was no evidence of loose spikes or that the rails spread at such point. Held, that a failure to mention spreading rails and loose spikes in a charge reciting the facts averred by plaintiffs as a basis for recovery was not error. *Johnson v. Galveston, H. & N. Ry. Co.*, 66 S. W. 906, 27 Tex. Civ. App. 616.

An instruction held erroneous as permitting a recovery on the terms of a railroad ticket, when the case was based on representation of the selling agent. *International, etc., R. Co. v. Kilgo* (Civ. App.), 71 S. W. 556.

In an action for injuries from being thrown from a street car, plaintiff testified that "I had signaled the conductor;" "the bell was rung, to stop

the car. When I raised up he was standing \* \* \* at the back end of the car." "I gave the signal to let him know we were where I wanted to get off." Held, that an instruction on the hypothesis that plaintiff signaled the motorman to stop the car was not without support in the evidence. *El Paso Electric Ry. Co. v. Ruckman*, 107 S. W. 1158, 49 Tex. Civ. App. 25.

In an action for injuries by falling from a platform while boarding a railway car, the evidence showed no negligence on plaintiff's part until he had purchased tickets, he then remaining in the waiting room after being notified to get on board. Held, that the charge was properly confined to acts of negligence thus presented. *Gulf, C. & S. F. R. Co. v. Fox* (Sup.), 6 S. W. 569.

The petition alleged that the platform was not safe nor long enough, and that there was no platform where plaintiff's wife got off. There was no evidence that the platform was defective, but there was evidence that the steps of the car were just beyond the end of the platform. The company requested a charge that there was no evidence of any defect in the platform. Held, that there was no error in refusing to give the charge. *Texas & P. Ry. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

A petition set up that petitioner went to defendant's ticket office in due time to procure a ticket, but that the ticket office was closed, in violation of law, until the train of the defendant was about arriving at said station, when petitioner, leaving her daughter to secure her ticket, which she did, hurried to get on said train, and began to ascend the steps of the car, but that before she reached the platform, and before said train had remained stopped a sufficient length of time to allow the getting on and off of passengers, defendant's train was suddenly, negligently,

and recklessly started, etc. Held, that the failure of the train to stop long enough to allow petitioner to board in safety was the only issue presented, and an instruction submitting, as a distinct basis of liability, failure to open the ticket office sooner, was improper. *St. Louis S. W. Ry. Co. of Texas v. Cannon*, 71 S. W. 992, 31 Tex. Civ. App. 437.

Where the place at which plaintiff was injured was a passenger depot, though a flag station and watering place, an instruction requested by defendant, "that a higher degree of care is required of trainmen at a passenger depot than at stopping places for water only," is properly refused. *Galveston, H. & S. A. Ry. Co. v. Cooper*, 2 Tex. Civ. App. 42, 20 S. W. 990.

Where, in a suit for personal injuries suffered by plaintiff in attempting to alight from defendant's train, the petition alleges that the train did not stop long enough to allow plaintiff to alight in safety, and that just as he was alighting the train was suddenly and violently started, throwing plaintiff to the ground, negligence of defendant is predicated upon both the insufficiency of the stop and the suddenness of the start, and instructions covering either point are properly based on the pleadings. *Missouri, K. & T. Ry. Co. of Texas v. McElree* (Tex. Civ. App.), 41 S. W. 843, 16 Tex. Civ. App. 182.

Where, in an action for injuries to a passenger on a street car, plaintiff and another witness testified that at the time of the accident the rear end of the car was elevated, and when it fell back it was derailed, an instruction that if plaintiff was injured by the "wreck and derailment," and such "wreck and derailment," if any, was the result of defendant's negligence, and was the proximate cause, etc., plaintiff was entitled to recover, was not objectionable on the ground that there was no evidence authorizing the

court to submit the question of plaintiff's injury by reason of the "derailment" of the car. *San Antonio Traction Co. v. Williams*, 78 S. W. 977, 34 Tex. Civ. App. 372.

**Instructions as to Want or Sufficiency of Evidence.**—In an action for injuries to a passenger, it is the duty of the judge to declare negatively that there is no evidence to go to the jury but not affirmatively that a certain issue had been proved. *San Antonio & A. P. Ry. Co. v. Long*, 4 Tex. Civ. App. 497, 22 S. W. 499.

**Giving Undue Prominence to Certain Facts Developed by Evidence.**—In an action against a railroad for damages for personal injuries to passenger, where evidence is conflicting to select a particular fact from the evidence, which the jury might or might not find, and tell them it would be negligence, and would entitle defendant to verdict, is error. *Gulf, etc., R. Co. v. Danshank*, 6 Tex. Civ. App. 385, 388, 25 S. W. 295.

In an action for the death of a passenger an instruction that in the application of the rules relating to liabilities of the defendant to the evidence before the jury, they might consider, in addition to the evidence of the facts and circumstances attending and immediately preceding the killing, any evidence, etc., might be calculated to give in some degree undue prominence to certain facts developed in the evidence which were therein referred to and called specially to the attention of the jury. *Int. & G. N. Ry. Co. v. Ormond*, 62 Tex. 274.

In an action by a passenger on a street car to recover for personal injuries, the court instructed that, if a street car passenger when she handed her transportation to the conductor informed him that she desired to leave the car at S. street, and that when the car approached such street she signaled said conductor, but the car did not stop at the usual place, but proceeded, mov-

ing forward slowly, and carried plaintiff beyond the place where such car should have stopped, and that plaintiff, while said car was still slowly moving, attempted to alight from the footboard, but, by reason of the car having so continued to move and not having stopped to permit plaintiff to alight on S. street, plaintiff was thrown to the ground, and that it was negligence to have permitted the said car to move eastward and not to have stopped the same at the usual place on S. street to permit plaintiff to alight, and that, if such negligence was the proximate cause of the injury, the verdict should be for plaintiff. Held, that the instruction was not objectionable as giving undue prominence to the conductor's failure to stop the car at S. street. *El Paso Electric Ry. Co. v. Ruckman*, 107 S. W. 1158, 49 Tex. Civ. App. 25.

**Instructions upon Weight of Evidence.**—In an action against a carrier by a passenger for injuries caused by the derailment of the car, it was not error to refuse a charge that defendant should recover if the evidence showed that the car was overturned, but no cause or reason was shown for such overturning, and if defendant showed that the roadbed and cars and machinery connected therewith were suitable and in good condition, and the operatives of the train were in exercise of reasonable care and prudence in the management and running of the train, since such a charge would be upon the weight of evidence. *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. 766.

Where the evidence was conflicting as to whether plaintiff was injured in getting off the train, or was subsequently injured at her own home, and the court charged that, if she was injured in getting off the train, the jury should find such damages as she may have sustained, a further instruction that, unless she was so injured, they should find for defendant, no matter

what the other facts were, was not objectionable in laying too much stress on whether plaintiff was in fact injured in getting off the train, or in suggesting the weight of evidence upon that point. *Conwill v. Gulf, C. & S. F. Ry. Co.*, 85 Tex. 96, 19 S. W. 1017.

**Refusal of Requested Instructions Covered by Those Given.**—

In an action for personal injuries received in a rear-end collision, it appeared that the train on which plaintiff was riding, and which was stopped by reason of the air brakes getting out of order, was closely followed by the train which ran into it. As soon as the first train began to stop, the conductor sent the brakeman back to signal the other train. As the brakeman jumped from the train, he fell down an embankment, and afterwards, while running back, fell in trying to pass over a small bridge. There was no evidence as to the amount of time lost by reason of his last fall. Held, that it was proper to refuse to instruct that defendant was not liable if the collision was caused by reason of the brakeman's falling in crossing the bridge, thereby preventing him from getting far enough back to signal the second train in time for it to stop, a general charge that plaintiff must show negligence on defendant's part being given. *Missouri, K. & T. Ry. Co. of Texas v. Cook*, 12 Tex. Civ. App. 203, 23 S. W. 669.

**Assumption of Facts by Court.**—

Where the uncontradicted evidence showed that the bell of a street car was rung as a signal by one desiring to get off, the court could properly assume that the defendant company was guilty of negligence in failing to stop in response to the signal. *Dallas, etc., R. Co. v. Payne*, 98 Tex. 211, 82 S. W. 649, reversing 78 S. W. 1085.

Where plaintiff in an action for injuries while in a freight car with his furniture testified that the car was kicked back onto a track with considerable force, and struck some other

cars in a train which was being made up, and defendant's employees testified that they did not remember its occurrence, an instruction was not erroneous as assuming that the injury occurred while defendant was making up a train. *Texas & P. Ry. Co. v. Adams*, 72 S. W. 81, 32 Tex. Civ. App. 112.

In an action for injuries sustained in alighting from a train, an instruction that if the jury believed the employees announced the station prior to the train's reaching it, and that, after the train had stopped a sufficient time, plaintiff without the conductor's knowledge, attempted to get off after it had started and was injured, she could not recover, is not misleading in assuming that the question whether the operatives announced the station was a material issue, when it was admitted. *Harris v. Gulf, C. & S. F. Ry. Co.*, 80 S. W. 1023, 36 Tex. Civ. App. 94.

In an action against a carrier for injuries to a passenger, an instruction that if plaintiff took passage on defendant's train intending to pay his fare, he became a passenger thereon and defendant would be liable for injury to him because of the negligence of its employees, was not subject to the objection that it, in effect, instructed the jury that defendant's employees were negligent. *Missouri, K. & T. Ry. Co. of Texas v. Simmons*, 12 Tex. Civ. App. 500, 33 S. W. 1096.

In an action by a passenger for damages for ejection from a train, an expression in the general charge that, if plaintiff had no money with which to pay fare, he might recover, is not irrelevant or misleading, where the fact is not controverted. *Atchison, T. & S. F. Ry. Co. v. Cuniffe* (Civ. App.), 57 S. W. 692.

Whether an intending passenger was subjected to discomfort, inconvenience, and expense in walking between stops because of the failure of a street car to stop for him was a question of fact. *Northern Texas Traction Co. v. Hooper* (Civ. App.), 80 S. W. 113.

**Instruction Erroneous as Authorizing Recovery for Injury to Person Not Party to Suit.**—In an action by a boy four years old against a railway company for personal injuries, it was error to charge that, if plaintiff's mother used ordinary care in getting off defendant's train, and was injured, and the injuries were caused by the negligence of defendant, plaintiff was entitled to recover, as it authorized the jury to find for plaintiff if plaintiff's mother was injured. *Texas & P. Ry. Co. v. Beckworth*, 11 Tex. Civ. App. 153, 32 S. W. 347.

**Instructions to Be Considered as a Whole.**—In an action against a railroad for death by reason of the derailment of a train it was alleged that such derailment was due to negligent lack of repairs in the track and roadbed and running at an excessive speed; and the court, after instructing that if the jury believed that the unrepaired track or excessive speed caused the accident they should find for plaintiffs, though it should also appear that a broken axle contributed to the accident, charged that, if they believed the broken axle was the sole cause of the accident, they should find for defendant. Held, that such charge was not erroneous as ignoring the derailment, or excusing defendant, notwithstanding the broken axle might have been due to defendant's negligence, since, read in connection with the part of the instruction preceding, a recovery was allowed if the broken axle, whether due to its own defects or the conditions alleged in the complaint, contributed to cause the derailment. *Johnson v. Galveston, H. & N. Ry. Co.*, 66 S. W. 906, 27 Tex. Civ. App. 616.

Plaintiffs' theory as to the cause of the accident having been overthrown on adequate evidence, such charge was not erroneous, as being on the weight of the evidence, in that it denied to plaintiffs the weight of the accident itself as an evidential fact tending to

support the allegations of negligence, since, on such proof, the accident lost its evidential force. *Johnson v. Galveston, H. & N. Ry. Co.*, 66 S. W. 906, 27 Tex. Civ. App. 616.

In an action against a carrier for injuries to a passenger, an instruction that if the jury believe from the evidence that the defendant was negligent, and that the negligence was the direct cause of plaintiff's injuries, they should find for plaintiff, was not objectionable as undertaking to submit all the issues and excluding the principal defense that plaintiff was guilty of contributory negligence, where the court had fully instructed as to this. *Galveston, H. & N. Ry. Co. v. Morrison*, 102 S. W. 143, 46 Tex. Civ. App. 186.

**Instructions Construed in Connection with Pleading and Evidence.**—In an action against a street railroad for injuries sustained by a passenger in a collision between two cars, the petition confined the negligence to the motorman of the car on which plaintiff was riding, and the court charged that, if the injury would not have occurred if the motorman of defendant had been in the exercise of care and skill, the jury should find for plaintiff. Held, that the instruction was not ground for reversal, on the theory that it did not inform the jury which motorman was intended; it not appearing from the evidence that the jury could have thought it to refer to the motorman whose conduct was not complained of by plaintiff. *Galveston City Ry. Co. v. Chapman*, 80 S. W. 856, 35 Tex. Civ. App. 551.

**Propriety of Instructions as to Duty Directly Applicable to Facts of Case.**—Plaintiff was riding in a street car, and was injured by a blow from a stick in the hands of the driver, who was attempting to drive away some boys from the platform by striking at them with the stick. The court instructed the jury as to the duty of the car driver to his passengers, instead of

giving general instructions as to the duty of carriers of passengers. Held that, being directly applicable to the facts of the case on trial, it was the proper practice. *Allen v. Galveston City R. Co.*, 79 Tex. 631, 15 S. W. 498.

**2. Propriety and Sufficiency of Instructions in Particular Instances.**

As to the propriety and sufficiency of instructions in particular instances, see the appropriate sections in this title. Thus, for instance, as to instructions as to duty of carrier to exercise care, measure of care required, etc., see ante, "Care Required of Carrier," IV; as to instructions relating to contributory negligence, see ante, "Liability of Carrier as Affected by Contributory Negligence of Passenger," V, L.

**H. PROVINCE OF COURT OR JURY.**

**Negligence of Defendant.**—See ante,

"Exercise of Proper Care a Question for the Jury," IV, D; and also the particular sections of this title treating of the various acts of the carriers claimed to constitute negligence.

**Contributory Negligence of Plaintiff.**

—See ante, "Liability of Carrier as Affected by Contributory Negligence of Passenger," V, L.

**Occurrence of Injury as Testified to by Plaintiff.**—In an action by a passenger for personal injuries, whether plaintiff's injuries could have occurred as testified to by him held a question for the jury. *Houston & T. C. Ry. Co. v. Johnson* (Civ. App.), 103 S. W. 239.

**I. VERDICT.**

See, generally, the title VERDICT.

As to verdicts for excessive or inadequate damages, see the title NEW TRIALS.











